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FEDERAL REGISTER

Vol. 84 Friday,

No. 245 December 20, 2019

Pages 69983–70392

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.

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Presidential Documents

Title 3—

The President

Executive Order 13900 of December 17, 2019

Providing for the Closing of Executive Departments and Agencies of the Federal Government on December 24, 2019

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. All executive departments and agencies of the Federal Government shall be closed and their employees excused from duty on Tuesday, December 24, 2019, the day before Christmas Day.

Sec. 2. The heads of executive departments and agencies may determine that certain offices and installations of their organizations, or parts thereof, must remain open and that certain employees must report for duty on December 24, 2019, for reasons of national security, defense, or other public need.

Sec. 3. December 24, 2019, shall be considered as falling within the scope of Executive Order 11582 of February 11, 1971, and of 5 U.S.C. 5546 and 6103(b) and other similar statutes insofar as they relate to the pay and leave of employees of the United States.

Sec. 4. The Director of the Office of Personnel Management shall take such actions as may be necessary to implement this order.

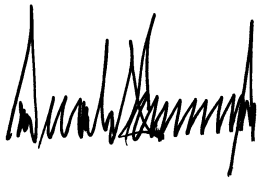
Sec. 5. *General Provisions*. (a) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(b) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
December 17, 2019.

[FR Doc. 2019–27678
Filed 12–19–19; 8:45 am]
Billing code 3295–F0–P

Rules and Regulations

Federal Register

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

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DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

7 CFR Part 1486

RIN 0551–AA95

Emerging Markets Program

AGENCY: Commodity Credit Corporation and Foreign Agricultural Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule is revising the Emerging Markets Program (EMP) regulations to incorporate legislative changes introduced in the Agriculture Improvement Act of 2018 and to incorporate changes that conform the operation of the program to the requirements in the ''Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards'' (Uniform Guidance) and Federal grant–making best practices.

DATES: This rule is effective on December 20, 2019.

FOR FURTHER INFORMATION CONTACT: Curt Alt, (202) 690–4784, *curt.alt@usda.gov.*

SUPPLEMENTARY INFORMATION:

Background

The EMP is authorized by Section 203 of the Agricultural Trade Act of 1978 (7 U.S.C. 5623), as amended. The EMP regulations appear at 7 CFR part 1486. The Agriculture Improvement Act of 2018 (Pub. L. 115–334), which reauthorized the program for fiscal years 2019–2023, introduced legislative changes to the program that improve the program's flexibility and usefulness to stakeholders, such as the delinking of proposed technical assistance activities from an assessment and an expansion of permitted travel activities. In addition, this rule updates the regulations to bring the operation of the program into conformance with the requirements in the Uniform Guidance. Additional changes are desirable to bring the administration of the program into line with the current best practices in Federal grantmaking.

Notice and Comment

This rule is being issued as a final rule without prior notice and opportunity for comment. The Administrative Procedure Act (5 U.S.C. 553) exempts rules ''relating . . . to public property, loans, grants, benefits, or contracts'' from the statutory requirements for prior notice and opportunity for comment and publication of the rule not less than 30 days before its effective date (5 U.S.C. 553(a)(2)). Accordingly, this final rule is effective when published in the **Federal Register**.

Catalog of Federal Domestic Assistance

The program covered by this regulation is listed in the Catalog of Federal Domestic Assistance (CFDA) under the following FAS CFDA number: 10.603, Emerging Markets Program.

E-Government Act Compliance

The Foreign Agricultural Service (FAS) is committed to complying with the E-Government Act of 2002 (44 U.S.C. chapter 36), to promote the use of the internet and other information technologies to provide increased opportunities for citizens' access to Government information and services, and for other purposes.

Executive Order 12988

This rule has been reviewed in accordance with Executive Order 12988, ''Civil Justice Reform.'' This rule does not preempt State or local laws, regulations, or policies unless they present an irreconcilable conflict with this rule. This rule will not be retroactive.

Executive Order 12372

Executive Order 12372, ''Intergovernmental Review of Federal Programs,'' requires consultation with officials of State and local governments that would be directly affected by the proposed Federal financial assistance. The objectives of the Executive order are to foster an intergovernmental partnership and a strengthened federalism by relying on State and local processes for the State and local government coordination and review of proposed Federal financial assistance and direct Federal development. This rule will not directly affect State or local governments, and, for this reason, it is excluded from the scope of Executive Order 12372.

Executive Order 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This final rule has been determined to be not significant and was not reviewed by the Office of Management and Budget (OMB) in conformance with Executive Order 12866.

Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs has designated this rule as not a major rule, as defined by 5 U.S.C. 804(2).

Executive Order 13175

This rule has been reviewed for compliance with Executive Order 13175, ''Consultation and Coordination with Indian Tribal Governments.'' Executive Order 13175 requires Federal agencies to consult and coordinate with tribes on a government-to-government basis on policies that have tribal implications, including regulations, legislative comments, proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes or on the distribution of power and responsibilities between the Federal Government and Indian tribes. FAS has assessed the impact of this rule on Indian tribes and determined that this rule does not, to the knowledge of FAS, have tribal implications that require tribal consultation under Executive Order 13175. If a tribe requests consultation, FAS will work with USDA Office of Tribal Relations to ensure meaningful consultation is provided where changes, additions, and

modifications identified herein are not expressly mandated by Congress.

Executive Order 13771

Executive Order 13771 directs agencies to reduce regulation and control regulatory costs and provides that for every new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process. This rule is not an Executive Order 13771 regulatory action because this rule is not significant under Executive Order 12866.

List of Subjects in 7 CFR Part 1486

Agricultural commodities, Exports.

■ For the reasons discussed in the preamble, 7 CFR part 1486 is revised to read as follows:

PART 1486—EMERGING MARKETS PROGRAM

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Authority: 7 U.S.C. 5623, 5662–5663.

Subpart A—General Information

§ 1486.100 General purpose and scope.

(a) The E (Kika) de la Garza Emerging Markets Program (EMP) is established to develop, maintain, or expand markets for exports of United States agricultural commodities and to promote cooperation and exchange of information between agricultural institutions and agribusinesses in the United States and emerging markets. While the program is primarily intended to support the export market development efforts of the private sector, the program's resources may also be used to assist public agricultural organizations.

(b) This part sets forth the general terms, conditions, and policies governing the Commodity Credit Corporation's (CCC) operation of the EMP.

(c)(1) The Office of Management and Budget (OMB) issued guidance on Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200. In 2 CFR 400.1, the U.S. Department of Agriculture (USDA) adopted OMB's guidance in subparts A through F of 2 CFR part 200, as supplemented by 2 CFR part 400, as USDA policies and procedures for uniform administrative requirements, cost principles, and audit requirements for Federal awards.

(2) The OMB guidance at 2 CFR part 200, as supplemented by 2 CFR part 400 and this part, applies to the EMP.

(3) In addition to the provisions of this part, other regulations that are generally applicable to grants and cooperative agreements of USDA, including the applicable regulations set forth in 2 CFR chapters I, II, IV, also apply to the EMP, to the extent that these regulations do not directly conflict with the provisions of this part. The provisions of the CCC Charter Act (15 U.S.C. 714 *et seq.*) and any other statutory or regulatory provisions that are generally applicable to CCC also apply to the EMP.

(d) Under the EMP, CCC provides grants to eligible U.S. private or government entities who demonstrate a role or interest in the export of U.S. agricultural commodities to conduct assessments of food and rural business system needs of emerging markets, make recommendations on measures necessary to enhance the effectiveness of such systems, including potential reductions in trade barriers, and identify and carry out specific opportunities and projects to enhance the effectiveness of such systems. The EMP may only be used to support exports of U.S. agricultural commodities through generic activities.

(e) Only initiatives that support the export of U.S. agricultural commodities are eligible for assistance under the program. The program's resources may not be used to support the export of another country's products to the United States or another country, or to promote the development of a foreign economy as a primary objective.

(f) The EMP generally operates on a reimbursement basis. The program is administered by the Foreign Agricultural Service (FAS) acting on behalf of CCC.

(g) EMP recipients are responsible for complying with all applicable laws and regulations.

§ 1486.101 Definitions.

For purposes of this part, the following definitions apply:

Activities means components of a project that carries out one or more statutorily-authorized activities, *e.g.,* activities that assess the food and rural business system needs of emerging markets; promote information exchange with such markets; and/or carry out recommendations, projects, and opportunities in emerging markets to enhance the effectiveness of such systems.

Agreement means a legally binding grant entered into between CCC and an EMP applicant setting forth the terms and conditions of approved activities under the EMP, including any subsequent amendments to such agreement.

Approval letter means a document by which CCC informs an applicant that its EMP proposal has been approved for funding. This letter may also approve specific activities and contain terms and conditions in addition to the agreement.

Attaché/Counselor means the FAS employee representing United States Department of Agriculture interests in a foreign country.

Cost share means the portion of project costs not paid by Federal funds (unless otherwise authorized by Federal statute). In terms of the EMP program, cost share is the funds provided by the Recipient, the U.S. industry, or a State agency in support of an approved activity.

Emerging market means generally any country, foreign territory, customs union, or other economic market that CCC determines is taking steps toward a market-oriented economy through its food, agriculture, or rural business sectors of the economy and has the potential to provide a viable and significant market for U.S. agricultural commodities. CCC has determined that

any country that is not designated as a high-income country by the World Bank is an eligible emerging market under this program. The World Bank periodically redefines the income limits for its country classification. Consequently, the list of ''emerging market'' countries may change over time. CCC will provide guidance on country eligibility in each program announcement.

Generic activities mean an activity that does not involve or promote the exclusive or predominant use of an individual company name, logo, or brand name, or the brand of a U.S. agricultural cooperative, but rather promotes a U.S. agricultural commodity generally.

Project means an approach or undertaking made up of one or more activities that, taken together, carries out one or more statutorily-authorized activities under the EMP (*e.g.,* activities that assess the food and rural business system needs of emerging markets and develop recommendations on measures necessary to enhance the effectiveness of such systems; promote information exchange with such markets; or identify and carry out specific recommendations, opportunities, or projects to enhance the effectiveness of such systems).

Project funds means the funds made available to a Recipient by CCC under an agreement and authorized for expenditure in accordance with this part.

Proposal means an application for funding.

Recipient means a U.S. entity receiving financial assistance from CCC to carry out a project under the EMP.

SRTG is the acronym for State Regional Trade Group. An STRG is a non-profit association of state-funded agricultural promotion agencies.

STRE is the acronym for sales and trade relations expenditures. Expenditures made on breakfast, lunch, dinner, receptions, and refreshments at approved activities; miscellaneous courtesies such as checkroom fees, taxi fares and tips for approved activities; and decorations for a special promotional occasion that is part of an approved activity.

Unified Export Strategy (UES) system means an online internet system maintained by FAS through which applicants may apply to the EMP and other FAS market development programs. The system is currently accessible at *https://apps.fas.usda.gov/ues/webapp/*. FAS may prescribe a different system through which applicants may apply to EMP and will announce such system in the applicable Notice of Funding Opportunity (NOFO).

U.S. agricultural commodity means any agricultural commodity of U.S. origin, including food, feed, fiber, forestry product, livestock, insects, and fish harvested from a U.S. aquaculture farm or harvested by a vessel (as defined in Title 46 of the United States Code) in waters that are not waters (including the territorial sea) of a foreign country, and any product thereof.

§ 1486.102 Regional projects.

Projects that focus on regions, such as the Caribbean Basin, rather than individual countries are eligible for consideration provided such projects target qualifying emerging markets in the specified region. CCC may also consider activities that target qualified emerging markets in a specific region but are conducted in a non-emerging market because of its importance as a central location and ease of access to that region.

Subpart B—Eligibility, Applications, and Funding

§ 1486.200 Participation eligibility.

(a) To participate in the EMP, U.S. private or government entities must demonstrate a role or interest in the exports of U.S. agricultural commodities. Government organizations consist of Federal, state, and local agencies. Private entities include non-profit trade associations, universities, agricultural cooperatives, SRTGs, consulting businesses, research institutions, and profit-making entities. Foreign organizations, whether government or private, may participate as subrecipients in activities carried out by U.S. entities, but are not eligible for direct funding assistance from the program.

(b) Proposals from research and consulting entities will be considered for funding assistance only with evidence of substantial participation in and financial support to the proposed project by U.S. industry. Such support is most credibly demonstrated through actual monetary contributions to the cost of the project.

(c) For-profit entities shall not use program funds to conduct private business, promote private self-interests, or promote their own products or services beyond specific uses approved in a given project. For-profit entities shall not use program funds to supplement the costs of normal day-to-day operations.

§ 1486.201 Eligible commodities.

Any agricultural commodity or product thereof, excluding tobacco, that is comprised of at least 50 percent by weight, exclusive of added water, of agricultural commodities grown or raised in the United States is eligible for funding. Projects that seek support for multiple commodities are also eligible.

§ 1486.202 Application process.

(a) *Announcement of accepting EMP applicants.* CCC will periodically announce that it is accepting applications for participation in the EMP. All relevant information, including application deadlines and proposal content, will be noted in the announcement, and proposals must be submitted in accordance with the terms and requirements specified in the announcement and in this part. Currently, applicants are encouraged to submit applications through the UES system but are not required to do so. CCC may request any additional information it deems necessary from any applicant in order to properly evaluate any proposal.

(b) *Universal identifier and System for Award Management (SAM).* In accordance with 2 CFR part 25, each entity that applies to the EMP and does not qualify for an exemption under 2 CFR 25.110 must:

(1) Be registered in the SAM prior to submitting an application or plan;

(2) Maintain an active SAM registration with current information at all times during which it has an active Federal award or an application or plan under consideration by CCC; and

(3) Provide its DUNS number, or a unique identifier designated as a DUNS replacement, in each application or plan it submits to CCC.

(c) *Reporting subaward and executive compensation information.* In accordance with 2 CFR part 170, each entity that applies to the EMP and does not qualify for an exception under 2 CFR 170.110(b) must ensure it has the necessary processes and systems in place to comply with the applicable reporting requirements of 2 CFR part 170 should it receive EMP funding.

§ 1486.203 Application review and formation of agreements.

(a) *General.* Proposals received in accordance with the announcement and this part will undergo a multi-phase review by CCC to determine eligibility for the program, the qualifications, quality, and appropriateness of proposed projects, and the reasonableness of proposed project budgets.

(b) *Evaluation criteria.* CCC will review all proposals for eligibility and completeness. CCC will evaluate and score each proposal against the factors

described in the NOFO. All proposals that meet the eligibility and completeness criteria described in the NOFO and receive a passing score will be recommended for funding to the FAS Administrator. The purpose of this review is to identify meritorious proposals, recommend an appropriate funding level for each proposal, and submit the proposals and funding recommendations to appropriate officials for decision. CCC may, when appropriate to the subject matter of the proposal, request the assistance of other U.S. Government experts in evaluating the merits of a proposal. Demonstration of substantial U.S. industry participation in or financial or other support of a proposal will be a positive factor in the consideration of proposals. The degree of commitment to a proposed project, represented by the amount and type of cost share, is used in determining which proposals will be approved. Proposals in which the private sector is willing to commit funds, rather than in-kind items such as staff resources, and those with higher amounts of cost share will be given priority consideration. All reviewers will be required to sign a conflict of interest form, and when conflicts of interests are identified the reviewer will be recused from the objective review process.

(c) *Approval decision.* CCC will approve those applications that it determines best satisfy the criteria and factors specified in the announcement and this part. All decisions regarding the disposition of an application are final.

§ 1486.204 Funding limits.

(a) The EMP is a relatively small program intended to develop, maintain, or expand access to qualified emerging markets. Its funds are intended for focused projects with specific activities, rather than expansive concept papers that contain only broad ideas. Large, overly expensive projects (*i.e.,* in excess of $500,000) will not be funded.

(b) CCC will not reimburse 100 percent of the cost of any project undertaken by the private sector. The program is intended to provide appropriate assistance to projects that have significant financial contributions from other sources, especially U.S. private industry.

(c) Proposals for projects exceeding one year in duration may be considered, but proposals for projects that last longer than five years will not be considered. If approved, funding for multi-year projects may be provided one year at a time, with commitments beyond the first-year subject to interim evaluations intended to assess the progress of the project toward meeting its intended objectives.

(d) Funding for continuing and substantially similar projects is generally limited to three calendar years, although FAS will entertain requests to extend an agreement's expiration date up to a maximum of five calendar years. After that time, the project is assumed to have proven its viability and, if necessary, should be continued by the Recipient with its own or with alternative sources of funding. Recipients must submit in writing a valid justification for why an extension is necessary no later than 60 days before the end of the period of performance. If warranted, extensions generally will be granted in one-year increments. Recipients must wait for written approval from FAS before proceeding with the project.

Subpart C—Program Operations

§ 1486.300 Applicant notification.

(a) CCC will notify each applicant in writing of the final decision on its application. CCC will send an agreement and an approval letter to each approved applicant. An applicant that accepts the terms and conditions contained in the agreement must so indicate by having the appropriate authorizing official sign the agreement and return it to CCC. The applicant may not begin to implement approved activities until the applicant's authorizing official and CCC have signed the agreement. The applicant is authorized to begin implementation of the project as of the date specified in the approval letter, unless otherwise indicated.

(b) The approval letter and agreement will outline the activities and budgets that are approved and will specify the terms and conditions applicable to the project, including the levels of EMP funding and cost-share requirements.

§ 1486.301 Amendments.

(a) Recipients may request to modify approved projects if circumstances change in such a way that they would likely affect the progress and ultimate success of a project. Such modification must be made through a written amendment to the agreement. All requests for project modifications must be made in writing to CCC and must include:

(1) A justification as to why changes to the project as originally designed are needed;

(2) An explanation of the necessary adjustments in approach or strategy; and

(3) A description of necessary changes in the project's time line(s) and/or budget (*e.g.,* shifting of budgetary resources from one-line item to another in order to accommodate the changes).

(b) All requests for project modifications must be reviewed and approved by CCC. Upon approval, CCC will issue an amendment to the agreement, which must be signed by CCC and the Recipient.

§ 1486.302 Subrecipients.

(a) A Recipient may utilize the services of a subrecipient to implement activities under the agreement if this is provided for in the agreement. The subrecipient may receive CCC-provided funds, program income, or other resources from the Recipient for this purpose. The Recipient must enter in to a written subaward with the subrecipient and comply with the applicable provisions of 2 CFR 200.331 and/or the Federal Acquisition Regulation (FAR), if applicable. If required by the agreement, the Recipient must provide a copy of such subaward to FAS, in the manner set forth in the agreement, prior to the transfer of CCC-provided funds or program income to the subrecipient.

(b) A Recipient must include the following requirements in a subaward:

(1) The subrecipient is required to comply with the applicable provisions of this part and 2 CFR parts 200 and 400 and/or the FAR, if applicable. The applicable provisions are those that relate specifically to subrecipients, as well as those relating to non-Federal entities that impose requirements that would be reasonable to pass through to a subrecipient because they directly concern the implementation by the subrecipient of one or more activities under the agreement. If there is a question about whether a particular provision is applicable, FAS will make the determination.

(2) The subrecipient must pay to the Recipient the value of CCC-provided funds, interest, or program income that are not used in accordance with the subaward, or that are lost, damaged, or misused as a result of the subrecipient's failure to exercise reasonable care.

(3) In accordance with 2 CFR 200.501(h), subawards must include a description of the applicable compliance requirements and the subrecipient's compliance responsibility. Methods to ensure compliance may include pre-award audits, monitoring during the agreement, and post-award audits.

(c) A Recipient must monitor the actions of a subrecipient as necessary to ensure that CCC-provided funds and

program income provided to the subrecipient are used for authorized purposes in compliance with applicable U.S. Federal laws and regulations and the subaward and that performance indicator targets are achieved for both activities and results under the agreement.

(d) Recipients have full and sole responsibility for the legal sufficiency of all subawards they may enter into with one or more subrecipients in order to carry out an approved project and shall assume financial liability for any costs or claims resulting from suits, challenges, or other disputes based on subawards entered into by the Recipient. Neither CCC nor any other agency of the United States Government nor any official or employee of CCC, FAS, USDA, or the United States Government has any obligation or responsibility with respect to Recipient subawards with third parties.

(e) Recipients are responsible for ensuring to the greatest extent possible that the terms, conditions, and costs of subawards constitute the most economical and effective use of project funds.

(f) All fees for professional and technical services paid to subrecipients in any part with project funds must be covered by written subawards.

(g) A Recipient shall:

(1) Ensure that all expenditures for goods and services in excess of $25 reimbursed by CCC are documented by a purchase order or invoice;

(2) Ensure that no employee, officer, board member, agent, or the employee's, officer's, board member's, or agent's family, partners, or an organization that employs or is about to employ any of the parties indicated herein, participates in the review, selection, award or administration of a subaward in which such entities or their affiliates have a financial or other interest;

(3) Conduct all contracting in an openly competitive manner. Individuals who develop or draft specifications, requirements, statements of work, invitations for bids, or requests for proposals for procurement of any goods or services, and such individuals' families or partners, or an organization that employs or is about to employ any of the aforementioned shall be excluded from competition for such procurement;

(4) Conduct all awarding of grants and agreements in an openly competitive manner, except under the following conditions:

(i) Non-monetary awards of property or services;

(ii) Awards of less than $75,000;

(iii) Awards to fund continuing work already started under a previous award;

(iv) Awards that cannot be delayed due to an emergency or a substantial danger to health or safety;

(v) Awards when it is impracticable to secure competition; or

(vi) Awards to fund unique and innovative unsolicited applications;

(5) Base each solicitation for professional or technical services on a clear and accurate description of and requirements related to the services to be procured;

(6) Perform and document some form of fee, price, or cost analysis, such as a comparison of price quotations to market prices or other price indicia, to determine the reasonableness of the offered fees or prices for procurements in excess of the simplified acquisition threshold defined at 2 CFR 200.88; and

(7) Document the decision-making process.

Subpart D—Cost Share and Reimbursements

§ 1486.400 Cost share.

(a) The EMP is intended to complement, not supplant, the efforts of the U.S. private sector. Therefore, no private sector proposal will be considered without the element of cost share from the Recipient and/or U.S. partners.

(b) There is no minimum or maximum required amount of cost share. The degree of commitment to a proposed project, represented by the amount and type of private funding, is used as one factor in determining which proposals will be approved. The type of cost share is also not specified, though some contributions are ineligible (see § 1486.402). Cost share may be actual cash invested or professional time of staff assigned to the project. Proposals in which the private sector is willing to commit funds, rather than in-kind items such as staff resources, and those with higher amounts of cost share will be given priority consideration.

(c) Cost share is not required for proposals from Federal, state, or local government agencies. It is mandatory from all other eligible entities, even when they are party to a joint proposal with a government agency.

(d) Contributions from foreign (non-U.S.) organizations may not be counted toward the cost share requirement but may be included in the total cost of the project.

(e) An activity that is undertaken by an entity at the request of FAS may be exempted from the cost share requirement. This determination is made at the discretion of FAS.

(f) A Recipient's cost share requirement will be specified in the agreement and approval letter. If a Recipient fails to contribute the total specified in the agreement, the difference between the amount contributed and the total amount required must be repaid to CCC in U.S. dollars within six months after the end of the period of performance of the agreement. If a Recipient is reimbursed by CCC for less than the amount of funds approved in the agreement, then the final required cost share shall equal, on a percentage basis, the original ratio of cost share to the authorized EMP funding level.

§ 1486.401 Eligible cost share.

(a) In calculating the amount of cost share that it will make and the cost share U.S. entities or a State or local agency will make, a Recipient may include those costs (or such prorated costs) not proscribed under § 1486.402 if:

(1) The expenditures are necessary and reasonable for accomplishment of the Recipient's overall EMP;

(2) The expenditures are not included as cost share for any other Federal award;

(3) The expenditures are not paid by the Federal Government under another Federal award, except where the Federal statute authorizing a program specifically provides that Federal funds made available for such program can be applied to matching or cost sharing requirements of other Federal programs; and

(4) The cost share is made during the period covered by the agreement.

(b) Cost share must be included in a project's line item budget.

§ 1486.402 Ineligible cost share.

(a) The following are not eligible as cost share:

(1) Normal operating expenses and other costs not directly related to the project;

(2) Any portion of salary or compensation of an individual who is the target of an approved project activity;

(3) The cost of insuring articles owned by private individuals;

(4) The cost of product development, product modification, or product research;

(5) Slotting fees or similar sales expenditures;

(6) Funds, services, capital goods, or personnel provided by any U.S. Government agency;

(7) The value of any services generated by a Recipient or a third party that involve no expenditure by the Recipient or third party, *e.g.,* free publicity;

(8) The cost of developing any application/proposal for EMP funding;

(9) Membership fees in clubs and social organizations; and

(10) Any expenditure for an activity prior to CCC's approval of that activity.

(b) CCC shall determine, at CCC's discretion, whether any cost not expressly listed in this section may be included as an eligible cost share.

§ 1486.403 Reimbursement rules.

(a) A Recipient may seek reimbursement for an eligible expenditure if:

(1) The expenditure was necessary and reasonable for the performance of an approved activity; and

(2) The Recipient has not been and will not be reimbursed for such expenditure by any other source.

(b) Subject to paragraph (a) of this section, as well as applicable cost principles in 2 CFR part 200, to the extent these principles do not directly conflict with the provisions of this part, CCC will reimburse, in whole or in part, the cost of:

(1) Salaries and benefits of the Recipient's existing personnel or any other participating entity that are directly assigned to EMP-funded projects. Salaries of administrative and clerical staff should normally be treated as indirect costs. Federal, state, and local government Recipients may not be reimbursed for salaries and benefits. Reimbursement of salaries and benefits for other Recipients is limited to:

(i) The actual daily rate paid by the Recipient for the employee's salary or the daily rate of a GS-15, Step 10 U.S. Government employee in effect during the calendar year in which the project or activity is approved for funding, whichever is less;

(ii) The actual assigned time of the employee to the project; and

(iii) Benefits at a maximum rate of 30 percent of the existing salary of the employee, prorated to the time assigned to the project, provided that such benefits are required and granted pursuant to the Recipient's established written policies.

(2) Consulting fees for professional services, limited to the daily rate of a GS-15, Step 10 U.S. Government employee in effect during the calendar year in which the project or activity is approved for funding. Reimbursement is authorized only for actual days worked and is not authorized for travel and rest days. Benefits are not reimbursable.

(3) STRE for social events or receptions that are primarily attended by foreign officials and that are held at foreign venues and are part of an approved activity. Such expenses must conform to the American Embassy representational funding guidelines as the standard for judging the appropriateness of the STRE costs. The amount of unauthorized STRE expenses that exceed the guidelines will not be reimbursed. Recipients must pay the difference between the total cost of STRE events and the appropriate amount as determined by the guidelines. STRE incurred in the United States is not authorized for reimbursement but may be counted as a cost share to the project.

(4) Travel expenses, subject to the following:

(i) All expenses while in travel status must conform to the U.S. Federal Travel Regulations (41 CFR parts 300 through 304);

(ii) Air travel must comply with the Fly America Act (49 U.S.C. App. 1517) and is limited to the full-fare economy class rate;

(iii) Per diem is limited to the allowable rate for each domestic or foreign locale (41 CFR part 301–11). Expenses in excess of the authorized per diem rates may be allowed in special or unusual circumstances (41 CFR part 301–11), but must be approved in advance; and

(iv) The Recipient shall notify the Attaché/Counselor in the destination countries in writing in advance of any proposed travel by the Recipient or its consultants or other Recipients. The timing of such notice should be far enough in advance to enable the Attaché/Counselor to schedule appointments, make preparations, or otherwise provide any assistance being requested. Failure to provide advance notification of travel generally will result in disallowance of the expenses related to the travel, unless CCC determines it was impractical to provide such notification.

(5) Direct administrative costs.

(6) Indirect costs not identified as direct costs, but which are necessary for the implementation of a project. Indirect costs must be specified to be eligible for reimbursement. Indirect costs may be reimbursed up to a maximum of 10 percent of the EMP-funded portion of the project budget, excluding indirect costs, except that Recipients in FAS' Market Access Program and the Foreign Market Development Cooperator Program, SRTGs, for-profit entities, and government Recipients may not be reimbursed for indirect costs.

(7) Rental costs for equipment necessary to carry out approved projects. Equipment rentals must be returned by the Recipient to the supplier in accordance with the lease agreements, but in no case later than 90 calendar days from the completion date of the project.

(8) Procuring samples of specific agricultural commodities that are appropriate and necessary to the success of a technical assistance activity.

§ 1486.404 Ineligible expenditures.

(a) CCC will not reimburse expenditures made prior to approval of a Recipient's proposal, unreasonable expenditures, or any cost of:

(1) Branded product promotions, *e.g.,* in-store promotions, restaurant advertising, labeling, etc.;

(2) Administrative and operational expenses for trade shows;

(3) Advertising;

(4) Preparation and printing of magazines, brochures, flyers, posters, etc., except in connection with specific approved activities such as training;

(5) Design, development, and maintenance of information technology projects;

(6) Purchase of equipment, *e.g.,* office equipment or other fixed assets;

(7) Subsidizing or otherwise providing funds for graduate programs at colleges and/or universities (salaries or fees for individual students who are directly assigned to specific project activities appropriate to their backgrounds may be covered on a pro-rated basis);

(8) Subsidizing normal, day-to-day operating costs of an entity, except as allowed under § 1486.403(b)(6);

(9) Honoraria for speakers;

(10) Costs of product research or new product development;

(11) Costs of developing technical assistance proposals submitted to the program;

(12) Refundable deposits or advances;

(13) STRE expenses within the United States;

(14) All costs related to the shipping, over land and sea, of commodity samples;

(15) Expenses, fines, settlements, judgments, or payments relating to legal suits, challenges, or disputes, including legal fees and costs associated with trade disputes, except as otherwise allowed in 2 CFR part 200;

(16) Real estate costs other than allowable rental costs for office space whose use is assigned specifically to a project funded by the EMP; and

(17) Any expenditure that has been or will be reimbursed by any other source.

(b) CCC may determine, at CCC's discretion, whether any cost not expressly listed in this section will be reimbursed.

§ 1486.405 Reimbursement procedures.

(a) Following the implementation of a project for which CCC has agreed to

provide funding, a Recipient may submit claims for reimbursement of eligible expenses incurred in implementing an EMP project, to the extent that CCC has agreed to pay such expenses. Any changes to approved activities must be approved in writing by CCC before any reimbursable expenses associated with the change can be incurred. A Recipient will be reimbursed after CCC reviews the claim and determines that it is complete.

(b) CCC will make all payments to the Recipients in U.S. dollars. FAS will initiate payment within 30 days after receipt of the billing, unless the billing is improper.

(c) Recipients will be authorized to submit requests for reimbursements or advances at least monthly when electronic fund transfers (EFTs) are not used, and as frequently as desired when electronic transfers are used, in accordance with the provisions of the Electronic Fund Transfer Act (15 U.S.C. 1693–1693r).

(d) Recipients may submit claims for reimbursement of the expenses incurred in implementing EMP projects, to the extent CCC has agreed to pay for such costs, limited initially to 85 percent of the total amount specified in the agreement. The Recipient may be reimbursed for the remaining 15 percent of the funds only after the final performance report containing the information required by the agreement is submitted to and approved by FAS.

(e) Final claims for reimbursement must be received no later than 90 calendar days after the completion date of the project or following the expiration or termination date of the agreement, whichever is sooner, and are subject to FAS approval of the Recipient's final performance report. Recipients are required to use a prescribed system to submit their claims. This system will be clearly stated in the NOFO. Currently the CCC's internet-based UES system is being used to request reimbursement for eligible EMP program expenses.

(f) Recipients shall maintain complete records of all program expenditures, identified by EMP agreement number, program year, country or region, activity number, and cost category. Such records shall be accompanied by documentation that supports the expenditure and shall be made available to CCC upon request. CCC may deny a claim for reimbursement if the claim is not supported by acceptable documentation.

(g) In the event that a reimbursement claim is overpaid or is disallowed after payment already has been made, the Recipient shall repay CCC within 30 calendar days of such overpayment or disallowance the amount overpaid or disallowed either by submitting a check payable to CCC and referencing the applicable project, or by offsetting its next reimbursement claim. The Recipient shall make such payment in U.S. dollars, unless otherwise approved in advance by CCC.

(h) The Recipient shall report any actions that may have a bearing on the propriety of any claims for reimbursement in writing to the appropriate Attaché/Counselor and FAS Division Director.

§ 1486.406 Advances.

(a) *Policy.* In general, CCC operates the EMP on a cost reimbursable basis.

(b) *Exception.* Upon request, CCC may make advance payments to a Recipient against an approved project budget. Up to 40 percent of the approved project budget may be provided as an advance, either at one time or in incremental payments. Advances should be limited to the minimum amounts needed and requested as close as is administratively feasible to the actual time of disbursement by the Recipient. Reimbursement claims will be used to offset advances. Recipients shall deposit and maintain advances in insured, interest-bearing accounts, unless the exceptions in 2 CFR part 200 apply. Interest earned by the Recipient on funds advanced by CCC is not program income. Up to $500 of interest earned per year may be retained by the Recipient for administrative expenses. Any additional interest earned on Federal advance payments shall be remitted annually to the appropriate entity as required in 2 CFR part 200.

(c) *Refunds due CCC.* A Recipient shall fully expend all advances on approved activities within 90 calendar days after the date of disbursement by CCC. By the end of 90 calendar days, the Recipient must submit reimbursement claims to offset the advance and submit a check made payable to CCC for any unexpended balance. The Recipient shall make such payment in U.S. dollars, unless otherwise approved in advance by CCC.

Subpart E—Reporting, Evaluation, and Compliance

§ 1486.500 Reports.

(a) Recipients are required to submit regular financial and performance reports in accordance with their agreement. Reporting requirements and formats for both annual financial and performance reports and final financial and performance reports will be specified in the agreement between CCC and the Recipient.

(b)(1) In addition to the information required in 2 CFR 200.328(b)(2), a Recipient's performance reports must include pertinent information regarding the Recipient's progress, measured against established indicators, baselines, and targets, towards achieving the expected results specified in the agreement. This reporting must include, for each performance indicator, a comparison of actual accomplishments with the baseline and the targets established for the period. When actual accomplishments deviate significantly from targeted goals, the Recipient must provide an explanation in the report.

(2) A Recipient must ensure the accuracy and reliability of the performance data submitted to FAS in performance reports. At any time during the period of performance of the agreement, FAS may review the Recipient's performance data to determine whether it is accurate and reliable. The Recipient must comply with all requests made by FAS or an entity designated by FAS in relation to such reviews.

(c) All final performance reports will be made available to the public.

(d) If requested by FAS, a Recipient must provide to FAS additional information or reports relating to the agreement.

(e) If a Recipient requires an extension of a reporting deadline, it must ensure that FAS receives an extension request at least five business days prior to the reporting deadline. FAS may decline to consider a request for an extension that it receives after this time period. FAS will consider requests for reporting deadline extensions on a case by case basis and will make a decision based on the merits of each request. FAS will consider factors such as unforeseen or extenuating circumstances and past performance history when evaluating requests for extensions.

§ 1486.501 Evaluation.

Project evaluations may be carried out by CCC at its option with or without Recipients. CCC may also seek outside expertise to conduct or participate in evaluations.

§ 1486.502 Compliance reviews and notices.

(a) *Compliance review process.* (1) USDA staff may conduct compliance reviews of Recipient's activities under the EMP to ensure compliance with this part, applicable Federal laws and regulations, and the terms of the agreements and approval letters. Recipients shall cooperate fully with relevant USDA staff conducting compliance reviews and shall comply

with all requests from USDA staff to facilitate the conduct of such reviews. Program funds spent inappropriately or on unapproved activities must be returned to CCC.

(2) Any project or activity funded under the program is subject to review or audit at any time during the course of implementation or after the completion of the project.

(3) Upon conclusion of the compliance review, USDA staff will provide a written compliance report to the Recipient. The compliance report will detail any instances where it appears that the Recipient is not complying with any of the terms or conditions of the agreement, approval letter, or the applicable laws and regulations. The report will also specify if it appears that CCC may be entitled to recover funds from the Recipient and will explain the basis for any recovery of funds from the Recipient. If, as a result of a compliance review, CCC determines that further review is needed in order to ensure compliance with the requirements of the EMP, CCC may require the Recipient to contract for an independent audit.

(4) In addition, CCC may notify a Recipient in writing at any time if CCC determines that CCC may be entitled to recover funds from the Recipient. CCC will explain the basis for any recovery of funds from the Recipient in the written notice. The Recipient shall, within 30 calendar days of the date of the notice, repay CCC the amount owed either by submitting a check payable to CCC or by offsetting its next reimbursement claim. The Recipient shall make such payment in U.S. dollars, unless otherwise approved in advance by CCC. If, however, a Recipient notifies CCC within 30 calendar days of the date of the written notice that the Recipient intends to file an appeal pursuant to the provisions of this part, the amount owed to CCC by the Recipient is not due until the appeal procedures are concluded and CCC has made a final determination as to the amount owed.

(5) The fact that a compliance review has been conducted by USDA staff does not signify that a Recipient is in full compliance with its agreement, approval letter, and/or applicable laws and regulations.

(b) *Recipient response to compliance report.* (1) A Recipient shall, within 60 calendar days of the date of the issuance of a compliance report, submit a written response to CCC. The response may include additional documentation for consideration or a request for reconsideration of any finding along with supporting justification. If the Recipient does not wish to contest the compliance report, the response shall include any money owed to CCC, which may be returned by submitting a check payable to CCC or by offsetting a reimbursement claim. The Recipient shall make any payments in U.S. dollars, unless otherwise approved in advance by CCC. CCC, at its discretion, may extend the period for response.

(2) After reviewing the response, CCC shall determine whether the Recipient owes any funds to CCC and will inform the Recipient in writing of the basis for the determination. CCC may initiate action to collect such amount by providing the Recipient a written demand for payment of the debt pursuant to the debt settlement policies and procedures in 7 CFR part 1403.

(c) *Recipient appeals of CCC determinations.* (1) Within 30 calendar days of the date of the issuance of a determination, the Recipient may appeal the determination by making a request in writing that includes the basis for such reconsideration. The Recipient may also request a hearing.

(2) If the Recipient requests a hearing, CCC will set a date and time for the hearing. The hearing will be an informal proceeding. A transcript will not ordinarily be prepared unless the Recipient bears the cost of a transcript; however, CCC may, at its discretion, have a transcript prepared at CCC's expense.

(3) CCC will base its final determination upon information contained in the administrative record. The Recipient must exhaust all administrative remedies contained in this section before pursuing judicial review of a determination by CCC.

§ 1486.503 Records retention.

Each Recipient shall retain all records relating to the project for three calendar years from the date of submission of the final expenditure report. All records related to the project, including records pertaining to contractors, shall be made available upon request to authorized officials of the U.S. Government.

§ 1486.504 Program income.

Program income means gross income earned by the Recipient that is directly generated by a supported activity or earned as a result of the Federal award during the period of performance. Any such income generated from an activity, the expenditures for which have been wholly or partially reimbursed with EMP funds, shall be used by the Recipient in furtherance of its approved activities in the program period during which the EMP funds are available for obligation by the Recipient, or must be returned to CCC. The use of such income shall be governed by this part. Reasonable activity fees or registration fees, if identified as such in a project budget, may be charged for projects approved for program funding. The intent to charge a fee must be part of the original proposal, along with an explanation of how such fees are to be used. Any activity fees charged must be used to offset activity expenses or returned to CCC. Such fees may not be used as profit or counted as cost share.

§ 1486.505 Audit requirements.

(a) Subpart F of 2 CFR part 200 applies to all Recipients and subrecipients under this part other than those that are for-profit entities, foreign public entities, or foreign organizations.

(b) A Recipient or subrecipient that is a for-profit entity or a subrecipient that is a foreign organization and that expends, during its fiscal year, a total of at least the audit requirement threshold in 2 CFR 200.501 in Federal awards, is required to obtain an audit. Such a Recipient or subrecipient has the following two options to satisfy the requirement in this paragraph (b):

(1)(i) A financial audit of the agreement or subaward, in accordance with the Government Auditing Standards issued by the United States Government Accountability Office (GAO), if the Recipient or subrecipient expends Federal awards under only one FAS program during such fiscal year; or

(ii) A financial audit of all Federal awards from FAS, in accordance with GAO's Government Auditing Standards, if the Recipient or subrecipient expends Federal awards under multiple FAS programs during such fiscal year; or

(2) An audit that meets the requirements contained in subpart F of 2 CFR part 200.

(c) A Recipient or subrecipient that is a for-profit entity or a subrecipient that is a foreign organization and that expends, during its fiscal year, a total that is less than the audit requirement threshold in 2 CFR 200.501 in Federal awards, is exempt from requirements under this section for an audit for that year, except as provided in paragraphs (d) and (f) of this section, but it must make records available for review by appropriate officials of Federal agencies.

(d) FAS may require an annual financial audit of an agreement or subaward when the audit requirement threshold in 2 CFR 200.501 is not met. In that case, FAS must provide funds under the agreement for this purpose, and the Recipient or subrecipient, as applicable, must arrange for such audit and submit it to FAS.

(e) When a Recipient or subrecipient that is a for-profit entity or a subrecipient that is a foreign organization is required to obtain a financial audit under this section, it must provide a copy of the audit to FAS within 60 days after the end of its fiscal year.

(f) FAS, the USDA Office of Inspector General, or GAO may conduct or arrange for additional audits of any Recipients or subrecipients, including for-profit entities and foreign organizations. Recipients and subrecipients must promptly comply with all requests related to such audits. If FAS conducts or arranges for an additional audit, such as an audit with respect to a particular agreement, FAS will fund the full cost of such an audit, in accordance with 2 CFR 200.503(d).

§ 1486.506 Disclosure of program information.

(a) Documents submitted to CCC by Recipients are subject to the provisions of the Freedom of Information Act (FOIA), 5 U.S.C. 552, and 7 CFR part 1, subpart A, including, specifically, 7 CFR 1.11.

(b) Any research conducted by a Recipient pursuant to an agreement and/or approval letter shall be subject to the provisions relating to intangible property in 2 CFR part 200.

§ 1486.507 Ethical conduct.

(a) The Recipient shall maintain written standards of conduct governing the performance of its employees engaged in the award and administration of contracts.

(b) A Recipient shall conduct its business in accordance with the laws and regulations of the country(s) in which each activity is carried out and in accordance with applicable U.S. Federal, state, and local laws and regulations. A Recipient shall conduct its business in the United States in accordance with applicable Federal, state, and local laws and regulations.

(c) Neither a Recipient nor its affiliates shall make export sales of U.S. agricultural commodities covered under the terms of an agreement. Neither a Recipient nor its affiliates shall charge a fee for facilitating an export sale. A Recipient may collect check-off funds and membership fees that are required for membership in the Recipient's organization.

(d) The Recipient shall not use program activities or project funds to promote private self-interests or conduct private business.

(e) A Recipient shall not limit participation in its EMP activities to members of its organization. Recipients shall ensure that their EMP-funded programs and activities are open to all otherwise qualified individuals and entities on an equal basis and without regard to any non-merit factors.

(f) A Recipient shall select U.S. agricultural industry representatives to participate in activities based on criteria that ensure participation on an equitable basis by a broad cross section of the U.S. industry. If requested by CCC, a Recipient shall submit such selection criteria to CCC for approval.

(g) The Recipient must report any actions or circumstances that may have a bearing on the propriety of program activities to the appropriate Attaché/Counselor, and the Recipient's U.S. office shall report such actions or circumstances in writing to CCC.

(h) The officers, employees, board members, and agents of the Recipient shall neither solicit nor accept gratuities, favors, or anything of monetary value from contractors, sub-contractors, or parties to sub-agreements. However, Recipients may set standards for situations in which the financial interest is not substantial, or the gift is an unsolicited item of nominal value. The standards of conduct shall provide for disciplinary actions to be applied for violations of such standards by officers, employees, board members, or agents of the Recipient.

§ 1486.508 Suspension and termination.

(a) An agreement or subaward may be suspended or terminated in accordance with 2 CFR 200.338 or 200.339. FAS may suspend or terminate an agreement if it determines that:

(1) One of the bases in 2 CFR 200.338 or 200.339 for termination or suspension by FAS has been satisfied; or

(2) The continuation of the assistance provided under the agreement is no longer necessary or desirable.

(b) If an agreement is terminated, the Recipient:

(1) Is responsible for using or returning any CCC-provided funds, interest, or program income that have not been disbursed, as agreed to by FAS; and

(2) Must comply with any closeout and post–closeout procedures specified in the agreement and 2 CFR 200.343 and 200.344.

§ 1486.509 Noncompliance with an agreement.

(a) If a Recipient fails to comply with any term in its agreement, approval letter, or this part, CCC may take one or more of the enforcement actions in 2 CFR part 200 and, if appropriate, initiate a claim against the Recipient, following the procedures set forth in this part. CCC may also initiate a claim against a Recipient if program income or CCC-provided funds are lost due to an action or omission of the Recipient. If any Recipient has engaged in fraud with respect to the EMP program, or has otherwise violated program requirements under this part, CCC may:

(1) Hold such Recipient liable for any and all losses to CCC resulting from such fraud or violation;

(2) Require a refund of any assistance provided to such Recipient plus interest as determined by FAS; and

(3) Collect liquidated damages from such Recipient in an amount determined appropriate by FAS.

(b) The provisions of this section shall be without prejudice to any other remedy that is available under any other provision of law.

§ 1486.510 Paperwork reduction requirements.

The paperwork and recordkeeping requirements imposed by this part have been approved by OMB under the Paperwork Reduction Act of 1980. OMB has assigned control number 0551–0048 for this information collection.

Dated: November 27, 2019.

Margo Erny,

Acting Executive Vice President, Commodity Credit Corporation.

In concurrence with:

Dated: November 26, 2019.

Ken Isley,

Administrator, Foreign Agricultural Service.

[FR Doc. 2019–27246 Filed 12–19–19; 8:45 am]

BILLING CODE 3410–10–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1003

Home Mortgage Disclosure (Regulation C) Adjustment to Asset-Size Exemption Threshold

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Final rule; official commentary.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau) is amending the official commentary that interprets the requirements of the Bureau's Regulation C (Home Mortgage Disclosure) to reflect the asset-size exemption threshold for banks, savings associations, and credit unions based on the annual percentage change in the average of the Consumer Price Index for Urban Wage Earners and Clerical

Workers (CPI–W). Based on the 1.6 percent increase in the average of the CPI–W for the 12-month period ending in November 2019, the exemption threshold is adjusted to $47 million from $46 million. Therefore, banks, savings associations, and credit unions with assets of $47 million or less as of December 31, 2019, are exempt from collecting data in 2020.

DATES: This rule is effective on January 1, 2020.

FOR FURTHER INFORMATION CONTACT: Rachel Ross, Attorney-Advisor; Kristen Phinnessee, Senior Counsel, Office of Regulations, at (202) 435–7700. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The Home Mortgage Disclosure Act of 1975 (HMDA) [1] requires most mortgage lenders located in metropolitan areas to collect data about their housing related lending activity. Annually, lenders must report their data to the appropriate Federal agencies and make the data available to the public. The Bureau's Regulation C [2] implements HMDA.

Prior to 1997, HMDA exempted certain depository institutions as defined in HMDA (*i.e.,* banks, savings associations, and credit unions) with assets totaling $10 million or less as of the preceding year-end. In 1996, HMDA was amended to expand the asset-size exemption for these depository institutions.[3] The amendment increased the dollar amount of the asset-size exemption threshold by requiring a one-time adjustment of the $10 million figure based on the percentage by which the CPI–W for 1996 exceeded the CPI–W for 1975, and it provided for annual adjustments thereafter based on the annual percentage increase in the CPI–W, rounded to the nearest multiple of $1 million.

The definition of ''financial institution'' in § 1003.2(g) provides that the Bureau will adjust the asset threshold based on the year-to-year change in the average of the CPI–W, not seasonally adjusted, for each 12-month period ending in November, rounded to the nearest $1 million. For 2019, the threshold was $46 million. During the 12-month period ending in November 2019, the average of the CPI–W increased by 1.6 percent. As a result, the exemption threshold is increased to $47 million for 2020. Thus, banks, savings associations, and credit unions with assets of $47 million or less as of December 31, 2019, are exempt from collecting data in 2020. An institution's exemption from collecting data in 2020 does not affect its responsibility to report data it was required to collect in 2019.

II. Procedural Requirements

A. Administrative Procedure Act

Under the Administrative Procedure Act (APA), notice and opportunity for public comment are not required if the Bureau finds that notice and public comment are impracticable, unnecessary, or contrary to the public interest.[4] Pursuant to this final rule, comment 2(g)–2 in Regulation C, supplement I, is amended to update the exemption threshold. The amendment in this final rule is technical and non-discretionary, and it merely applies the formula established by Regulation C for determining any adjustments to the exemption threshold. For these reasons, the Bureau has determined that publishing a notice of proposed rulemaking and providing opportunity for public comment are unnecessary. Therefore, the amendment is adopted in final form.

Section 553(d) of the APA generally requires publication of a final rule not less than 30 days before its effective date, except (1) a substantive rule which grants or recognizes an exemption or relieves a restriction; (2) interpretive rules and statements of policy; or (3) as otherwise provided by the agency for good cause found and published with the rule.[5] At a minimum, the Bureau believes the amendments fall under the third exception to section 553(d). The Bureau finds that there is good cause to make the amendments effective on January 1, 2020. The amendment in this final rule is technical and non-discretionary, and it applies the method previously established in the agency's regulations for determining adjustments to the threshold.

B. Regulatory Flexibility Act

Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis.[6]

C. Paperwork Reduction Act

The Bureau has determined that this final rule does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act.[7]

D. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Bureau will submit a report containing this rule and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the United States prior to the rule taking effect. The Office of Information and Regulatory Affairs (OIRA) has designated this rule as not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 12 CFR Part 1003

Banking, Banks, Credit unions, Mortgages, National banks, Reporting and recordkeeping requirements, Savings associations.

Authority and Issuance

For the reasons set forth above, the Bureau amends Regulation C, 12 CFR part 1003, as set forth below:

PART 1003—HOME MORTGAGE DISCLOSURE (REGULATION C)

■ 1. The authority citation for part 1003 continues to read as follows:

Authority: 12 U.S.C. 2803, 2804, 2805, 5512, 5581.

■ 2. Effective January 1, 2020, Supplement I to Part 1003—Official Interpretations, as amended at 82 FR 40388, further amended at 84 FR 57946, is further amended by revising ''2(g) Financial Institution'' under the heading *Section 1003.2—Definitions* to read as follows:

Supplement I to Part 1003—Official Interpretations

* * * * *

Section 1003.2—Definitions

* * * * *

2(g) Financial Institution

1. *Preceding calendar year and preceding December 31.* The definition of financial institution refers both to the preceding calendar year and the preceding December 31. These terms refer to the calendar year and the December 31 preceding the current calendar year. For example, in 2019, the preceding calendar year is 2018 and the preceding December 31 is December 31, 2018. Accordingly, in 2019, Financial Institution A satisfies the asset-size threshold described in § 1003.2(g)(1)(i) if its assets exceeded the threshold specified in comment 2(g)–2 on December 31, 2018. Likewise, in

[1] 12 U.S.C. 2801–2810.

[2] 12 CFR part 1003.

[3] 12 U.S.C. 2808(b).

[4] 5 U.S.C. 553(b)(B).

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

[6] 5 U.S.C. 603(a), 604(a).

[7] 44 U.S.C. 3501–3521.

2020, Financial Institution A does not meet the loan-volume test described in § 1003.2(g)(1)(v)(A) if it originated fewer than 25 closed-end mortgage loans during either 2018 or 2019.

2. *Adjustment of exemption threshold for banks, savings associations, and credit unions.* For data collection in 2020, the asset-size exemption threshold is $47 million. Banks, savings associations, and credit unions with assets at or below $47 million as of December 31, 2019, are exempt from collecting data for 2020.

3. *Merger or acquisition—coverage of surviving or newly formed institution.* After a merger or acquisition, the surviving or newly formed institution is a financial institution under § 1003.2(g) if it, considering the combined assets, location, and lending activity of the surviving or newly formed institution and the merged or acquired institutions or acquired branches, satisfies the criteria included in § 1003.2(g). For example, A and B merge. The surviving or newly formed institution meets the loan threshold described in § 1003.2(g)(1)(v)(B) if the surviving or newly formed institution, A, and B originated a combined total of at least 500 open-end lines of credit in each of the two preceding calendar years. Likewise, the surviving or newly formed institution meets the asset-size threshold in § 1003.2(g)(1)(i) if its assets and the combined assets of A and B on December 31 of the preceding calendar year exceeded the threshold described in § 1003.2(g)(1)(i). Comment 2(g)–4 discusses a financial institution's responsibilities during the calendar year of a merger.

4. *Merger or acquisition—coverage for calendar year of merger or acquisition.* The scenarios described below illustrate a financial institution's responsibilities for the calendar year of a merger or acquisition. For purposes of these illustrations, a ''covered institution'' means a financial institution, as defined in § 1003.2(g), that is not exempt from reporting under § 1003.3(a), and ''an institution that is not covered'' means either an institution that is not a financial institution, as defined in § 1003.2(g), or an institution that is exempt from reporting under § 1003.3(a).

i. Two institutions that are not covered merge. The surviving or newly formed institution meets all of the requirements necessary to be a covered institution. No data collection is required for the calendar year of the merger (even though the merger creates an institution that meets all of the requirements necessary to be a covered institution). When a branch office of an institution that is not covered is acquired by another institution that is not covered, and the acquisition results in a covered institution, no data collection is required for the calendar year of the acquisition.

ii. A covered institution and an institution that is not covered merge. The covered institution is the surviving institution, or a new covered institution is formed. For the calendar year of the merger, data collection is required for covered loans and applications handled in the offices of the merged institution that was previously covered and is optional for covered loans and applications handled in offices of the merged institution that was previously not covered. When a covered institution acquires a branch office of an institution that is not covered, data collection is optional for covered loans and applications handled by the acquired branch office for the calendar year of the acquisition.

iii. A covered institution and an institution that is not covered merge. The institution that is not covered is the surviving institution, or a new institution that is not covered is formed. For the calendar year of the merger, data collection is required for covered loans and applications handled in offices of the previously covered institution that took place prior to the merger. After the merger date, data collection is optional for covered loans and applications handled in the offices of the institution that was previously covered. When an institution remains not covered after acquiring a branch office of a covered institution, data collection is required for transactions of the acquired branch office that take place prior to the acquisition. Data collection by the acquired branch office is optional for transactions taking place in the remainder of the calendar year after the acquisition.

iv. Two covered institutions merge. The surviving or newly formed institution is a covered institution. Data collection is required for the entire calendar year of the merger. The surviving or newly formed institution files either a consolidated submission or separate submissions for that calendar year. When a covered institution acquires a branch office of a covered institution, data collection is required for the entire calendar year of the merger. Data for the acquired branch office may be submitted by either institution.

5. *Originations.* Whether an institution is a financial institution depends in part on whether the institution originated at least 25 closed-end mortgage loans in each of the two preceding calendar years or at least 500 open-end lines of credit in each of the two preceding calendar years. Comments 4(a)–2 through –4 discuss whether activities with respect to a particular closed-end mortgage loan or open-end line of credit constitute an origination for purposes of § 1003.2(g).

6. *Branches of foreign banks—treated as banks.* A Federal branch or a State-licensed or insured branch of a foreign bank that meets the definition of a ''bank'' under section 3(a)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(a)) is a bank for the purposes of § 1003.2(g).

7. *Branches and offices of foreign banks and other entities—treated as nondepository financial institutions.* A Federal agency, State-licensed agency, State-licensed uninsured branch of a foreign bank, commercial lending company owned or controlled by a foreign bank, or entity operating under section 25 or 25A of the Federal Reserve Act, 12 U.S.C. 601 and 611 (Edge Act and agreement corporations) may not meet the definition of ''bank'' under the Federal Deposit Insurance Act and may thereby fail to satisfy the definition of a depository financial institution under § 1003.2(g)(1). An entity is nonetheless a financial institution if it meets the definition of nondepository financial institution under § 1003.2(g)(2).

* * * * *

Dated: December 17, 2019.

Thomas Pahl,

Policy Associate Director, Bureau of Consumer Financial Protection.

[FR Doc. 2019–27522 Filed 12–18–19; 4:15 pm]

BILLING CODE 4810–AM–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2019–0704; Product Identifier 2019–NM–132–AD; Amendment 39–19813; AD 2019–24–10]

RIN 2120–AA64

Airworthiness Directives; Airbus SAS Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Airbus SAS Model A350–941 airplanes. This AD was prompted by an investigation that identified the cargo lining gutter assembly would be unable to drain a certain quantity of water in case of leakage or rupture of certain water pipes. This AD requires modification of the cargo lining gutter assemblies, as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective January 24, 2020.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of January 24, 2020.

ADDRESSES: For the material incorporated by reference (IBR) in this AD, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 89990 1000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find this IBR material on the EASA website at *https://ad.easa.europa.eu.* You may view this IBR material at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available in the AD docket on the internet at *https://www.regulations.gov* by searching for

and locating Docket No. FAA–2019–0704.

Examining the AD Docket

You may examine the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0704; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the regulatory evaluation, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Kathleen Arrigotti, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3218.

SUPPLEMENTARY INFORMATION:

Discussion

The EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2019–0183, dated July 26, 2019 (''EASA AD 2019–0183'') (also referred to as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for certain Airbus SAS Model A350–941 airplanes.

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain Airbus SAS Model A350–941 airplanes. The NPRM published in the **Federal Register** on September 25, 2019 (84 FR 50339). The NPRM was prompted by an investigation that identified the cargo lining gutter assembly would be unable to drain a certain quantity of water in case of leakage or rupture of certain water pipes. The NPRM proposed to require modification of the cargo lining gutter assemblies.

The FAA is issuing this AD to address this condition, which, if not corrected, could lead to fluid contamination of certain electrical equipment and connectors, possibly resulting in the loss of several flight control functions, with consequent reduced control of the airplane. See the MCAI for additional background information.

Comments

The FAA gave the public the opportunity to participate in developing this final rule. The FAA has considered the comments received. The commenter John Motzel and two anonymous commenters stated support for the NPRM.

Conclusion

The FAA reviewed the relevant data, considered the comments received, and determined that air safety and the public interest require adopting this final rule as proposed, except for minor editorial changes. The FAA has determined that these minor changes:

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

Related IBR Material Under 1 CFR Part 51

EASA AD 2019–0183 describes procedures for modifying the cargo lining gutter assemblies. This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Costs of Compliance

The FAA estimates that this AD affects 5 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
17 work-hours × $85 per hour = $1,445	$12,000	$13,445	$67,225

According to the manufacturer, some or all of the costs of this AD may be covered under warranty, thereby reducing the cost impact on affected individuals. The FAA does not control warranty coverage for affected individuals. As a result, the FAA has included all known costs in the cost estimate.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. Subtitle VII: Aviation Programs, describes in more detail the scope of the Agency's authority.

The FAA is issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701: ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

This AD is issued in accordance with authority delegated by the Executive Director, Aircraft Certification Service, as authorized by FAA Order 8000.51C. In accordance with that order, issuance of ADs is normally a function of the Compliance and Airworthiness Division, but during this transition period, the Executive Director has delegated the authority to issue ADs applicable to transport category airplanes and associated appliances to the Director of the System Oversight Division.

Regulatory Findings

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

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

(1) Is not a ''significant regulatory action'' under Executive Order 12866,

(2) Will not affect intrastate aviation in Alaska, and

(3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2019–24–10 Airbus SAS: Amendment 39–19813; Docket No. FAA–2019–0704; Product Identifier 2019–NM–132–AD.

(a) Effective Date

This AD is effective January 24, 2020.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Airbus SAS Model A350–941 airplanes, certificated in any category, as identified in European Union Aviation Safety Agency (EASA) AD 2019–0183, dated July 26, 2019 (''EASA AD 2019–0183'').

(d) Subject

Air Transport Association (ATA) of America Code 92, Electric and electronic common installation.

(e) Reason

This AD was prompted by an investigation that identified the cargo lining gutter assembly would be unable to drain a certain quantity of water in case of leakage or rupture of certain water pipes. The FAA is issuing this AD to address this condition, which, if not corrected, could lead to fluid contamination of certain electrical equipment and connectors, possibly resulting in the loss of several flight control functions, with consequent reduced control of the airplane.

(f) Compliance

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

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, EASA AD 2019–0183.

(h) Exception to EASA AD 2019–0183

The ''Remarks'' section of EASA AD 2019–0183 does not apply to this AD.

(i) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Section, Transport Standards Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Section, send it to the attention of the person identified in paragraph (j) of this AD. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

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

(3) *Required for Compliance (RC)*: For any service information referenced in EASA AD 2019–0183 that contains RC procedures and tests: Except as required by paragraph (i)(2) of this AD, RC procedures and tests must be done to comply with this AD; any procedures or tests that are not identified as RC are recommended. Those procedures and tests that are not identified as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the procedures and tests identified as RC can be done and the airplane can be put back in an airworthy condition. Any substitutions or changes to procedures or tests identified as RC require approval of an AMOC.

(j) Related Information

For more information about this AD, contact Kathleen Arrigotti, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3218.

(k) Material Incorporated by Reference

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

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

(i) European Union Aviation Safety Agency (EASA) AD 2019–0183, dated July 26, 2019.

(ii) [Reserved]

(3) For information about EASA AD 2019–0183, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 89990 6017; email *ADs@easa.europa.eu;* Internet *www.easa.europa.eu.* You may find this EASA AD on the EASA website at *https://ad.easa.europa.eu.*

(4) You may view this material at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. This material may be found in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0704.

(5) You may view this material that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, email *fedreg.legal@nara.gov,* or go to: *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Des Moines, Washington, on November 27, 2019.

Michael Kaszycki,

Acting Director, System Oversight Division, Aircraft Certification Service.

[FR Doc. 2019–27468 Filed 12–19–19; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2019–0698; Product Identifier 2019–NM–109–AD; Amendment 39–19814; AD 2019–24–11]

RIN 2120–AA64

Airworthiness Directives; Dassault Aviation Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: The FAA is superseding Airworthiness Directive (AD) 2014–16–26 and AD 2017–19–04, which applied to certain Dassault Aviation Model FALCON 900EX airplanes. Those ADs required revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive maintenance requirements and/or airworthiness limitations. Since the FAA issued AD 2014–16–26 and AD 2017–19–04, the FAA determined that new or more restrictive airworthiness limitations are necessary. This AD continues to require those maintenance or inspection program revisions, and also requires revising the existing maintenance or inspection program, as applicable, to incorporate additional new or more restrictive airworthiness limitations. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective January 24, 2020.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of January 24, 2020.

The Director of the Federal Register approved the incorporation by reference of a certain other publication listed in this AD as of October 19, 2017 (82 FR 43163, September 14, 2017).

ADDRESSES: For service information identified in this final rule, contact Dassault Falcon Jet Corporation, Teterboro Airport, P.O. Box 2000, South Hackensack, NJ 07606; telephone 201–440–6700; internet *https://www.dassaultfalcon.com.* You may view this referenced service information at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0698.

Examining the AD Docket

You may examine the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0698; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the regulatory evaluation, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Tom Rodriguez, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3226.

SUPPLEMENTARY INFORMATION:

Discussion

The European Union Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2019–0133, dated June 11, 2019 (''EASA AD 2019–0133'') (also referred to as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for certain Dassault Aviation Model FALCON 900EX airplanes. You may examine the MCAI in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0698.

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2014–16–26, Amendment 39–17950 (79 FR 51077, August 27, 2014) (''AD 2014–16–26''); and AD 2017–19–04, Amendment 39–19034 (82 FR 43163, September 14, 2017) (''AD 2017–19–04''). AD 2014–16–26 and AD 2017–19–04 applied to certain Dassault Aviation Model FALCON 900EX airplanes. The NPRM published in the **Federal Register** on September 16, 2019 (84 FR 48569). The NPRM was prompted by the FAA's determination that new or more restrictive airworthiness limitations are necessary. The NPRM proposed to continue to require revising the existing maintenance or inspection program, as applicable; and to require additional revision of the existing maintenance or inspection program, as applicable; to incorporate new or more restrictive airworthiness limitations. The FAA is issuing this AD to address reduced structural integrity of the airplane. See the MCAI for additional background information.

Comments

The FAA gave the public the opportunity to participate in developing this final rule. The FAA received no comments on the NPRM or on the determination of the cost to the public.

Conclusion

The FAA reviewed the relevant data and determined that air safety and the public interest require adopting this final rule as proposed, except for minor editorial changes. The FAA determined that these minor changes:

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

Related Service Information Under 1 CFR Part 51

Dassault Aviation has issued Chapter 5–40, Airworthiness Limitations, Revision 16, dated September 2018, of the Dassault FALCON 900EX Maintenance Manual. This service information describes procedures, maintenance tasks, and airworthiness limitations specified in the Airworthiness Limitations section of the Airplane Maintenance Manual.

This AD also requires Chapter 5–40, Airworthiness Limitations, Revision 14, dated November 2015, of the FALCON 900EX Maintenance Manual, which the Director of the Federal Register approved for incorporation by reference as of October 19, 2017 (82 FR 43163, September 14, 2017).

This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Costs of Compliance

The FAA estimates that this AD affects 100 airplanes of U.S. registry.

The FAA estimates the following costs to comply with this AD:

The FAA estimates the total cost per operator for the retained actions from AD 2017–19–04 to be $7,650 (90 work-hours × $85 per work-hour).

The FAA has determined that revising the existing maintenance or inspection program takes an average of 90 work-hours per operator, although the agency recognizes that this number may vary from operator to operator. In the past, the FAA has estimated that this action takes 1 work-hour per airplane. Since operators incorporate maintenance or inspection program changes for their affected fleet(s), the FAA has determined that a per-operator estimate is more accurate than a per-airplane estimate. The FAA estimates the total cost per operator for the new actions to be $7,650 (90 work-hours × $85 per work-hour).

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. Subtitle VII: Aviation Programs, describes in more detail the scope of the Agency's authority.

The FAA is issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701: ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

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

applicable to transport category airplanes and associated appliances to the Director of the System Oversight Division.

Regulatory Findings

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

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

(1) Is not a ''significant regulatory action'' under Executive Order 12866,

(2) Will not affect intrastate aviation in Alaska, and

(3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by

■ a. Removing Airworthiness Directive (AD) 2014–16–26, Amendment 39–17950 (79 FR 51077, August 27, 2014); and AD 2017–19–04, Amendment 39–19034 (82 FR 43163, September 14, 2017); and

■ b. Adding the following new AD:

2019–24–11 Dassault Aviation: Amendment 39–19814; Docket No. FAA–2019–0698; Product Identifier 2019–NM–109–AD.

(a) Effective Date

This AD is effective January 24, 2020.

(b) Affected ADs

(1) This AD replaces AD 2014–16–26, Amendment 39–17950 (79 FR 51077, August 27, 2014) (''AD 2014–16–26''); and AD 2017–19–04, Amendment 39–19034 (82 FR 43163, September 14, 2017) (''AD 2017–19–04'').

(2) This AD affects AD 2010–26–05, Amendment 39–16544 (75 FR 79952, December 21, 2010) (''AD 2010–26–05'').

(c) Applicability

This AD applies to Dassault Aviation Model FALCON 900EX airplanes, certificated in any category, serial numbers 1 through 96 inclusive, and serial numbers 98 through 119 inclusive.

(d) Subject

Air Transport Association (ATA) of America Code 05, Time Limits/Maintenance Checks.

(e) Reason

This AD was prompted by a determination that new or more restrictive airworthiness limitations are necessary. The FAA is issuing this AD to address reduced structural integrity of the airplane.

(f) Compliance

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

(g) Retained Revision of Maintenance or Inspection Program, With No Changes

This paragraph restates the requirements of paragraph (g) of AD 2017–19–04, with no changes. Within 90 days after October 19, 2017 (the effective date of AD 2017–19–04), revise the existing maintenance or inspection program, as applicable, to incorporate the information specified in Chapter 5–40, Airworthiness Limitations, Revision 14, dated November 2015, of the FALCON 900EX Maintenance Manual. The initial compliance time for accomplishing the actions specified in Chapter 5–40, Airworthiness Limitations, Revision 14, dated November 2015, of the FALCON 900EX Maintenance Manual, is within the applicable times specified in the maintenance manual, or 90 days after October 19, 2017, whichever occurs later, except as provided by paragraphs (g)(1) through (4) of this AD.

(1) The term ''LDG'' in the ''First Inspection'' column of any table in the service information means total airplane landings.

(2) The term ''FH'' in the ''First Inspection'' column of any table in the service information means total flight hours.

(3) The term ''FC'' in the ''First Inspection'' column of any table in the service information means total flight cycles.

(4) The term ''M'' in the ''First Inspection'' column of any table in the service information means months.

(h) Retained Requirement for No Alternative Actions and Intervals, With New Exception

This paragraph restates the requirement specified in paragraph (h) of AD 2017–19–04, with a new exception. Except as required by paragraph (i) of this AD, after accomplishing the revision required by paragraph (g) of this AD, no alternative actions (*e.g.,* inspections) or intervals may be used unless the actions or intervals are approved as an alternative method of compliance (AMOC) in accordance with the procedures specified in paragraph (l)(1) of this AD.

(i) New Requirement of This AD: Maintenance or Inspection Program Revision

Within 90 days after the effective date of this AD, revise the existing maintenance or inspection program, as applicable, to incorporate the information specified in Chapter 5–40, Airworthiness Limitations, Revision 16, dated September 2018, of the Dassault FALCON 900EX Maintenance Manual. The initial compliance times for accomplishing the actions are at the times specified in Chapter 5–40, Airworthiness Limitations, Revision 16, dated September 2018, or 90 days after the effective date of this AD, whichever occurs later, except as provided by paragraphs (i)(1) through (4) of this AD.

(1) The term ''LDG'' in the ''First Inspection'' column of any table in the service information means total airplane landings.

(2) The term ''FH'' in the ''First Inspection'' column of any table in the service information means total flight hours.

(3) The term ''FC'' in the ''First Inspection'' column of any table in the service information means total flight cycles.

(4) The term ''M'' in the ''First Inspection'' column of any table in the service information means months since the date of issuance of the original airworthiness certificate or the date of issuance of the original export certificate of airworthiness.

(j) No Alternative Actions or Intervals

After the existing maintenance or inspection program has been revised as required by paragraph (i) of this AD, no alternative actions (*e.g.,* inspections) or intervals may be used unless the actions and intervals are approved as an AMOC in accordance with the procedures specified in paragraph (l)(1) of this AD.

(k) Terminating Actions for Certain Actions in AD 2010–26–05

Accomplishing the actions required by paragraph (g) or (i) of this AD terminates the requirements of paragraph (g)(1) of AD 2010–26–05, for Dassault Aviation Model FALCON 900EX airplanes, serial numbers 1 through 96 inclusive, and serial numbers 98 through 119 inclusive.

(l) Other FAA AD Provisions

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Section, Transport Standards Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Section, send it to the attention of the person identified in paragraph (m)(2) of this AD. Information may be emailed to *9-ANM-116-AMOC-REQUESTS@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(2) *Contacting the Manufacturer:* As of the effective date of this AD, for any requirement

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

(m) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) EASA AD 2019–0133, dated June 11, 2019, for related information. This MCAI may be found in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0698.

(2) For more information about this AD, contact Tom Rodriguez, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3226.

(n) Material Incorporated by Reference

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

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

(3) The following service information was approved for IBR on January 24, 2020.

(i) Chapter 5–40, Airworthiness Limitations, Revision 16, dated September 2018, of the Dassault FALCON 900EX Maintenance Manual.

(ii) [Reserved]

(4) The following service information was approved for IBR on October 19, 2017 (82 FR 43163, September 14, 2017).

(i) Chapter 5–40, Airworthiness Limitations, Revision 14, dated November 2015, of the FALCON 900EX Maintenance Manual.

(ii) [Reserved]

(5) For service information identified in this AD, contact Dassault Falcon Jet Corporation, Teterboro Airport, P.O. Box 2000, South Hackensack, NJ 07606; telephone 201–440–6700; internet *https://www.dassaultfalcon.com.*

(6) You may view this service information at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

(7) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, email *fedreg.legal@nara.gov,* or go to: *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Des Moines, Washington, on November 27, 2019.

Michael Kaszycki,

Acting Director, System Oversight Division, Aircraft Certification Service.

[FR Doc. 2019–27467 Filed 12–19–19; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2019–0406; Product Identifier 2019–NM–059–AD; Amendment 39–21006; AD 2019–24–17]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all The Boeing Company Model MD–90–30 airplanes. This AD was prompted by reports indicating that certain center wing stringers and skins are potentially susceptible to cracking. This AD requires repetitive eddy current, low frequency (ETLF) inspections of the left and right side fastener holes for any crack; repetitive eddy current, high frequency (ETHF) inspections of the lower skin for any crack; and repair if any crack is found. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective January 24, 2020.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of January 24, 2020.

ADDRESSES: For service information identified in this final rule, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110 SK57, Seal Beach, CA 90740–5600; telephone 562–797–1717; internet *https://www.myboeingfleet.com.* You may view this service information at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0406.

Examining the AD Docket

You may examine the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0406; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the regulatory evaluation, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: David Truong, Aerospace Engineer, Airframe Section, FAA, Los Angeles ACO Branch, 3960 Paramount Boulevard, Lakewood, CA 90712–4137; phone: 562–627–5224; fax: 562–627–5210; email: *david.truong@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to all The Boeing Company Model MD–90–30 airplanes. The NPRM published in the **Federal Register** on June 21, 2019 (84 FR 29105). The NPRM was prompted by reports indicating that based on Model MD–80 airplane service experience, certain center wing stringers and skins are potentially susceptible to fatigue-related cracking on Model MD–90 airplanes. The Model MD–80 and Model MD–90 wings share the same basic design and experience similar stresses, but no such cracking has been found on Model MD–90 airplanes. Cracks on Model MD–80 airplanes were found in the center wing lower stringers, at the inboard end where they are joined to the airplane centerline by end fittings; in the lower stringer end fittings, at the outboard end where they attach to stringers; and in the lower forward and aft skins, underneath cracked stringers. If not addressed, this cracking could result in the inability of the structure to sustain limit loads, and adversely affect the structural integrity of the airplane. The NPRM proposed to require repetitive ETLF inspections of the left and right side fastener holes for any crack; repetitive ETHF inspections of the lower skin for any crack; and repair if any crack is found.

Comments

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

Request for Clarification of Other Relevant Rulemaking Section

Boeing requested clarification regarding the number of cracking occurrences reported in areas outside of those addressed by AD 2016–07–28, Amendment 39–18473 (81 FR 21253, April 11, 2016) (''AD 2016–07–28''), or Boeing Alert Service Bulletin MD80–

57A244, dated March 3, 2016. Boeing noted that in the NPRM, the Other Relevant Rulemaking section stated that since AD 2016–07–28 was issued, cracking was found at fastener holes common to stringers (S) S–11 through S–22, and around the external bracket angle at S–18 and S–19. Boeing emphasized that there was only one case of cracking, at S–13.

In addition, Boeing requested that the Other Relevant Rulemaking section in the NPRM be revised to explain that the new service information that Boeing is developing for Model MD–80 airplanes is to address potential cracking in new stringer locations and is not in response to actual in-service reports of cracking.

The FAA agrees with the commenter's assessment of crack findings. Of the cracks found since issuance of AD 2016–07–28, only one was found at S–13—the only area not addressed by AD 2016–07–28. All remaining crack findings were within the scope of the requirements of AD 2016–07–28. As a result of these cracks, Boeing made the determination to expand the inspection to stringers S–11 through S–22. This AD addresses those stringers on Model MD–90–30 airplanes.

The FAA acknowledges that the service information for the Model MD–80 airplanes, Boeing Service Bulletin MD80–57A244, dated March 3, 2016, which is mandated by AD 2016–07–28, has been revised. Boeing Service Bulletin MD80–57A244, Revision 1, dated October 1, 2019, updates the inspection method and expands the inspection area. The FAA may consider further rulemaking in the future to mandate these changes for Model MD–80 airplanes.

Because the Other Relevant Rulemaking section in **SUPPLEMENTARY INFORMATION** is not retained in final rules, the FAA has not revised this final rule in regard to these issues.

Request To Revise Cost Information

Delta Air Lines (DAL) requested clarification regarding the number of airplanes on the U.S. registry that would be affected by the NPRM. DAL stated that the Costs of Compliance paragraph indicated that an estimated 43 airplanes would be affected. However, DAL is the only U.S. operator of the affected airplanes, and DAL reports that there are 65 airplanes in their operations specification.

The FAA agrees with the commenter and has revised the Costs of Compliance paragraph in this final rule accordingly.

Request for Legible Service Information

DAL requested that better quality copies of certain sheets of Boeing Drawing SN09570007 be provided to operators. The commenter stated that the poor quality of these sheets renders them useless in terms of doing inspections and is concerned about showing compliance with the requirements specified in the proposed AD.

The FAA acknowledges the commenter's concern regarding the legibility of certain sheets of Boeing Drawing SN09570007. Since Boeing Alert Service Bulletin MD90–57A031, dated March 19, 2019, does not include Boeing Drawing SN09570007 in the ''Required for Compliance (RC)'' section, the drawing is not required to comply with this AD. The drawing is referenced in Paragraph 1.J.2., Planning Information, References, Data Supplied with the Service Bulletin, in Boeing Alert Service Bulletin MD90–57A031, dated March 19, 2019. Operators notified Boeing about the illegible drawing sheets, and in response, Boeing issued Boeing Multi Operator Message MOM–MOM–19–0549–01B, dated October 4, 2019, which provides clearer images of Boeing Drawing SN09570007. The FAA recognizes that Boeing Drawing SN09570007 may provide helpful information to operators. Therefore, the FAA has added Note 1 to paragraph (g) of this AD to notify operators that if they have illegible pages of Boeing Drawing SN09570007, additional guidance can be found in Boeing Multi Operator Message MOM–MOM–19–0549–01B, dated October 4, 2019.

Conclusion

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

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

The FAA also determined that these changes will not increase the economic burden on any operator (other than the estimated number of affected airplanes as explained under the ''Request to Revise Cost Information'' section of this final rule) or increase the scope of this final rule.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Boeing Alert Service Bulletin MD90–57A031, dated March 19, 2019. This service information describes procedures for repetitive ETLF inspections of the left and right side fastener holes for any crack, repetitive ETHF inspections of the lower skin for any crack, and repair if any crack is found. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Costs of Compliance

The FAA estimates that this AD affects 65 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection	30 work-hours × $85 per hour = $2,550 per inspection cycle.	$0	$2,550 per inspection cycle.	$165,750 per inspection cycle.

The FAA has received no definitive data that would enable the agency to provide cost estimates for the on-condition actions specified in this AD.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. Subtitle VII: Aviation Programs, describes in more detail the scope of the Agency's authority.

The FAA is issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701: ''General requirements.'' Under that section, Congress charges the FAA

with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

This AD is issued in accordance with authority delegated by the Executive Director, Aircraft Certification Service, as authorized by FAA Order 8000.51C. In accordance with that order, issuance of ADs is normally a function of the Compliance and Airworthiness Division, but during this transition period, the Executive Director has delegated the authority to issue ADs applicable to transport category airplanes and associated appliances to the Director of the System Oversight Division.

Regulatory Findings

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

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

(1) Is not a ''significant regulatory action'' under Executive Order 12866,

(2) Will not affect intrastate aviation in Alaska, and

(3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2019–24–17 The Boeing Company: Amendment 39–21006; Docket No. FAA–2019–0406; Product Identifier 2019–NM–059–AD.

(a) Effective Date

This AD is effective January 24, 2020.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all The Boeing Company Model MD–90–30 airplanes, certificated in any category.

(d) Subject

Air Transport Association (ATA) of America Code 57, Wings.

(e) Unsafe Condition

This AD was prompted by reports indicating that certain center wing stringers and skins are potentially susceptible to cracking. The FAA is issuing this AD to address cracking of the center wing stringers and skins, which could result in the inability of the structure to sustain limit loads, and adversely affect the structural integrity of the airplane.

(f) Compliance

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

(g) Required Actions

Except as specified in paragraph (h) of this AD: At the applicable times specified in paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin MD90–57A031, dated March 19, 2019, do all applicable actions identified as ''RC'' (required for compliance) in, and in accordance with, the Accomplishment Instructions of Boeing Alert Service Bulletin MD90–57A031, dated March 19, 2019.

Note 1 to paragraph (g) of this AD: Boeing Alert Service Bulletin MD90–57A031, dated March 19, 2019, refers to Boeing Drawing SN09570007, as data supplied with this service bulletin. If the pages of Boeing Drawing SN09570007 are illegible, guidance can be found in Boeing Multi Operator Message MOM–MOM–19–0549–01B, dated October 4, 2019.

(h) Exceptions to Service Information Specifications

(1) For purposes of determining compliance with the requirements of this AD: Where Boeing Alert Service Bulletin MD90–57A031, dated March 19, 2019, uses the phrase ''the original issue date of this service bulletin,'' this AD requires using ''the effective date of this AD.''

(2) Where Boeing Alert Service Bulletin MD90–57A031, dated March 19, 2019, specifies contacting Boeing for repair instructions and doing the repair: This AD requires doing the repair using a method approved in accordance with the procedures specified in paragraph (i) of this AD.

(i) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Los Angeles ACO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (j)(1) of this AD. Information may be emailed to *9-ANM-LAACO-AMOC-Requests@faa.gov.*

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

(3) An AMOC that provides an acceptable level of safety may be used for any repair, modification, or alteration required by this AD if it is approved by The Boeing Company Organization Designation Authorization (ODA) that has been authorized by the Manager, Los Angeles ACO Branch, FAA, to make those findings. To be approved, the repair method, modification deviation, or alteration deviation must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(4) Except as specified by paragraph (h) of this AD: For service information that contains steps that are labeled as Required for Compliance (RC), the provisions of paragraphs (i)(4)(i) and (ii) of this AD apply.

(i) The steps labeled as RC, including substeps under an RC step and any figures identified in an RC step, must be done to comply with the AD. If a step or substep is labeled ''RC Exempt,'' then the RC requirement is removed from that step or substep. An AMOC is required for any deviations to RC steps, including substeps and identified figures.

(ii) Steps not labeled as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the RC steps, including substeps and identified figures, can still be done as specified, and the airplane can be put back in an airworthy condition.

(j) Related Information

(1) For more information about this AD, contact David Truong, Aerospace Engineer, Airframe Section, FAA, Los Angeles ACO Branch, 3960 Paramount Boulevard, Lakewood, CA 90712–4137; phone: 562–627–5224; fax: 562–627–5210; email: *david.truong@faa.gov.*

(2) Service information identified in this AD that is not incorporated by reference is available at the addresses specified in paragraphs (k)(3) and (4) of this AD.

(k) Material Incorporated by Reference

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

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

(i) Boeing Alert Service Bulletin MD90–57A031, dated March 19, 2019.

(ii) [Reserved]

(3) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110 SK57, Seal Beach, CA 90740 5600; telephone 562–797–1717; internet *https://www.myboeingfleet.com.*

(4) You may view this service information at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

(5) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, email *fedreg.legal@nara.gov,* or go to: *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Des Moines, Washington, on December 4, 2019.

Michael Kaszycki,

Acting Director, System Oversight Division, Aircraft Certification Service.

[FR Doc. 2019–27465 Filed 12–19–19; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 882

[Docket No. FDA–2014–N–1209]

Neurological Devices; Reclassification of Cranial Electrotherapy Stimulator Devices Intended To Treat Anxiety and/or Insomnia; Effective Date of Requirement for Premarket Approval for Cranial Electrotherapy Stimulator Devices Intended To Treat Depression

AGENCY: Food and Drug Administration, HHS.

ACTION: Final amendment; final order.

SUMMARY: The Food and Drug Administration (FDA) is issuing a final order to reclassify the cranial electrotherapy stimulator (CES) device intended to treat anxiety and/or insomnia, a preamendments class III device, into class II (special controls) and subject to premarket notification. FDA is also issuing this final order to require the filing of a premarket approval application (PMA) or a notice of completion of a product development protocol (PDP) for CES devices intended to treat depression (product code JXK) and clarify the device identification of the CES device to include it as a prescription device.

DATES: This order is effective on December 20, 2019. See further discussion in section V, ''Implementation Strategy.''

FOR FURTHER INFORMATION CONTACT: Michael Hoffmann, Center for Devices and Radiological Health, 10903 New Hampshire Ave., Bldg. 66, Silver Spring, MD 20993, 301–796–6610, *Michael.Hoffmann@fda.hhs.gov.*

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I. Table of Abbreviations/Commonly Used Acronyms in This Document

Abbreviation or acronym	What it means
2012 Panel	2012 Neurological Devices Panel.
510(k)	Premarket Notification.
AC	Alternating Current.
CES	Cranial Electrotherapy Stimulator Device.
CFR	Code of Federal Regulations.
CNS	Central Nervous System.
DC	Direct Current.
DSM–5	Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition.
ECT	Electroconvulsive Therapy Device.
FDA	Food and Drug Administration.
FDASIA	Food and Drug Administration Safety and Innovation Act.
FD&C Act	Federal Food, Drug, and Cosmetic Act.
FR	Federal Register.
IDE	Investigational Device Exemption.
MAUDE	Manufacturer and User Facility Device Experience.
MDR	Medical Device Reporting.
OMB	Office of Management and Budget.
PDP	Product Development Protocol.
PMA	Premarket Approval Application.
PRA	Paperwork Reduction Act of 1995.
RCT	Randomized Controlled Trial.
Ref.	Reference.
RWD	Real-World Data.
RWE	Real-World Evidence.
U.S.C.	United States Code.
VSE	Valid Scientific Evidence.

II. Background

The Federal Food, Drug, and Cosmetic Act (FD&C Act), as amended, establishes a comprehensive system for the regulation of medical devices intended for human use. Section 513 of the FD&C Act (21 U.S.C. 360c) established three categories (classes) of devices, reflecting the regulatory controls needed to provide reasonable assurance of their safety and effectiveness. The three categories of devices are class I (general controls), class II (special controls), and class III (premarket approval).

Under section 513(d) of the FD&C Act, devices that were in commercial distribution before the enactment of the

1976 amendments, May 28, 1976, (generally referred to as preamendments devices) are classified after FDA has: (1) Received a recommendation from a device classification panel (an FDA advisory committee); (2) published the panel's recommendation for comment, along with a proposed classification regulation classifying the device; and (3) published a final classification regulation classifying the device. FDA has classified most preamendments devices under these procedures.

Devices that were not in commercial distribution prior to May 28, 1976, (generally referred to as postamendments devices) are automatically classified by section 513(f) of the FD&C Act into class III without any FDA rulemaking process.[1] Those devices remain in class III and require premarket approval unless, and until, the device is reclassified into class I or II or FDA issues an order finding the device to be substantially equivalent, in accordance with section 513(i) of the FD&C Act, to a predicate device that does not require premarket approval. The Agency determines whether new devices are substantially equivalent to predicate devices by means of premarket notification procedures in section 510(k) of the FD&C Act (21 U.S.C. 360(k)) and part 807 (21 CFR part 807).

A preamendments device that has been classified into class III and devices found substantially equivalent by means of premarket notification (510(k)) procedures to such a preamendments device or to a device within that type (both the preamendments and substantially equivalent devices are referred to as preamendments class III devices) may be marketed without submission of a PMA until FDA issues a final order under section 515(b) of the FD&C Act (21 U.S.C. 360e(b)) requiring premarket approval.

A. Reclassification

Under section 515(i)(2) of the FD&C Act, following publication of a proposed order, a meeting of a device classification panel, and consideration of the comments of a proposed order, FDA has the authority to issue an administrative order revising the classification of a device that FDA has classified as a class III device and for which no administrative order has been issued calling for PMAs under section 515(b) of the FD&C Act, so that the device is classified into class I or II. In determining whether to revise the classification of a device or to require a device to remain in class III, FDA applies the criteria set forth in section 513(a) of the FD&C Act. Section 513(a)(1)(B) of the FD&C Act defines class II devices as those devices for which the general controls in section 513(a)(1)(A) by themselves are insufficient to provide reasonable assurance of safety and effectiveness, but for which there is sufficient information to establish special controls that, together with general controls, provide a reasonable assurance of safety and effectiveness of a device.

FDA published a proposed order in the **Federal Register** of January 22, 2016 (81 FR 3751) and held a meeting of the Neurological Devices Panel for a discussion of the CES device classification on February 10, 2012 (the 2012 Panel), as described in section 513(b) of the FD&C Act with respect to CES devices (Ref. 1). FDA also published an order in the **Federal Register** of September 10, 2009 (74 FR 16214), that was issued under section 515(i) of the FD&C Act that required submission of safety and effectiveness information on CES devices. FDA has considered the information available to the Agency, including the deliberations of the 2012 Panel meeting, the reclassification petitions submitted for these devices, and comments from the public docket to determine that there is sufficient information to establish special controls to effectively mitigate the risks to health identified in section III, and that these special controls, together with general controls, will provide a reasonable assurance of safety and effectiveness when applied to CES devices intended to treat anxiety and/or insomnia.

Therefore, in accordance with sections 513(e)(1) and 515(i) of the FD&C Act, based on information with respect to the CES device and taking into account the public health benefit of the use of the CES device and the nature and known incidence of the risk of the device, FDA, on its own initiative, is issuing this final order to reclassify CES devices intended for treatment of anxiety and/or insomnia from class III to class II (special controls).[2]

B. Requirement for Premarket Approval

Section 515(b)(1) of the FD&C Act sets forth the process for issuing a final order requiring PMAs. Specifically, prior to the issuance of a final order requiring premarket approval for a preamendments class III device, the following must occur: (1) Publication of a proposed order in the **Federal Register**; (2) a meeting of a device classification panel described in section 513(b) of the FD&C Act; and (3) consideration of comments from all affected stakeholders, including patients, payers, and providers. As noted above, FDA published a proposed order that would require PMAs for CES devices intended to treat depression in the **Federal Register** of January 22, 2016. FDA held a meeting of a device classification panel described in section 513(b) of the FD&C Act with respect to CES devices (Ref. 2). Finally, FDA received and considered over 300 comments on the proposed order, as discussed in section III. Therefore, FDA has met the requirements under section 515(b)(1) of the FD&C Act.

On July 9, 2012, the Food and Drug Administration Safety and Innovation Act (FDASIA) (Pub. L. 112–144) was enacted. Section 608(a) and (b) of FDASIA amended sections 513(e) and 515(b) of the FD&C Act, amended sections 513(e) and 515(b) of the FD&C Act, changing the mechanism for, respectively, reclassifying a device and requiring premarket approval for a preamendments device from rulemaking to an administrative order. In the **Federal Register** of December 17, 2018 (83 FR 64443), FDA published a final rule entitled ''Medical Device Classification Procedures: Incorporating Food and Drug Administration Safety and Innovation Act Procedures,'' which codified those sections of FDASIA (Medical Device Classification Procedures Final Rule).

Although under the FD&C Act a manufacturer of a class III preamendments device may respond to the call for PMAs by filing a PMA or a notice of completion of a PDP, in practice, the option of filing a notice of completion of a PDP has not been used. While corresponding requirements for PDPs remain available to manufacturers in response to a final order under section 515(b) of the FD&C Act, for simplicity this document will refer only to the requirement for the filing and receiving approval of a PMA.

Under section 501(f)(2)(B) of the FD&C Act (21 U.S.C. 351(f)(2)(B)), a preamendments class III device may be commercially distributed without a PMA until 90 days after FDA issues a

[1] CES devices with intended uses outside the scope of those listed in 21 CFR 882.5800 are considered postamendments devices that are subject to classification under section 513(f)(1) of the FD&C Act or, if the relevant requirements are met, under section 513(f)(2) of the FD&C Act.

[2] FDA notes that the ''ACTION'' caption for this final order is styled as ''Final amendment; final order,'' rather than ''Final order.'' Beginning in December 2019, this editorial change was made to indicate that the document ''amends'' the Code of Federal Regulations. The change was made in accordance with the Office of Federal Register's (OFR) interpretations of the Federal Register Act (44 U.S.C. chapter 15), its implementing regulations (1 CFR 5.9 and parts 21 and 22), and the Document Drafting Handbook.

final order (or a final rule issued under section 515(b) of the FD&C Act prior to the enactment of FDASIA) requiring premarket approval for the device, or 30 months after final classification of the device under section 513 of the FD&C Act, whichever is later. Because CES devices that are the subject of this final order were classified in 1979 (44 FR 51770, September 4, 1979), the 30-month period has expired and, thus, the later of these two time periods is the 90-day period. However, for currently legally marketed CES devices intended to treat depression, FDA does not intend to enforce compliance with this 90-day requirement for an additional 90 days (*i.e.,* 180 days after the effective date of this final order), as long as a notice of intent to file a PMA is submitted within 90 days of the effective date of this final order. The notification of the intent to file a PMA should include a list of all model numbers for which a manufacturer plans to seek marketing approval through a PMA. FDA does not intend to enforce compliance with the PMA requirements with respect to an applicant of a currently legally marketed CES device intended to treat depression during FDA's review of the PMA. FDA intends to review any PMA for the device within 180 days of the date of filing. FDA cautions that under section 515(d)(1)(B)(i) of the FD&C Act, the Agency may not enter into an agreement to extend the review period for a PMA beyond 180 days unless the Agency finds that ''the continued availability of the device is necessary for the public health.''

Also, a preamendments device subject to the order process under section 515(b) of the FD&C Act is not required to have an approved investigational device exemption (IDE) (see 21 CFR part 812) contemporaneous with its interstate distribution until the date identified by FDA in the final order requiring the filing of a PMA for the device. At that time, an IDE is required only if a PMA has not been filed and it has been determined that the device is a ''significant risk'' under § 812.3(m). If the manufacturer, importer, or other sponsor of the device submits an IDE application and FDA approves it, the device may be distributed for investigational use. If a PMA is not filed within 90 days after the issuance of a final order, and the device is not distributed for investigational use under an IDE, the device is deemed to be adulterated within the meaning of section 501(f)(1)(A) of the FD&C Act, and subject to seizure and condemnation under section 304 of the FD&C Act (21 U.S.C. 334) if its distribution continues. As stated above, FDA does not intend to enforce the requirement that a PMA be filed or that it has an approved IDE, if applicable, within 90 days, if a notice of intent to file a PMA is filed within 90 days of the effective date of this order. Other enforcement actions include, but are not limited to, the following: shipment of devices in interstate commerce will be subject to injunction under section 302 of the FD&C Act (21 U.S.C. 332), and the individuals responsible for such shipment will be subject to prosecution under section 303 of the FD&C Act (21 U.S.C. 333). FDA requests that manufacturers take action to prevent the further use of devices for which no PMA has been filed.

C. Valid Scientific Evidence

The evidentiary standard FDA relies on to determine the safety and effectiveness of a device is valid scientific evidence. Section 860.7(c)(2) (21 CFR 860.7(c)(2)) defines valid scientific evidence. As described in section III, in finalizing this order, FDA has assessed the totality of the valid scientific evidence available to FDA. This evidence includes the literature discussed in the proposed order and the information provided in response to the proposed order, including several comments that referenced additional clinical studies. FDA also considered randomized controlled clinical studies, single arm studies, and systematic literature reviews that were submitted in the comments. Single case reports or opinion-based commentary were also submitted to the dockets for consideration; however, without well controlled empirical experimentation, these types of information are generally not considered valid scientific evidence and were not relied upon to support this reclassification.

Section 860.7(c)(2) also explains that although random experience and reports lacking sufficient details to permit scientific evaluation are not regarded as valid scientific evidence to show safety or effectiveness, such information may be considered in identifying a device, the safety and effectiveness of which is questionable (§ 860.7(c)(2)). Such random experience and reports lacking sufficient details to permit scientific evaluation may be early and, sometimes, informal indications that the device is unsafe and/or ineffective (43 FR 32988 at 32990, July 28, 1978). Where FDA is considering the classification of a device, such random experience and reports are not considered valid scientific evidence (§ 860.7(c)(2)).

FDA received many comments from healthcare professionals describing their practices, the length of time they have been practicing, and the utilization of CES devices in treating patients with certain conditions. While FDA acknowledges receiving comments in providing information for recommending the reclassification of CES devices for treatment of certain conditions including anxiety, insomnia, and depression, statements by individual healthcare professionals that they have used CES devices to treat individual patients do not constitute valid scientific evidence to demonstrate reasonable assurance of safety and effectiveness (see Valid Scientific Evidence (VSE) discussion in 48 FR 56778 at 56787–56788, comments 16–21, December 23, 1983 (Ref. 3)). Such comments do not contain sufficient detail to capture the use of the device, exposures, and outcomes in the appropriate population and are not interpretable using informed clinical and scientific judgment.

FDA also received many comments from patients, or friends and family of patients, in support of and against reclassification of CES devices for specific indications for use. These comments described the experience of the patient that received treatment from a CES device. FDA acknowledges receiving comments from patients and other individuals about their positive experiences with CES devices being considered for reclassification; however, FDA does not consider such comments to be valid scientific evidence. Because these comments did not contain sufficient data sources to capture the use of the device, exposures, and outcomes in the appropriate population and are not interpretable using informed clinical and scientific judgment, such comments are not considered valid scientific evidence.

For medical devices, available evidence traditionally consists of clinical and non-clinical studies conducted and provided to FDA by the device manufacturer or sponsor. However, FDA recognizes that a wealth of data covering medical device experience is routinely collected in the course of treatment and management of patients. Under certain circumstances, these real-world data (RWD) may constitute real-world evidence (RWE), or clinical evidence regarding the usage and potential benefits or risks of a medical product derived from analysis of RWD, that may be of sufficient quality to help inform or augment FDA's understanding of the benefit-risk profile of devices at various points in their life cycle, and could potentially be valid scientific evidence used to aid FDA in regulatory decision making. See FDA's

guidance, ''Use of Real-World Evidence to Support Regulatory Decision-Making for Medical Devices'' (82 FR 41418, August 31, 2017) (Ref. 4), which clarifies how FDA evaluates RWD to determine whether it may be sufficiently relevant and reliable to generate the types of RWE that can be used in FDA regulatory decision making for medical devices, including potentially generating valid scientific evidence.

In order to determine the suitability of RWD for regulatory decision making, FDA will assess the relevance and reliability of the source and its specific elements. This assessment will be used to determine whether the RWD source(s) and the proposed analysis can generate evidence that is sufficiently robust to be used for a given regulatory purpose. Whether evidence is sufficiently relevant and reliable for use will, in part, depend on the level of quality necessary to make a particular regulatory decision (Ref. 4). Although FDA received numerous comments to the proposed order of patient and healthcare professionals' experiences with CES devices, many of the comments did not include sufficient data sources as evidence for consideration of reclassification of CES devices intended for treatment of depression in finalizing this order.

III. Public Comments in Response to the Proposed Order

On January 22, 2016, FDA published in the **Federal Register** a proposed order to reclassify from class III to class II, subject to premarket notification, the CES devices intended to treat anxiety and/or insomnia and to require filing of a PMA for CES devices intended to treat depression. The comment period on the proposed order closed on April 21, 2016.

In response to the January 22, 2016, proposed order, FDA received over 300 comments from industry, professional societies, trade organizations, and individual consumers by the close of the comment period, each containing one or more comments on one or more issues.

We describe and respond to the comments in this section of the document. The comments are grouped based on common themes; we grouped similar comments together under the same number and listed them numerically. The number assigned to each group is purely for organizational purposes and does not signify the comment's value or importance or the order in which comments were received. Please note that in some cases we separated different issues discussed by the same commenter and designated them as distinct comments for purposes of our responses.

(Comment 1) FDA received numerous comments in favor of the proposed reclassification of CES for treatment of anxiety and/or insomnia into class II with special controls.

(Response 1) Based on the consideration of the deliberation at the 2012 Panel meeting, valid scientific evidence, and review of relevant scientific articles and comments received in response to the 2016 proposed order, FDA continues to believe that CES devices intended to treat anxiety and/or insomnia should be reclassified from class III to class II (Refs. 1, 5, and 6), as initially specified in the proposed order. FDA has made this determination based upon an assessment (or, in some cases, reassessment) of the following sources of information: (1) Published literature referenced in the Executive Summary to the 2012 Panel; (2) comments and literature received in public dockets including the call for safety and effectiveness information for all preamendments class III devices (74 FR 16214), the 2012 Panel (76 FR 6625, February 7, 2011), and the proposed order (81 FR 3751); and (3) review of medical device reports (MDRs) in the FDA Manufacturer and User Facility Device Experience (MAUDE) database. The reevaluation of the scientific evidence presented to and discussed at the 2012 Panel meeting, and the review of additional post-2012 scientific information, further supports this finding. Based on the totality of this available evidence, FDA has determined that the designated special controls, together with general controls, mitigate the risks to health associated with use of CES for the specific indications of treating anxiety and/or insomnia and provide a reasonable assurance of safety and effectiveness, as initially specified in the proposed order. Table 1 identifies the risks associated with CES for treatment of anxiety and/or insomnia and the necessary mitigation measures by the required special controls. In this final order, FDA has included a non-substantive, clarifying edit in table 1 for the mitigation measures for skin irritation by changing ''biocompatibility testing'' to ''biocompatibility evaluation'' in table 1. As a result, FDA is adopting the special controls identified in the proposed order for CES devices for the treatment of anxiety and/or insomnia. Therefore, FDA has determined that the proposed special controls identified in this final order, in combination with general controls, provide a reasonable assurance of safety and effectiveness of CES for treatment of anxiety and/or insomnia.

FDA will also create a new product code for CES devices intended for the treatment of anxiety and/or insomnia.

TABLE 1—IDENTIFIED RISKS TO HEALTH AND MITIGATION MEASURES FOR TREATMENT OF ANXIETY AND/OR INSOMNIA IN CES DEVICES

Identified risk	Mitigation measures
Ineffective treatment	Clinical Performance Testing. Non-clinical (bench) performance testing. Characterization and Verification of technical Parameters. Labeling.
Skin irritation	Biocompatibility Evaluation Labeling.
Headaches	Clinical Performance Testing Labeling.
Dizziness	Clinical Performance Testing Labeling.
Electrical shocks and burns	Electrical safety and electromagnetic compatibility testing. Software verification, validation and hazard analysis.

(Comment 2) Several comments opposed maintaining the classification of CES for the treatment of depression in class III and the call for PMAs for the following reasons: (1) There are little to no safety or effectiveness concerns; (2) maintaining the classification of CES for treatment of depression as class III is inconsistent with the statutory definition of class III because, among other things, it does not ''present a potential unreasonable risk of illness or

injury'' based on valid scientific evidence available at the time of premarket clearance; (3) CES for treatment of depression may be addressed by requiring clinical performance data to support a premarket notification (510(k)); and (4) there is prevalence of comorbidity of anxiety disorders and depression that supports the reclassification of CES for treatment of depression to class II.

(Response 2) Based on the totality of evidence, including consideration of the deliberation at the 2012 Panel meeting, recent review of relevant scientific articles, and comments received in response to the 2016 proposed order (81 FR 3751), FDA continues to disagree with reclassification of CES for treatment of depression into class II. FDA has identified the following reasons for maintaining CES for the treatment of depression in class III and the call for PMAs:

(Response 2A) FDA disagrees that there are no safety or effectiveness concerns with reclassifying CES devices for treatment of depression into class II. As noted previously, the evidentiary standard FDA relies on to determine the safety and effectiveness of a device is valid scientific evidence as defined in § 860.7(c)(2). In finalizing this order, FDA has assessed the totality of the valid scientific evidence for treatment of depression that was discussed at the 2012 Panel meeting and provided in comments to the 2016 proposed order, including several comments that referenced additional clinical studies. In addition, this assessment also included an updated analysis of the publicly available safety data in FDA's MAUDE database and an updated review of the literature.

For the treatment of depression, FDA concluded in the 2016 proposed order that there was insufficient information to establish special controls that, in addition to general controls, would provide reasonable assurance of safety and effectiveness of CES devices for treating depression (81 FR 3751 at 3760).

The Agency's previous literature assessment identified 12 papers that examined the effect of CES on measures of depression (6 Randomized Controlled Trials (RCT) and 6 observational studies). In most RCTs, depression levels did not differ significantly between patients who were treated with active CES compared to those treated with placebo (Refs. 7–11), although one randomized trial by Hearst et al. reported fewer depression symptoms in the active CES treatment versus placebo groups (Ref. 12). Of the six observational studies that were reviewed, four studies reported improvement in depression symptoms after treatment with CES (Refs. 13–16). Moore et al. also reported improvement in depression post- (versus pre-) CES treatment, but the findings were not statistically significant (Ref. 17). The observational study by Marshall et al. reported no difference in depressive symptoms between the CES and placebo arms (Ref. 18). Moreover, the observational study Marshall et al. reported no difference in depressive symptoms between the CES and placebo arms (Ref. 18).

Among the intended uses of insomnia, anxiety, and depression, the evidence supporting the effectiveness of CES for treating depression was the weakest. As established in section 513(a)(1)(C) of the FD&C Act and § 860.3(c)(3), a device is in class III if insufficient information exists to determine that general controls and/or special controls are sufficient to provide reasonable assurance of its safety and effectiveness and the device is purported or represented to be for a use that is life-supporting or life-sustaining, or for a use which is of substantial importance in preventing impairment of human health, or if the device presents a potential unreasonable risk of illness or injury. FDA believes that the risks to health, identified earlier in this section, for the use of CES devices for treating depression, in the absence of an established positive benefit-risk profile, presents a potential unreasonable risk of illness or injury. FDA therefore concluded that there was insufficient information regarding the risks and benefits of the device for FDA to establish special controls that, in combination with general controls, would provide reasonable assurance of the safety and effectiveness of CES for treating depression.

As of the date of this final order, there is still insufficient information to establish special controls that, in addition to general controls, will provide reasonable assurance of safety and effectiveness of CES devices for treating depression. FDA has reviewed all the scientific literature that was cited in comments submitted to the docket of the 2016 proposed order. While these articles had not been discussed specifically in the proposed order, FDA is clarifying that they are not-supportive to the reclassification of CES for treatment of depression. Specifically, these articles have significant shortcomings, such as lacking a well-controlled design (Ref. 19), lacking a diagnosis for eligibility (Ref. 20), having uncertain correlation with diagnostic criteria used in the United States (Ref. 21), containing an exclusion for unipolar depression (Ref. 22), lacking an appropriately matched control group (Ref. 23), and/or including studies that did not focus specifically on CES (Refs. 24 and 25). In one case, while FDA considered a reference supportive of reclassification for anxiety, there was insufficient information to support reclassification for depression because the two groups were not matched with respect to the diagnosis (Ref. 26). Thus, these articles do not justify FDA changing the classification of CES devices intended for treatment of depression. Following the closure of the comment period for the 2016 proposed order, as part of the assessment of the current state of scientific evidence for CES devices, FDA also conducted an updated review of scientific literature. The search used a similar methodology as previous searches conducted in support of the preceding **Federal Register** orders, and the 2012 Panel meeting. As part of FDA's systematic identification of literature, FDA did not identify studies regarding the use of CES to treat depression as the primary diagnosis. However, FDA did identify four studies either where symptoms of depression were studied in populations of subjects where the primary diagnosis was not a psychiatric condition (Refs. 27 to 29), or where there was one single session administered to examine acute physiological changes only (Ref. 30). FDA evaluated these studies to determine whether they were designed to assess the use of CES to treat depressive disorders that are recognized by the clinical community as identified in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM–5, published 2013) (Ref. 31). FDA concluded that the four studies published after January 1, 2016, through November 1, 2019, did not contribute sufficient information in the form of valid scientific evidence to demonstrate that the subjects met the criteria for any recognized depressive disorder, as defined in DSM–5 (Ref. 31).

In addition, FDA conducted a review of adverse event reporting for CES devices since the publication of the proposed order. The FDA's MAUDE database search resulted in a total of three additional CES-related medical device reporting (MDRs) and one possibly pertinent to CES between January 1, 2016, and September 1, 2019. Two MDRs were injury reports submitted by voluntary reporters for a CES device manufacturer. A third MDR was a malfunction report submitted by a device manufacturer for an implanted intestinal stimulator and noted concomitant use of an unspecified CES

device and a fourth MDR report was used to ''improve brain functioning'' with a report of a third-degree burn. Although there are a low number of MDRs related to CES devices, the adverse reports for treatment of depression are only one factor (*e.g.,* other factors may include the patient population targeted, alternative therapies) for FDA to consider in concluding that there is insufficient information to establish special controls that, in combination with general controls, will provide a reasonable assurance of safety and effectiveness of CES for the treatment of depression. FDA continues to believe that the risks to health identified for the use of CES devices for treating depression, in the absence of an established positive benefit-risk profile, presents a potential unreasonable risk of illness or injury. Thus, following the review of all the evidence presented, FDA has concluded that there is insufficient evidence to establish special controls that, in addition to general controls, will provide a reasonable assurance of safety and effectiveness for CES in treating depression. Accordingly, it is appropriate to maintain CES for treatment of depression in class III.

(Response 2B) FDA disagrees that maintaining the classification of CES for treatment of depression in class III is inconsistent with the statutory definition of class III. Section 513(a)(1)(C) of the FD&C Act (21 U.S.C. 360c(a)(l)(C)) defines class III, premarket approval as the following:

> (1) A device which because it cannot be classified as a class I device because insufficient information exists to determine that the application of general controls are sufficient to provide reasonable assurance of the safety and effectiveness of the device, (2) cannot be classified as a class II device because insufficient information exists to determine that the special controls described in subparagraph (B) would provide a reasonable assurance of its safety and effectiveness, and is purported or represented to be for a use in supporting or sustaining human life or for a use which is of substantial importance in preventing impairment of human health, or (3) presents a potential unreasonable risk of illness or injury.

Both class II and class III devices may present a potential unreasonable risk of illness or injury; however, the distinction is that devices in class II have sufficient evidence from which special controls can be established, in combination with general controls, that will provide a reasonable assurance of safety and effectiveness. As stated above, the CES proposed order indicated that there was insufficient evidence that would allow FDA to develop special controls that, in combination with general controls, would provide a reasonable assurance of safety and effectiveness of CES devices intended for treatment of depression, and FDA has determined that there is not sufficient new information that would satisfy that requirement to mitigate a potential unreasonable risk of illness or injury.

(Response 2C) Some comments stated that CES for treatment of depression can be addressed by requiring clinical performance data to support a premarket notification (510(k)). However, in order to classify CES into class II for the treatment of depression, it is necessary for the evidence to first exist that permits the establishment of special controls to provide a reasonable assurance of safety and effectiveness. As mentioned above, FDA has conducted an extensive review of scientific literature and such evidence was not available at the time of the proposed order, and there continues to be a lack of effectiveness data to mitigate a potential unreasonable risk of illness or injury for CES devices for treatment of depression. Furthermore, there is lack of sufficient evidence to support development of special controls that would provide a reasonable assurance of safety and effectiveness for CES devices in treating depression.

(Response 2D) A comment also stated that there is a prevalence of comorbidity of anxiety disorders and depression that supports the reclassification of CES for treatment of depression to class II. While the articles by Jansson-Frojmark et al. and Coplan et al. (Refs. 24 and 25) discuss this connection, they are not studies of CES (as mentioned above) (Refs. 24 and 25). The available evidence where CES was investigated in an anxiety population where depression was a comorbidity is Barclay et al. (Ref. 6). This study, which investigated the use of CES to treat primary anxiety, also included subjects with ''comorbid depression'' provided that a subject's anxiety was more severe than the depression (Ref. 6). However, the study does not clearly demonstrate that these subjects met the DSM 5 criteria for a recognized depressive disorder (Ref. 31). Therefore, the evidence is insufficient to enable FDA to establish a reasonable assurance of safety and effectiveness to support reclassifying CES devices intended for treatment of depression from class III to II.

(Comment 3) A few comments supported the proposal for a call for PMAs for treatment of depression because they believed there was a lack of valid scientific evidence to support the effectiveness of CES devices for treatment of depression.

(Response 3) FDA agrees with the comments to maintain the classification of CES for treatment of depression as class III. As stated in the preceding response, FDA has determined that there is a lack of sufficient evidence that would satisfy the requirement to mitigate ''a potential unreasonable risk of illness or injury'' to warrant the reclassification for depression into class II with special controls. As a result, there is insufficient evidence to establish special controls to provide a reasonable assurance of safety and effectiveness of CES devices for treatment of depression.

(Comment 4) One comment compared the reclassification of CES with that of Electroconvulsive Therapy (ECT) devices. Specifically, the commenter states that FDA's reclassification of ECT devices, which provide the largest amount of electricity, to class II should equate to reclassification of CES devices, which provide less electricity, as class I.

(Response 4) FDA disagrees with this commenter's comparison of ECT and CES devices. The safety and effectiveness evidence in support of reclassifying ECT for specific uses was substantial and demonstrated benefits more consistently, in comparison to the evidence evaluated for reclassifying CES intended for treatment of depression from class III to II, although sufficient information exists to establish special controls that, in addition to general controls, will provide reasonable assurance of safety and effectiveness of the CES devices intended for treatment of anxiety and/or insomnia, as discussed above. FDA assessed the totality of the valid scientific evidence that was provided in response to the proposed ECT order, including several comments that referenced new clinical studies. Several of these studies included safety and effectiveness data for adult as well as adolescent patients as well as randomized controlled clinical studies, open-label observational trials, case series reports, systematic literature reviews, and practice guidelines that were submitted in the comments. Additionally, the final order for the reclassification of ECT devices published in the **Federal Register** (December 26, 2018, 83 FR 66103) identifies ECT devices as applying a brief electrical stimulation of the brain to produce a seizure, while CES devices provide lower stimulation current that is not intended to result in seizure in patients. FDA also believes that general controls alone are insufficient to mitigate the risks to

health of CES devices; therefore, the special controls are also needed to provide reasonable assurance of safety and effectiveness for CES devices intended for treating anxiety and/or insomnia.

(Comment 5) Several comments oppose the proposal to identify CES devices as prescription devices. Also, one comment opposes a prescription for treatment of depression and suggests that Federal and State laws mandate that physicians advise patients about CES before prescribing psychiatric, sleeping and/or pain medications so that patients can make a reasonable decision and possibly reduce medication-induced mental health issues.

(Response 5) As stated in the proposed order, the CES device is a prescription only device for all three intended uses, *i.e.,* anxiety, insomnia, and depression, and may not be safe for use except under the authorization of a healthcare professional licensed by law to administer the use of the device. As such, the device identification in § 882.5800(a) (21 CFR 882.5800(a)) has been revised to clarify that CES is a prescription device in accordance with 21 CFR 801.109. Per § 801.109(c), a prescription device must include labeling that describes the indications and other information for use, such as methods, frequency and duration of administration, any relevant hazards, contraindications, side effects, and precautions under which the healthcare professionals can use the device safely (see § 882.5800(b)). Accordingly, healthcare professionals will have access to and be aware of the warnings and precautions in the labeling, and as such, healthcare professionals should be adequately informed of the risks associated with these devices. The healthcare professional can inform the patients of the relevant risks. The warning and precaution statements are an appropriate mitigation for CES intended for the treatment of anxiety and insomnia.

(Comment 6) Several comments expressed the desire for insurance coverage to reduce the cost of the device.

(Response 6) FDA understands the concerns with cost and insurance coverage. However, FDA has no authority over commercial health insurance carriers. Under sections 513(e) and 515(i) of the FD&C Act, FDA has no authority to consider as part of a classification decision whether an indication or a device is covered by commercial health insurance companies. FDA recommends that patients check with their insurance company regarding coverage before receiving CES treatment.

(Comment 7) One comment stated that a manufacturer's website of a currently marketed CES device includes misleading marketing material that may persuade consumers to use this device. The comment also claims that the marketed CES device is not effective.

(Response 7) FDA takes seriously any alleged claims of false or misleading claims by a device manufacturer. Several complaints have been received by the agency claiming that CES devices have not demonstrated effectiveness for treating anxiety and/or insomnia. FDA reviews all complaints and follows the appropriate steps to address complaints received. As a result, FDA continues to believe that the special controls proposed and finalized in this final order should include clinical performance data that demonstrates, among other things, that a CES device, when used as directed, will provide clinically meaningful results in the indicated patient population and provide a reasonable assurance of effectiveness for the intended use of CES devices for treating anxiety and/or insomnia. FDA also believes that a call for PMAs is appropriate for CES devices for treatment of depression to mitigate the potential unreasonable risk of illness or injury.

(Comment 8) One comment suggested FDA should not rely on the recommendations of the 2012 Panel because the meeting was not conducted properly due to the following alleged errors by FDA: (1) Failure to include any panel members with the knowledge of or experience with CES devices; (2) failure to allow all interested parties ample time to present at the 2012 Panel; and (3) failure to provide adequate information by not presenting to the 2012 Panel for consideration the comments received from the proposed rule published in the **Federal Register** on August 8, 2011 (76 FR 48062), or articles of valid scientific evidence.

(Response 8) FDA believes the 2012 Panel was properly conducted based on the requirements under the FD&C Act. FDA also disagrees with the alleged errors stated for the following reasons.

First, FDA has specific procedures and protocols for all panel meetings that are followed to provide an objective outcome of the panel meetings. For more information, please refer to the FDA's Guidance, ''Procedures for Meetings of the Medical Devices Advisory Committee'' (Ref. 32). Also, FDA may exclude a healthcare professional from participating on an advisory committee if the person has a conflict of interest. Although a healthcare professional was excluded from the 2012 Panel, there was adequate representation of professionals with experience in using CES devices on the 2012 Panel. For more information on conflicts of interest as it relates to FDA advisory committees, please refer to the relevant FDA guidance entitled, ''Public Availability of Advisory Committee Members' Financial Interest Information and Waivers'' (Ref. 33).

Second, under section 513(b)(6)(A)(iii) of the FD&C Act, any person whose device is specifically the subject of review by a panel shall have the same opportunity as the Secretary to participate in meetings of the panel, including, subject to the discretion of the panel chairperson, by designating a representative who will be provided a time during the panel meeting to address the panel for the purpose of correcting misstatements of fact or providing clarifying information, and permitting the person or representative to call on experts within the person's organization to address such specific issues in the time provided. Furthermore, section 513(b)(6)(B) of the FD&C Act, before and after the enactment of the 21st Century Cures Act (Pub. L. 114–255), requires that meetings shall provide adequate time for initial presentations; and encourage free and open participation by all interested persons. FDA provided the appropriate allocated time for all interested parties to speak or present at the 2012 Panel and for the 2012 Panel to consider their concerns with CES devices (Ref. 32).

Third, during the 2012 Panel, FDA's presentation included a listing of scientific articles (Refs. 1 and 2) and the 2011 proposed rule (76 FR 48062) with a summary of the comments received to the docket for the proposed rule. Therefore, the 2012 Panel members received sufficient information on the 2011 proposed rule and other information to make an informed decision on the classification of CES devices.

(Comment 9) Some comments questioned FDA's effectiveness claims for reclassification and suggested that more research is needed on CES before the device should be reclassified. One comment stated that the proposed order did not provide sufficient valid scientific evidence through tests to prove the effectiveness of CES for reclassification into class II because most of the studies conducted were inconclusive.

(Response 9) FDA disagrees with these comments. The proposed order acknowledged that no individual published study on CES provides

definitive evidence of effectiveness of CES for the treatment of anxiety and/or insomnia. FDA noted, however, that in 18 of the 24 small published studies (those that enrolled fewer than 50 patients) that included assessments of anxiety and/or insomnia, each study had a main finding that indicated a greater benefit of CES versus control for at least 1 of the outcome measures evaluated. Furthermore, CES treatment group outcomes improved in all large published studies (although not all studies demonstrated improvement compared with control patients), including two studies identified after the 2012 Panel (Refs. 5 and 6). Based on the available information, the proposed order concluded that there is valid scientific evidence of effectiveness for CES in the treatment of anxiety and/or insomnia. Since the proposed order was published, FDA has not become aware of new information that changes this position.

Importantly, however, FDA acknowledges that because different CES devices were evaluated and the methodology of CES delivery (*e.g.,* electrode placement, stimulation parameters, duration and frequency of treatment sessions) varied, the data are insufficient to determine the technical performance parameters, adequate directions for use, and warnings for unsafe use for specific devices, and whether the devices, when used in accordance with such directions, will provide clinically meaningful results. As explained in the proposed order, although the evidence available to FDA collectively demonstrates a class effect of CES devices for treating anxiety and/or insomnia, it cannot be concluded, based on available information alone, that specific CES devices will be effective for treating anxiety and/or insomnia. As a result, FDA believes that the special controls must include clinical performance data that demonstrates that a device, when used as directed (including instructions for electrode placement, stimulation parameters, duration and frequency of treatment sessions, and other relevant characteristics), will provide clinically meaningful results in the indicated patient population and provide a reasonable assurance of safety and effectiveness for the intended use of CES devices for treating anxiety and/or insomnia.

(Comment 10) One comment recommended that FDA should obtain valid scientific evidence which supports that Central Nervous System (CNS) disorders are treatable with the use of CES.

(Response 10) The category of ''CNS disorders'' is very broad, while the classification of CES devices is only based on the treatment of anxiety, insomnia and/or depression, as they are the only indications that have been currently allowed for marketing authorization; therefore, valid scientific evidence for all CNS disorders are not relevant for this reclassification. This final order does not address the treatment of broader CNS disorders as they are outside the scope of this final order. Manufacturers seeking to indicate a device for a specific CNS disorder would be responsible for the collection of any valid scientific evidence that may be necessary to support a new indication for marketing CES devices.

(Comment 11) One comment suggests that FDA should correctly categorize CES as either Direct Current (DC) or Alternating Current (AC) stimulation and not whether it is the same waveform as the predicate CES devices used. Comment also suggests that clinical trials are necessary to determine regions of influence by current.

(Response 11) Based on our interpretation of this comment, FDA believes that CES devices could use AC or DC stimulation and that clinical trials conducted to comply with the special controls could be used to characterize the degree of activation in different brain regions.

IV. The Final Order

Based on the information discussed in the preamble to the proposed order (81 FR 3751), the comments received for the proposed order, a review of medical device reports in the FDA MAUDE database, a review of current scientific literature, and 2012 Panel deliberations (Ref. 1), FDA concludes that special controls, in conjunction with general controls, will provide reasonable assurance of the safety and effectiveness of CES devices intended for treatment of anxiety and/or insomnia. Under sections 513(e), 515(b), and 515(i) of the FD&C Act, FDA is adopting its findings, as published in the preamble to the proposed order. For the reasons described in section III, FDA is issuing this final order to reclassify CES devices intended for treatment of anxiety and/or insomnia from class III to class II (special controls). CES devices intended to treat anxiety and/or insomnia must comply with the special controls following the effective date of the final order. However, FDA does not intend to enforce compliance with the special controls for currently legally marketed CES devices intended to treat anxiety and/or insomnia until 1 year after the effective date of the final order.

Section 510(m) of the FD&C Act provides that FDA may exempt a class II device from the premarket notification requirements under section 510(k) of the FD&C Act, if FDA determines that premarket notification is not necessary to provide reasonable assurance of the safety and effectiveness of the device. For the CES devices classified as class II (*i.e.,* for treatment of anxiety and/or insomnia), FDA has determined that premarket notification is necessary to provide reasonable assurance of the safety and effectiveness of the device. Therefore, this device type is not exempt from premarket notification requirements. Persons who intend to market this type of device must submit to FDA a premarket notification, prior to marketing the device, which contains information about the device they intend to market.

FDA is also requiring the filing of a PMA for CES devices intended for the treatment of depression under section 515(b) of the FD&C Act. Under section 515(b)(1)(A) of the FD&C Act, PMAs for CES devices are required to be filed on or before 90 days after the effective date of a final order.

V. Implementation Strategy

A. Date To File a PMA

In accordance with section 515(b) of the FD&C Act, CES devices intended to treat depression must have a PMA or a notice of completion of PDP filed with the Agency by March 19, 2020. An applicant whose device was legally in commercial distribution before May 28, 1976, or whose device has been found to be substantially equivalent to such a device, will be permitted to continue marketing such class III devices during FDA's review of the PMA provided that the PMA is timely filed. For currently legally marketed CES devices intended to treat depression, FDA does not intend to enforce compliance with this 90-day requirement for an additional 90 days (*i.e.,* 180 days after the effective date of any final order), as long as notice of intent to file a PMA is submitted within 90 days of the effective date of the final order. The notification of the intent to file a PMA submission should include a list of all model numbers for which a manufacturer plans to seek marketing approval through a PMA. FDA does not intend to enforce compliance with the PMA requirements with respect to an applicant of a currently legally marketed CES device intended to treat depression during FDA's review of the PMA. FDA intends to review any PMA for the device within 180 days of the date of filing. FDA cautions that under section 515(d)(1)(B)(i) of the FD&C Act, the

Agency may not enter into an agreement to extend the review period for a PMA beyond 180 days unless the Agency finds that ''the continued availability of the device is necessary for the public health.'' If a PMA for a class III device is not filed with FDA by March 19, 2020, the device will be deemed adulterated under section 501(f) of the FD&C Act. Table 2 shows the regulatory timetable for currently legally marketed CES devices intended to treat depression.

TABLE 2—TIMETABLE FOR CES DEVICES INTENDED TO TREAT DEPRESSION

	Timetable for which FDA does not intend to enforce compliance (time after effective date of final order)	Distribution period (time after effective date of final order)
Intent to file a PMA	90 days	Devices included in an intent to file: 180 days.
File a PMA	Devices included in an intent to file: 180 days Devices not included in an intent to file: 90 days	Until a not approvable decision or denial decision is issued; can continue distribution if an approval order is issued.

Under § 812.2(d), the exemption from the requirements of the IDE regulations for preamendments class III devices in § 812.2(c)(1) and (2) will cease to apply to CES devices indicated for depression that are: (1) Not legally on the market on or before March 19, 2020 or (2) legally on the market on or before March 19, 2020 but for which a PMA or notice of completion of a PDP is not filed by March 19, 2020, or for which PMA approval has been denied or withdrawn.

The device may be distributed for investigational use only if the requirements of the IDE regulations are met. The requirements for significant risk devices include submitting an IDE application to FDA for its review and approval. An approved IDE is required to be in effect before an investigation of the device may be initiated or continued under § 812.30. FDA, therefore, cautions that IDE applications should be submitted to FDA at least 30 days before March 19, 2020 to avoid interrupting investigations. There will be no extended period for filing an IDE nor exemption from IDE requirements, and studies may not be initiated without appropriate IDE approvals, where necessary.

B. Compliance With Special Controls

Following the effective date of this final order, CES devices intended to treat anxiety and/or insomnia must comply with the special controls. FDA notes that a firm whose CES device was legally in commercial distribution before May 28, 1976, or whose device was found to be substantially equivalent to such a device and who does not intend to market such device for uses other than to treat insomnia and/or anxiety, may remove such intended uses from the device's labeling.

The special controls identified in this final order are effective as of the date of publication of this order, December 20, 2019. CES devices intended to treat anxiety and/or insomnia must comply with the special controls following the effective date of this order. However, FDA does not intend to enforce compliance with the special controls for currently legally marketed CES devices intended to treat anxiety and/or insomnia until 1 year after the effective date of the final order. Manufacturers who wish to continue to legally market a CES device for treatment of anxiety and/or insomnia must submit an amendment to their previously cleared 510(k) that demonstrates compliance with the special controls by December 21, 2020. Such amendment will be added to the 510(k) file but will not serve as a basis for a new substantial equivalence review. A submitted 510(k) amendment in this context will be used solely to demonstrate to FDA that a CES device is in compliance with the special controls. If a 510(k) amendment is not submitted by December 21, 2020 or if FDA determines that the amendment does not demonstrate compliance with the special controls, then this compliance policy would not apply, and FDA would intend to enforce compliance with these requirements. In that case, the device is deemed adulterated under section 501(f)(1)(B) of the FD&C Act as of the date of FDA's determination of noncompliance or 1 year after the effective date of the final order, whichever is sooner.

For models of CES devices intended to treat anxiety and/or insomnia that have not been legally marketed prior to December 20, 2019, or models that have been legally marketed but are required to submit a new 510(k) under § 807.81(a)(3) because the device is about to be significantly changed or modified, manufacturers must obtain 510(k) clearance, among other relevant requirements, and demonstrate compliance with the special controls included in the final order, before marketing the new or changed device.

VI. Codification of Orders

Sections 513(e) and 515(b), as amended by FDASIA, and 515(i) of the FD&C Act require FDA to issue final orders rather than regulations to reclassify devices. Therefore, FDA will continue to codify reclassifications and requirements for approval of an application for premarket approval, resulting from changes issued in final orders, in the Code of Federal Regulations. Accordingly, under sections 513(e)(1)(A)(i) and 515(b) of the FD&C Act, as amended by FDASIA and FDA's Medical Device Classification Procedures final rule (83 FR 64443), in this final order, we are codifying the amendment of § 882.5800 by: (1) Revoking the requirements in § 882.5800(b) and (c) related to the classification of CES devices intended to treat anxiety and/or insomnia as class III devices and codifying the reclassification of CES devices intended to treat anxiety and/or insomnia to class II (special controls); (2) retaining the requirements in § 882.5800(b) and (c) related to the classification of CES devices intended to treat depression as class III devices subject to the requirement of approval of an application for premarket approval, as described in section IV; and (3) clarifying the device identification of CES devices to include it as a prescription device.

VII. Analysis of Environmental Impact

The Agency has determined under 21 CFR 25.34(b) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

VIII. Paperwork Reduction Act of 1995

This final order refers to previously approved collections of information that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3521). The collections of information in part 807,

subpart E, have been approved under OMB control number 0910–0120. The collections of information in part 812 have been approved under OMB control number 0910–0078. The collections of information in 21 CFR part 814, subparts A through E have been approved under OMB control number 0910–0231. The collections of information in part 801 have been approved under OMB control number 0910–0485. The collections of information in 21 CFR part 820 have been approved under OMB control number 0910–0073.

IX. References

The following references marked with an asterisk (*) are on display at the Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, and are available for viewing by interested persons between 9 a.m. and 4 p.m., Monday through Friday; they also are available electronically at *https://www.regulations.gov.* References without asterisks are not on public display at *https://www.regulations.gov* because they have copyright restriction. Some may be available at the website address, if listed. References without asterisks are available for viewing only at the Dockets Management Staff. FDA has verified the website addresses, as of the date this document publishes in the **Federal Register**, but websites are subject to change over time.

*1. Transcript, February 10, 2012, meeting of the Neurological Devices Panel of the Medical Device Advisory committee, available at *https://wayback.archive-it.org/7993/20170403223434/https://www.fda.gov/downloads/Advisory Committees/Committees MeetingMaterials/MedicalDevices/MedicalDevicesAdvisoryCommittee/NeurologicalDevicesPanel/UCM296891.pdf.*

*2. FDA Executive Summary, Prepared for the February 10, 2012, meeting of the Neurological Device Panel at *https://wayback.archive-it.org/7993/20170404140724/https://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/MedicalDevices/MedicalDevices AdvisoryCommittee/Neurological DevicesPanel/UCM290787.pdf.*

*3. FDA, Reclassification of Daily Wear Spherical Contact Lenses Consisting of Rigid Gas Permeable Plastic Materials; Withdrawal of Proposed Rule. 48 FR 56778 to 56798, 1983.

*4. FDA Guidance, ''Use of Real-World Evidence to Support Regulatory Decision-Making for Medical Devices,'' August 2017, available at *https://www.fda.gov/regulatory-information/search-fda-guidance-documents/use-real-world-evidence-support-regulatory-decision-making-medical-devices.*

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*11. Feighner, J.P., S.L. Brown, and J.E. Olivier, ''Electrosleep Therapy: A Controlled Double Blind Study.'' *Journal of Nervous and Mental Disease* 157(2):121–128, 1973.

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List of Subjects in 21 CFR Part 882

Medical devices, Neurological devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 882 is amended as follows:

PART 882—NEUROLOGICAL DEVICES

■ 1. The authority citation for part 882 continues to read as follows:

Authority: 21 U.S.C. 351, 360, 360c, 360e, 360j, 360*l,* 371.

■ 2. Revise § 882.5800 to read as follows:

§ 882.5800 Cranial electrotherapy stimulator.

(a) *Identification.* A cranial electrotherapy stimulator is a prescription device that applies electrical current that is not intended to induce a seizure to a patient's head to treat psychiatric conditions.

(b) *Classification.* (1) Class II (special controls) when intended to treat insomnia and/or anxiety. The special controls for this device are:

(i) A detailed summary of the clinical testing pertinent to use of the device to demonstrate the effectiveness of the device to treat insomnia and/or anxiety.

(ii) Components of the device that come into human contact must be demonstrated to be biocompatible.

(iii) The device must be designed and tested for electrical safety and electromagnetic compatibility (EMC) in its intended use environment.

(iv) Appropriate software verification, validation, and hazard analysis must be performed.

(v) The technical parameters of the device, including waveform, output mode, pulse duration, frequency, train delivery, maximum charge, and energy, must be fully characterized and verified.

(vi) The labeling for the device must include the following:

(A) The intended use population and the intended use environment;

(B) A warning that patients should be monitored by their physician for signs of worsening;

(C) A warning that instructs patients on how to mitigate the risk of headaches, and what to do should a headache occur;

(D) A warning that instructs patients on how to mitigate the risk of dizziness, and what to do should dizziness occur;

(E) A detailed summary of the clinical testing, which includes the clinical outcomes associated with the use of the device, and a summary of adverse events and complications that occurred with the device;

(F) Instructions for use that address where to place the electrodes, what stimulation parameters to use, and duration and frequency of treatment sessions. This information must be based on the results of clinical studies for the device;

(G) A detailed summary of the device technical parameters, including waveform, output mode, pulse duration, frequency, train delivery, and maximum charge and energy; and

(H) Information on validated methods for reprocessing any reusable components between uses.

(vii) Cranial electrotherapy stimulator devices marketed prior to the effective date of this reclassification must have an amendment submitted to the previously cleared premarket notification (510(k)) demonstrating compliance with these special controls.

(2) Class III (premarket approval) when intended to treat depression.

(c) Date premarket approval application (PMA) or notice of completion of product development protocol (PDP) is required. A PMA or notice of completion of a PDP is required to be filed with the Food and Drug Administration on or before March 19, 2020, for any cranial electrotherapy stimulator device with an intended use described in paragraph (b)(2) of this section, that was in commercial distribution before May 28, 1976, or that has, on or before March 19, 2020, been found to be substantially equivalent to any cranial electrotherapy stimulator device with an intended use described in paragraph (b)(2) of this section, that was in commercial distribution before May 28, 1976. Any other cranial electrotherapy stimulator device with an intended use described in paragraph (b)(2) of this section shall have an approved PMA or declared completed PDP in effect before being placed in commercial distribution.

Dated: December 13, 2019.

Lowell J. Schiller,

Principal Associate Commissioner for Policy.

[FR Doc. 2019–27295 Filed 12–19–19; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF JUSTICE

Parole Commission

28 CFR Part 2

[Docket No. USPC–2018–02]

Paroling, Recommitting, and Supervising Federal Prisoners: Prisoners Serving Sentences Under the United States and District of Columbia Codes

AGENCY: United States Parole Commission, Justice.

ACTION: Final rule.

SUMMARY: The United States Parole Commission is amending its rule allowing hearings by videoconference to include parole termination hearings.

DATES: This regulation is effective December 20, 2019.

FOR FURTHER INFORMATION CONTACT: Helen H. Krapels, General Counsel, U.S. Parole Commission, 90 K Street NE, Third Floor, Washington, DC 20530, telephone (202) 346–7030. Questions about this publication are welcome, but inquiries concerning individual cases cannot be answered over the telephone.

SUPPLEMENTARY INFORMATION: Since early 2004, the United States Parole Commission has been conducting some parole proceedings by videoconference to cut down on delays in scheduling in-person hearings and conserve Commission resources. The Commission originally initiated the use of videoconference in parole release hearings as a pilot project in 2004 and then extended the use of videoconferencing to institutional revocation hearings in 2005, followed by probable cause hearings in 2007. Using videoconference for termination hearings is a natural progression in the use of this technology.

Conducted pursuant to 28 CFR 2.43(c) and 2.95(c), the primary objective of a termination hearing is to obtain information which assists the Commission in determining whether or not early termination of parole is appropriate. The subject is usually represented by an attorney, and the community supervision officer or the U.S. Probation officer provides a recommendation based on the subject's compliance with parole requirements. Given the limited purpose of the hearing, other witnesses are usually not present, and the hearing does not typically last long. The amendment will save travel time and expense, allowing the Commission to conduct termination hearings in a more expeditious manner.

In the interim rule with request for comments (83 FR 58500 (Nov. 20,

2018)), we encouraged the public to comment on our changes. We received written comments from the Public Defender Service for the District of Columbia (PDS) and one anonymous comment. We discuss those public comments below.

Public Comment From the Public Defender Service

PDS objects to amending § 2.25 to include parole termination hearings, and renews its prior objections to the use of videoconference for probable cause hearings. PDS's comments, both past and present, characterize videoconference as a barrier to due process which unjustifiably denies a subject the opportunity to appear in person before the Commission. The Commission does not agree with this proposition. Termination hearings are limited in scope. Unlike revocation hearings, when all facets of the case are explored, witnesses testify, and the status of the offender is finally determined, the purpose of a termination hearing is to obtain information regarding the parolee's conduct in the community. The liberty interest implicated in a revocation hearing is not implicated in a termination hearing. At a termination hearing, the subject does not face the possibility of a loss of freedom as a result of termination being denied. *See Henderson* v. *Sims,* 223 F.3d 267, 274 (4th Cir. 2000); *Little* v. *Thomas,* 719 F.2d 50, 52 (3d Cir. 1982). Further, there is no constitutional or statutory entitlement to early termination of parole supervision. *See Myers* v. *U.S. Parole Comm'n,* 813 F.2d 957, 960 (9th Cir. 1987). Thus, the fact that the parolee's appearance for the termination hearing will be by videoconference does not violate due process.

PDS recommends that termination hearings only be conducted by videoconference in circumstances where either distance or physical hardship renders the subject unable to appear in person. While the Commission agrees that videoconferencing may be appropriate in the circumstances described by PDS, the Commission does not agree that the rule should be so narrow. It is within the Commission's discretion to determine when conducting a termination hearing by videoconference is appropriate.

PDS also raises concerns about technological issues, stating that experiencing technical difficulties during a hearing would completely undermine the value of having a hearing at all. Over the years, the Commission's experience has been that the quality of the transmission has improved and the personal interactions among the hearing participants does not appreciably decline with the use of videoconferencing.

Anonymous Comment

The Commission also received an anonymous comment in support the use of videoconferencing for parole termination hearings. The comment, while acknowledging the issue of losing face-to-face contact, described the amendment as a logical practice that will increase the efficiency of the termination process.

Executive Orders 12866 and 13563

This regulation has been drafted and reviewed in accordance with Executive Order 12866, ''Regulation Planning and Review,'' section 1(b), Principles of Regulation, and in accordance with Executive Order 13565, ''Improving Regulation and Regulatory Review,'' section 1(b), General Principles of Regulation. The Commission has determined that this rule is not a ''significant regulatory action'' under Executive Order 12866, section 3(f), Regulatory Planning and Review, and accordingly this rule has not been reviewed by the Office of Management and Budget.

Executive Order 13132

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Under Executive Order 13132, this rule does not have sufficient federalism implications requiring a Federalism Assessment.

Regulatory Flexibility Act

The rule will not have a significant economic impact upon a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 605(b).

Unfunded Mandates Reform Act of 1995

The rule will not cause State, local, or tribal governments, or the private sector, to spend $100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. No action under the Unfunded Mandates Reform Act of 1995 is necessary.

Small Business Regulatory Enforcement Fairness Act of 1996 (Subtitle E—Congressional Review Act)

These rule is not a ''major rule'' as defined by Section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996 Subtitle E—Congressional Review Act, now codified at 5 U.S.C. 804(2). The rule will not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse effects on the ability of United States-based companies to compete with foreign-based companies. Moreover, this is a rule of agency practice or procedure that does not substantially affect the rights or obligations of non-agency parties, and does not come within the meaning of the term ''rule'' as used in Section 804(3)(C), now codified at 5 U.S.C. 804(3)(C). Therefore, the reporting requirement of 5 U.S.C. 801 does not apply.

List of Subjects in 28 CFR Part 2

Administrative practice and procedure, Prisoners, Probation and Parole.

The Final Rule

■ Accordingly, the U. S. Parole Commission adopts the interim rule amending 28 CFR part 2, which was published at 83 FR 58500 on November 20, 2018, as final without change.

Patricia K. Cushwa,

Chairman (Acting), U.S. Parole Commission.

[FR Doc. 2019–27340 Filed 12–19–19; 8:45 am]

BILLING CODE 4410–31–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2019–0945]

RIN 1625–AA08

Special Local Regulation; St. Thomas Lighted Boat Parade, St. Thomas, U.S. Virgin Island

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a special local regulation for the St. Thomas Lighted Boat Parade marine event. The special local regulation is for certain navigable waters of Crown Bay, Haulover Cay, and St. Thomas Harbor, St. Thomas, U.S. Virgin Islands. The special local regulation is necessary to ensure the safety of vessels, spectators, and public during the event. Entry of vessels or persons into this zone is prohibited unless specifically authorized by the Captain of the Port San Juan or a designated representative.

DATES: This rule is effective without actual notice from 6:30 p.m. until 9:00 p.m. on December 20, 2019.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2019–0945 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 LCDR Pedro L. Mendoza, Waterways Management Division, U.S. Coast Guard; telephone 787–691–7058, email *Pedro.L.Mendoza@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 the Coast Guard did not receive notice of the marine event from involved parties with sufficient time to publish a NPRM and to receive public comments prior to the event. It is impracticable to publish an NPRM because the Coast Guard did not receive notice of the boat parade until December 4, 2019, and the special local regulation is needed for December 20, 2019. This action is necessary for the protection of life and property on the navigable waters of the United States. Therefore, it would be contrary to the public interest to postpone establishing this temporary special local regulation.

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** for the same reason discussed above.

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 purpose of this rule is to ensure safety of the event participants, vessels and the navigable waters of Crown Bay, Haulover Clay and St. Thomas Harbor, St. Thomas, U.S. Virgin Islands (USVI), during the St. Thomas Lighted Boat Parade. The Captain of the Port (COTP) has determined that potential hazards associated with the marine parade event will pose a safety concern for any persons and vessels within the regulated area.

IV. Discussion of the Rule

This rule establishes a temporary special local regulation on certain navigable waters of the Crown Bay, Haulover Cay, and St. Thomas Harbor, St. Thomas, USVI during the St. Thomas Lighted Boat Parade from 6:30 p.m. until 9:00 p.m. on December 20, 2019. The regulated area will encompass all waters within a 100-foot radius of participating vessels, beginning with the lead vessel, ending with the last participating vessel, and at all times extending 100-feet on either side of the parade vessels. The parade route consist of a course that starts at Crown Bay Marina in potion 18°19′986″ N, 64°57′088″ W; proceeds thence east through Haulover Cut, thence northeast throu Cay Bay, thence east towards the Coast Guard Base in Kings Wharf and thence back through the same route to the beginning position. All coordinates are North American Datum 1983.

The special local regulation is intended to protect personnel, vessels, and the marine environment in these navigable waters during the power boat races. All persons and non-participating vessels are prohibited from entering, transiting through, anchoring in, or remaining within the regulated area unless authorized by the COTP San Juan or a designated representative. Persons and vessels may request authorization to enter, transit through, anchor in, or remain within the regulated area by contacting the COTP San Juan or a designated representative. If authorization to enter, transit through, anchor in, or remain within the regulated area is granted, all persons and vessels receiving such authorization must comply with the instructions of the COTP San Juan or a designated representative. The Coast Guard will provide notice of the regulated area by Local Notice to Mariners, Broadcast Notice to Mariners, and/or by on-scene designated representatives.

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 duration of the regulated area. The regulated area will impact a small designated area of Crown Bay, Haulover Cay, and St. Thomas Harbor, St. Thomas, USVI, during the event and thus is limited in scope. The special local regulation will be enforced for only a total period of 2.5 hours and thus is limited in time. Although persons and vessels will not be able to enter, transit through, anchor in, or remain within the zone without authorization from the Captain of the Port San Juan or a designated representative, they may operate in the surrounding area during the enforcement period. The rule will allow vessels to seek permission to enter the regulated area. Persons and vessels may still enter, transit through, anchor in, or remain within the regulated area during the enforcement period if authorized by the Captain of the Port San Juan or a designated representative. The Coast Guard will issue a Local Notice to Mariners and a Broadcast Notice to Mariners, allowing mariners to make alternative plans or seek permission to transit the regulated area.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their

fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to enter, transit through, anchor in, or remain witin the regulated area may be small entities, for the reason stated in section V. A. above, this rule will not have a significate 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 a creation of a regulated area in conjunction with a regatta or marine parade to ensure the safety of vessels, spectators, and the public during the event. It is categorically excluded from further review under paragraph L61 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 100

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

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

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

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

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

■ 2. Add § 100.T799–0945 to read as follows:

§ 100.T799–0945 Safety zones; St. Thomas Lighted Boat Parade, Crown Bay, Haulover Cut and St. Thomas Harbor, St. Thomas, U.S. Virgin Islands

(a) *Location.* The following area is a special local regulation: All waters within a 100-foot radius in front of the lead parade vessel, 100-feet behind the last participating parade vessel, and at all times extending 100-feet on either side of participating parade vessels. The St. Thomas Lighted Boat Parade consists of a course that starts at Crown Bay Marina in position 18°19′986″ N, 64°57′088″ W; proceeds thence east through Haulover Cut, thence northeast through Cay Bay, thence east towards the Coast Guard Base in Kings Wharf and thence west back through the same route to the beginning position. All coordinates are North American Datum 1983.

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

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

(2) Persons and vessels may request authorization to enter, transit through, anchor in, or remain within the regulated areas by contacting the COTP San Juan by telephone at (787) 289–2041, or a designated representative via VHF radio on channel 16. If authorization is granted by the COTP San Juan or a designated representative, all persons and vessels receiving such authorization must comply with the instructions of the COTP San Juan or a designated representative.

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

(d) *Enforcement Period.* This rule will be enforced from 6:30 p.m. until 9:00 p.m. on December 20, 2019, unless sooner terminated by the COTP San Juan.

Dated: December 16, 2019.

E.P. King,

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

[FR Doc. 2019–27526 Filed 12–19–19; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2019–0727]

RIN 1625–AA00

Safety Zone; Port Valdez, Valdez, AK

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone in the navigable waters, from the surface to seabed, within a 150 yard radius of the fireworks launching point located at Sea Otter Park in position 61°07′22″ North and 146°21′13″ West in the vicinity of the mouth of the Small Boat Harbor, Port of Valdez, Alaska, to limit access for the duration of the New Year's fireworks display. The purpose of the safety zone is to ensure the safety of mariners and vessels during the fireworks display.

DATES: This rule is effective on December 31, 2019, from 9:30 p.m. local time through 11:00 p.m. local time.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2019–0727 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 MST2 Chelsea M. Zimmerman, U.S. Coast Guard; telephone (907) 835–7233, email *chelsea.m.zimmerman@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

On August 15, 2019, the City of Valdez notified the Coast Guard that from 10 to 10:30 p.m. on December 31, 2019, it will be conducting a fireworks display launched from Sea Otter Park located next to the entrance of the Small Boat Harbor in the Port of Valdez, AK. In response, on November 13, 2019, the Coast Guard published a notice of proposed rulemaking (NPRM) titled Safety Zone; Port Valdez, Valdez, AK (84 FR 61583). There we stated why we issued the NPRM, and invited comments on our proposed regulatory action related to this fireworks display. During the comment period that ended December 13, 2019, we received one comment.

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 of Valdez (COTP) has determined that potential hazards associated with the fireworks to be used in this December 31, 2019 display will be a safety concern for anyone within a 150-yard radius of the fireworks launching site. The purpose of this rule is to ensure safety of vessels and the navigable waters in the safety zone before, during, and after the scheduled event.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be impracticable because the fireworks event is scheduled to take place in celebration of the New Year, on December 31, 2019. Accordingly, this fireworks event will take place before thirty days from the date this final rule is published. It is, therefore, necessary for public safety to make this rule effective less than 30 days after publication in the **Federal Register**.

IV. Discussion of Comments, Changes, and the Rule

As noted above, we received one comment on our NPRM published November 13, 2019. The comment was in support of this regulation and no issues were raised. In this temporary final rule, we are making one change from the NPRM. Due to an administrative error, the proposed regulation in the NPRM did not include the enforcement period for the safety zone. We are correcting that error in this final rule by adding the following enforcement period in the regulation: 9:30 p.m. to 11:00 p.m. local time on December 31, 2019.

This rule establishes a safety zone from 9:30 to 11:00 p.m. on December 31, 2019. The safety zone will cover all navigable waters within 150 yards of the launching site at Sea Otter Park, located near the entrance of the Small Boat Harbor in the Port of Valdez, AK. The duration of the zone is intended to ensure the safety of vessels and these navigable waters before, during, and after the scheduled 10 to 10:30 p.m. fireworks display. No vessel or person will be permitted to enter the safety 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, duration, and time-of-day of the safety zone. Vessel traffic is rare and normally low for this time of year at the Port of Valdez. Moreover, the Coast Guard would issue a Broadcast Notice to Mariners via VHF–FM marine channel 16 about the zone, and the rule would allow vessels to seek permission to enter the zone.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small

businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard received no comments from the Small Business Administration on this rulemaking. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to transit the safety zone 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 150 yards of the launching site at Sea Otter Park, located near the entrance of the Small Boat Harbor in the Port of Valdez, AK. 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.T17–0727 to read as follows:

§ 165.T17–0727 Safety Zone; City of Valdez New Year's Eve Fireworks, Port Valdez; Valdez, AK.

(a) *Location.* The following area is a safety zone: All navigable waters of Port Valdez within a 150 yard radius from a position of 61°07′22″ North and 146°21′13″ West. This includes the entrance to the Valdez small boat harbor.

(b) *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.

(2) To seek permission to enter, contact the COTP or the COTP's representative via Channel 16 or (907) 835–7205. 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.

(c) *Enforcement period.* This rule will be enforced from 9:30 p.m. to 11:00 p.m. local time on December 31, 2019.

Dated: December 16, 2019.

M.R. Franklin,

Commander, U.S. Coast Guard, Captain of the Port Prince William Sound, Alaska.

[FR Doc. 2019–27444 Filed 12–19–19; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2019–0959]

RIN 1625–AA00

Safety Zone; Illinois River, Mile Markers 91.5 and 28.3 (Frederick Light LLNR 7585 and Hurricane Island Upper Day Beacon LLNR 7980)

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for all navigable waters within one-tenth of a mile up and down river of Mile Marker (MM) 91.5 and Mile Marker (MM) 28.3 on the Illinois River. The safety zone is needed to protect personnel, vessels, and the marine environment from potential hazards created by diving operations for salvage work. Entry of vessels or persons into this zone is prohibited unless specifically authorized by the Captain of the Port Sector Upper Mississippi River or a designated representative.

DATES: This rule is effective without actual notice from December 20, 2019 through December 30, 2019. For the purposes of enforcement, actual notice will be used from December 16, 2019 through December 20, 2019.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2019–0959 in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rule.

FOR FURTHER INFORMATION CONTACT: If you have questions about this rulemaking, call or email Lieutenant Commander Christian Barger, Waterways Management Division, Sector Upper Mississippi River, U.S. Coast Guard; telephone 314–269–2560, email *Christian.J.Barger@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
COTP Captain of the Port Sector Upper Mississippi River
DHS Department of Homeland Security
FR Federal Register
MM Mile Marker
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 of the very short notification of when the diving work on the Illinois River is due to take place. It is impracticable to publish an NPRM because we must establish this safety zone by December 16, 2019.

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 necessary to respond to the potential safety hazards associated with the diving work to take place in the Illinois River.

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 Upper Mississippi River (COTP) has determined that potential hazards associated with dive operations starting December 16, 2019, will be a safety concern for anyone seeking to transit at MM 91.5 and MM 28.3 on the Illinois River. This rule is needed to protect personnel, vessels, and the marine environment in the navigable waters within the safety zone while the diving takes place.

IV. Discussion of the Rule

This rule establishes a safety zone which will be enforced for two days within the effective period from 7 a.m. through 1 p.m. or until dive operations are completed, whichever occurs sooner. The duration of the effective period is from December 16, 2019 to December 30, 2019 to allow for any potentially unsafe weather condtions that could delay the diving and salvage operations. The safety zone will cover all navigable waters of the Illinois River within one tenth of a mile up and down river of MM 91.5 and MM 28.3 extending the entire width of the river. This is necessary for divers and salvage equipment being used to complete work required to cut off old pilings below the water to recover the destroyed Coast Guard Aids to Navigation. The duration of the zone is intended to protect personnel, vessels, and the marine environment in these navigable waters while the work is taking place. No vessel or person will be permitted to enter the safety zone without obtaining permission from the COTP or a designated representative. The COTP or designated representative will notify the public of the actual enforcement dates by Broadcast Notice to Mariners, Locan Notice to Mariners and or Marine Safety Information Bulletin, as approtiate.

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 duration of the safety zone. This safety zone impacts two small sections totaling less than a one mile stretch of the Illinois River for up to six hours over two days. Additionally, this rule allows vessels to seek permission to enter the zone.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard 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 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 a safety zone lasting only 6 hours on two days that will prohibit entry within the dive operations locations at MM 91.5 and MM 28.3 on the Illinois River. 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

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. Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T08–0959 to read as follows:

§ 165.T08–0959 Safety Zone; Illinois River, Mile Markers 91.5 and 28.3 (Frederick Light LLNR 7585 and Hurricane Island Upper Day Beacon LLNR 7980).

(a) *Location.* The following area is a safety zone: all navigable waters of the Illinois River within one-tenth of a mile up and down river of mile marker (MM) 91.5 and MM 28.3 extending the entire width of the river.

(b) *Effective period.* This section is effective without actual notice from December 20, 2019 through December 30, 2019. For the purposes of enforcement, actual notice will be used from December 16, 2019 through December 20, 2019.

(c) *Enforcement periods.* This section will be enforced for up to six hours on two days during the effective period. This section will be enforced during diving operations from approximately 7 a.m. through 1 p.m. each day as needed.

(d) *Regulations.* (1) In accordance with the general regulations in § 165.23, entry of vessels or persons into this zone is prohibited unless specifically authorized by the Captain of the Port Sector Upper Mississippi River (COTP) or designated representative. A designated representative is a commissioned, warrant, or petty officer of the U.S. Coast Guard assigned to units under the operational control of USCG Sector Upper Mississippi River.

(2) Vessels requiring entry into this safety zone must request permission from the COTP or a designated representative. To seek entry into the safety zone, contact the COTP or the COTP's representative by telephone at 314–269–2332 or on VHF–FM channel 16.

(3) Persons and vessels permitted to enter this safety zone must transit at their slowest safe speed and comply with all lawful directions issued by the COTP or the designated representative.

(e) *Information broadcasts.* The COTP or a designated representative will

inform the public of the enforcement dates and times for this safety zone, as well as any emergent safety concerns that may delay the enforcement of the zone each day, through Broadcast Notice to Mariners (BNM), Local Notices to Mariners (LNMs), and/or Marine Safety Information Bulletins (MSIBs) as appropriate.

Dated: December 13, 2019.

S.A. Stoermer,

Captain, U.S. Coast Guard, Captain of the Port Sector Upper Mississippi River.

[FR Doc. 2019–27413 Filed 12–19–19; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2017–0526; FRL–10002–01]

Purpureocillium lilacinum Strain 251; Amendment to the Exemption From the Requirement of a Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation amends the existing tolerance exemption for residues of *Paecilomyces lilacinus* strain 251 in or on all food commodities due to a scientific reclassification of the substance as *Purpureocillium lilacinum.* Bayer CropScience LP submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), requesting this amendment. This regulation eliminates the need to establish a maximum permissible level for residues of *Purpureocillium lilacinum* strain 251 under FFDCA.

DATES: This regulation is effective December 20, 2019. Objections and requests for hearings must be received on or before February 18, 2020, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2017–0526, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Robert McNally, Biopesticides and Pollution Prevention Division (7511P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; main telephone number: (703) 305–7090; email address: *BPPDFRNotices@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

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

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

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

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

Under FFDCA section 408(g), 21 U.S.C. 346a(g), any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2017–0526 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before February 18, 2020. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2017–0526, by one of the following methods:

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

II. Background

In the **Federal Register** of December 15, 2017 (82 FR 59604) (FRL–9970–50), EPA issued a document pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide tolerance petition (PP 7F8547) by Bayer CropScience, LP, 2 TW Alexander Drive, Research Triangle Park, NC 27709. The petition requested that 40 CFR 180.1257 be amended by changing the name of the microbial from *Paecilomyces lilacinus* strain 251 to *Purpureocillium lilacinum* strain 251. That document referenced a summary of the petition prepared by the petitioner Bayer CropScience LP, which is available in the docket via *http://www.regulations.gov.* Although comments submitted to the docket for this notice of filing, none were relevant to this tolerance rulemaking.

III. Final Rule

A. EPA's Safety Determination

Section 408(c)(2)(A)(i) of FFDCA allows EPA to establish an exemption from the requirement for a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the exemption is ''safe.'' Section 408(c)(2)(A)(ii) of FFDCA

defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings but does not include occupational exposure. Pursuant to FFDCA section 408(c)(2)(B), in establishing or maintaining in effect an exemption from the requirement of a tolerance, EPA must take into account the factors set forth in FFDCA section 408(b)(2)(C), which require EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance or tolerance exemption, and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue . . . .'' Additionally, FFDCA section 408(b)(2)(D) requires that EPA consider ''available information concerning the cumulative effects of [a particular pesticide's] . . . residues and other substances that have a common mechanism of toxicity.''

The species *lilacinus,* formerly considered within the genus *Paecilomyces,* has been moved to the genus *Purpureocillium* and renamed *lilacinum.* The new taxonomy is presented in a 2011 scientific paper discussed and referenced in EPA's supporting document mentioned later in this paragraph. The strain-specific features and properties, including toxicological aspects of *Paecilomyces lilacinus* strain 251, have not changed due to the name change. Therefore, the risk assessments and tolerance exemption rationale for *Paecilomyces lilacinus* strain 251 apply to the new taxonomic classification, *Purpureocillium lilacinum* strain 251.

EPA evaluated the available toxicity and exposure data on *Purpureocillium lilacinum* strain 251 and considered its validity, completeness, and reliability, as well as the relationship of this information to human risk. A full explanation of the data upon which EPA relied and its risk assessment based on that data can be found within the document entitled ''Federal Food, Drug, and Cosmetic Act (FFDCA) Safety Determination for *Purpureocillium lilacinum* strain 251.'' This document, as well as other relevant information, is available in the docket for this action as described under **ADDRESSES**. Based upon its evaluation, EPA concludes that there is a reasonable certainty that no harm will result to the U.S. population, including infants and children, from aggregate exposure to residues of *Purpureocillium lilacinum* strain 251. Therefore, the existing tolerance exemption for *Paecilomyces lilacinus* strain 251 is amended by updating the name of the exempt substance from *Paecilomyces lilacinus* strain 251 to *Purpureocillium lilacinum* strain 251.

B. Analytical Enforcement Methodology

An analytical method is not required for *Purpureocillium lilacinum* strain 251 because EPA is amending an exemption from the requirement of a tolerance without any numerical limitation.

IV. Statutory and Executive Order Reviews

This action establishes a tolerance exemption under FFDCA section 408(d) in response to a petition submitted to EPA. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993). Because this action has been exempted from review under Executive Order 12866, this action is not subject to Executive Order 13211, entitled ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001), or Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), nor is it considered a regulatory action under Executive Order 13771, entitled ''Reducing Regulations and Controlling Regulatory Costs'' (82 FR 9339, February 3, 2017). This action does not contain any information collections subject to OMB approval under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.,* nor does it require any special considerations under Executive Order 12898, entitled ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under FFDCA section 408(d), such as the tolerance exemption in this action, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply.

This action directly regulates growers, food processors, food handlers, and food retailers, not States or tribes. As a result, this action does not alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, EPA has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the National Government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, EPA has determined that Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), and Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), do not apply to this action. In addition, this action does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*).

This action does not involve any technical standards that would require EPA's consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act (15 U.S.C. 272 note).

V. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: November 20, 2019.

Robert McNally,

Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. Revise § 180.1257 to read as follows:

§ 180.1257 Purpureocillium lilacinum strain 251; exemption from the requirement of a tolerance.

An exemption from the requirement of a tolerance is established for residues

of *Purpureocillium lilacinum* strain 251 in or on all food commodities when applied/used in accordance with label directions and good agricultural practices.

[FR Doc. 2019–27378 Filed 12–19–19; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2019–0205; FRL–10002–71]

Flutianil; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of flutianil in or on the following commodities: Berry, low growing, subgroup 13–07G; cherry subgroup 12–12A; fruit, small, vine climbing, except fuzzy kiwifruit, subgroup 13–07F; hop, dried cones; and vegetable, cucurbit, group 9. Interregional Research Project Number 4 (IR–4) requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective December 20, 2019. Objections and requests for hearings must be received on or before February 18, 2020, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2019–0205, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

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

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

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

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

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

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

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2019–0205 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before February 18, 2020. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2019–0205, by one of the following methods:

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

II. Summary of Petitioned-For Tolerance

In the **Federal Register** of June 7, 2019 (84 FR 26630) (FRL–9993–93), EPA issued a document pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 8E8730) by IR–4, IR–4 Project Headquarters, Rutgers, The State University of New Jersey, 500 College Road East, Suite 201 W, Princeton, NJ 08540. The petition requested to amend 40 CFR 180.697 by removing the established tolerances for residues of flutianil, (2Z)-2-[2-fluoro-5-(trifluoromethyl)phenyl]sulfanyl-2-[3-(2-methoxyphenyl)thiazolidin-2-ylidene] acetonitrile, including its metabolites and degradates, in or on the raw agricultural commodities cantaloupe at 0.07 ppm; cherry at 0.40 ppm; cucumber at 0.20 ppm; grape at 0.70 ppm; squash at 0.05 ppm; and strawberry at 0.50 ppm.

In the **Federal Register** of October 3, 2019 (84 FR 52850) (FRL–9999–89), EPA issued a document pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 8E8730) by IR–4, IR–4 Project Headquarters, Rutgers, The State University of New Jersey, 500 College Road East, Suite 201 W, Princeton, NJ 08540. The petition requested to amend 40 CFR 180.697 by establishing tolerances for residues of flutianil, (2Z)-2-[2-fluoro-5-(trifluoromethyl)phenyl]sulfanyl-2-[3-(2-methoxyphenyl)thiazolidin-2-ylidene] acetonitrile, including its metabolites and degradates in or on berry, low growing, subgroup 13–07G at 0.50 ppm; cherry subgroup 12–12A at 0.40 ppm; fruit, small, vine climbing, except fuzzy kiwifruit, subgroup 13–07F at 0.70 ppm;

hop, dried cones at 2.0 ppm; and vegetable, cucurbit, group 9 at 0.20 ppm.

The documents referenced a summary of the petition prepared by OAT Agrio Co., Ltd., c/o Landis International, Inc., the registrant, which is available in the docket, *http://www.regulations.gov.* A comment was received on the notices of filing. EPA's response to this comment is discussed in Unit IV.C.

For reasons discussed in Unit IV.D., EPA is establishing tolerances that vary slightly from what was requested, consistent with its authority in FFDCA section 408(d)(4)(A)(i).

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue . . . .''

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

A. Toxicological Profile

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

No single or repeated dose study performed by any route of exposure produced an adverse effect following flutianil exposure below, at, or above the limit dose (1,000 mg/kg/day). The only toxic effect of flutianil exposure in the rat 28-day, 90-day, or 104-day oral toxicity studies was associated with hyaline droplet formation in the renal proximal tubular cells of males. No toxicity was observed in the female rats dosed up to the limit dose for comparable time periods. An immunohistochemical staining demonstrated that the hyaline droplets in the proximal tubular cells were related to the presence of alpha-2μ-globulin, which is not relevant for human toxicity. Based on the link to alpha-2μ-globulin and the lack of any degenerative or other associated effects, the hyaline droplet was not considered biologically relevant to humans.

No toxicity was seen in the developmental, reproductive, neurotoxic, or immunotoxic studies for flutianil. No dermal or systemic toxicity was observed at the limit dose in the rat 28-day dermal toxicity study. Nevertheless, in the rat 28-day inhalation toxicity study, increased lung weights in females and histopathological findings of minimal nasal mucous cell hypertrophy/hyperplasia and minimal lung centriacinar inflammation in males and females were observed at the highest dose tested. These observations were consistent with response to aerosol exposure to an airway irritant. The nasal mucous cell hypertrophy/hyperplasia is considered the physiological response of these cells to an irritant; however, the increased lung weights and cellular inflammation reflect some degree of edema in air spaces, and inflammation in the lung could affect airway responsiveness and pulmonary function. Therefore, the increased lung weights in females and lung lesions in both sexes were considered adverse effects. Flutianil is classified as ''Not Likely to be Carcinogenic to Humans'' based on lack of evidence of carcinogenicity in rats and mice and no evidence of mutagenicity. Flutianil produced no genotoxicity.

Specific information on the studies received and the nature of the adverse effects caused by flutianil as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* on pages 24–28 of the document titled ''Flutianil. Human Risk Assessment to Support New Uses for a New Active Ingredient, Flutianil on Apple, Cantaloupe, Cherry, Cucumber, Grape, Summer Squash, and Strawberry'' in docket ID number EPA–HQ–OPP–2019–0205.

B. Toxicological Points of Departure/Levels of Concern

Once a pesticide's toxicological profile is determined, EPA identifies toxicological points of departure (POD) and levels of concern to use in evaluating the risk posed by human exposure to the pesticide. For hazards that have a threshold below which there is no appreciable risk, the toxicological POD is used as the basis for derivation of reference values for risk assessment. PODs are developed based on a careful analysis of the doses in each toxicological study to determine the dose at which no adverse effects are observed (the NOAEL) and the lowest dose at which adverse effects of concern are identified (the LOAEL). Uncertainty/safety factors are used in conjunction with the POD to calculate a safe exposure level—generally referred to as a population-adjusted dose (PAD) or a reference dose (RfD)—and a safe margin of exposure (MOE). For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www2.epa.gov/pesticide-science-and-assessing-pesticide-risks/assessing-human-health-risk-pesticide.*

Based on the analysis of the available flutianil toxicological studies, there is no adverse toxicity from oral exposures seen in any of the required submitted toxicology studies. No toxicity endpoint and point of departure for regulating dietary exposure are established for the human health risk assessment. There are no registered or proposed residential uses at this time for flutianil; therefore, residential handler and post-application exposure and risk were not assessed.

C. Exposure Analysis

Flutianil is used on a variety of crops. Humans could potentially be exposed to flutianil residues in food because flutianil may be applied directly to growing crops. These applications can also result in flutianil reaching surface and ground water, both of which can serve as sources of drinking water. There are no proposed uses in residential settings; therefore, there are no anticipated residential exposures.

D. Additional FFDCA Factors

Based on the toxicological profile of flutianil, EPA has concluded that the FFDCA requirements to retain an additional safety factor for protection of infants and children and to consider cumulative effects do not apply. Section 408(b)(2)(C) of the FFDCA (21 U.S.C. 346a) requires an additional tenfold margin of safety in the case of threshold risks, which are not present in this case. Section 408(b)(2)(D)(v) of the FFDCA requires consideration of information concerning cumulative effects of substances that have a common mechanism of toxicity, which flutianil does not have.

E. Safety Determination

Based on the available data indicating a lack of adverse effects from exposure to flutianil, EPA concludes that there is a reasonable certainty that no harm will result to the general population, or to infants and children from aggregate exposure to flutianil.

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate enforcement methodology—gas chromatography-mass spectrometry detector (GC/MSD) and high-performance liquid chromatography with tandem mass spectral detection (LC/MS/MS) for grapes only—is available to enforce the tolerance expression. The methods may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; email address: *residuemethods@epa.gov.*

B. International Residue Limits

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4). The Codex Alimentarius is a joint United Nations Food and Agriculture Organization/World Health Organization food standards program, and it is recognized as an international food safety standards-setting organization in trade agreements to which the United States is a party. EPA may establish a tolerance that is different from a Codex MRL; however, FFDCA section 408(b)(4) requires that EPA explain the reasons for departing from the Codex level.

The Codex has not established any MRLs for these crops for flutianil.

C. Response to Comments

One comment generally asserting that flutianil is toxic and should not be allowed on vegetables was received in response to the notice of filing. Although the Agency recognizes that some individuals believe that pesticides should be banned on agricultural crops, the existing legal framework provided by section 408 of the Federal Food, Drug and Cosmetic Act (FFDCA) authorizes EPA to establish tolerances when it determines that the tolerance is safe. Upon consideration of the validity, completeness, and reliability of the available data as well as other factors the FFDCA requires EPA to consider, EPA has determined that these flutianil tolerances are safe. The commenter has provided no information to indicate that flutianil is not safe.

D. Revisions to Petitioned-for Tolerances

The petitioner seeks a vegetable, cucurbit, group 9 tolerance of 0.20 ppm. Previously, separate tolerances were established for cucumber, cantaloupe, and squash for harmonization purposes with Japan. The available data support establishing subgroup tolerances, so EPA is establishing two subgroup tolerances as follows: Melon subgroup 9A at 0.07 ppm and squash/cucumber subgroup 9B at 0.2 ppm. There are no Codex MRLs.

EPA is establishing the remaining tolerances as requested, except for modifications to be consistent with the rounding class practices of the Organisation for Economic Co-operation and Development (OECD).

V. Conclusion

Although the lack of toxicity supports a safety finding for an exemption from the requirement of tolerance for all crops, EPA is establishing numerical tolerances for residues resulting from direct applications to commodities for international trade purposes. Therefore, tolerances are established for residues of flutianil, (2Z)-2-[2-fluoro-5-(trifluoromethy)phenyl]sulfanyl-2-[3-(2-methoxyphenyl)thiazolidin-2-ylidene]acetonitrile, in or on berry, low growing, subgroup 13–07G at 0.5 ppm; cherry subgroup 12–12A at 0.4 ppm; fruit, small, vine climbing, except fuzzy kiwifruit, subgroup 13–07F at 0.7 ppm; hop, dried cones at 2 ppm; melon subgroup 9A at 0.07 ppm; and squash/cucumber subgroup 9B at 0.2 ppm.

Additionally, the following tolerances are removed as unnecessary due to the establishment of the above tolerances: Cantaloupe; cherry; cucumber; grape; squash; and strawberry.

VI. Statutory and Executive Order Reviews

This action establishes and modifies tolerances under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993). Because this action has been exempted from review under Executive Order 12866, this action is not subject to Executive Order 13211, entitled ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), nor is it considered a regulatory action under Executive Order 13771, entitled ''Reducing Regulations and Controlling Regulatory Costs'' (82 FR 9339, February 3, 2017). This action does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), nor does it require any special considerations under Executive Order 12898, entitled ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (59 FR 7629, February 16, 1994). Since tolerances and exemptions that are established on the basis of a petition under FFDCA section 408(d), such as the tolerances in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), do not apply.

This action directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled ''Consultation and Coordination

with Indian Tribal Governments'' (65 FR 67249, November 9, 2000) do not apply to this action. In addition, this action does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1501 *et seq.*). This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note).

VII. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: December 5, 2019.

Michael Goodis,

Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. In § 180.697(a):

■ a. In the introductory text, remove ''the table below'' and ''below'' and add in their places ''Table 1 to this paragraph (a)'' and ''in Table 1,'' respectively; and

■ b. Revise the table.

The revision reads as follows:

§ 180.697 Flutianil; tolerances for residues.

(a) * * *

TABLE 1 TO PARAGRAPH (a)

Commodity	Parts per million
Apple	0.15
Apple, wet pomace	0.30
Berry, low growing, subgroup 13–07G	0.5
Cherry subgroup 12–12A	0.4
Fruit, small, vine climbing, except fuzzy kiwifruit, subgroup 13–07F	0.7
Hop, dried cones	2
Melon subgroup 9A	0.07
Squash/cucumber subgroup 9B	0.2

* * * * *

[FR Doc. 2019–27361 Filed 12–19–19; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 54

[WC Docket No. 13–184; FCC 19–117; FRS 16311]

Modernizing the E-Rate Program for Schools and Libraries

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) makes permanent the ''category two budget'' approach that the Commission adopted in 2014 to fund internal connections, which are primarily used for Wi-Fi, a technology that has enabled schools and libraries to transition from computer labs to one-to-one learning.

DATES: Effective January 21, 2020, except for §§ 54.502(d) and (e) and 54.513(d) which are delayed. The Commission will publish a document in the **Federal Register** announcing the effective date of those rules.

FOR FURTHER INFORMATION CONTACT: Stephanie Minnock, Wireline Competition Bureau, (202) 418–7400 or TTY: (202) 418–0484.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order (Order) in WC Docket No. 13–184; FCC 19–117, adopted on November 20, 2019 and released on December 3, 2019. The full text of this document is available for public inspection during regular business hours in the FCC Reference Center, Room CY–A257, 445 12th Street SW, Washington, DC 20554 or at the following internet address: *https://docs.fcc.gov/public/attachments/FCC-19-117A1.pdf.*

I. Introduction

1. The Commission's E-Rate program is a vital source of support for connectivity to—and within—schools and libraries. In particular, the E-Rate program provides funding for internal connections, which are primarily used for Wi-Fi, a technology that has enabled schools and libraries to transition from computer labs to one-to-one digital learning. In this document, the Commission makes permanent the ''category two budget'' approach that the Commission adopted in 2014 to fund these internal connections. The category two budget approach consists of five-year budgets for schools and libraries that provide a set amount of funding to support internal connections. In adopting this approach, the Commission also established a five-year test period (from funding year 2015 to funding year 2019), to consider whether this approach would be effective in ensuring greater and more equitable access to E-Rate discounts.

2. Based on the overwhelming record support for the category two budget approach from the E-Rate community, coupled with the Commission's own experience during the five-year test period, the Commission concludes that the category two budget approach has provided broader, more equitable, and more predictable funding for schools and libraries than under the prior rules. The budget amount provided to schools and libraries during the test period proved to be successful, and, moving forward, the Commission intends to generally remain within those parameters of support. Building on the success of the category two budget approach, the Commission takes important steps to (1) streamline processes to ensure more equitable, consistent distribution of support for small, rural schools and libraries within the existing E-Rate program budget for category two services, (2) simplify the category two budgets, and (3) decrease the administrative burden of applying for category two services. As a result of the measures the Commission takes in this document, the category two budget approach will become more streamlined, furthering the program's overall effectiveness and the deployment of Wi-Fi in schools and libraries across the country.

II. Discussion

3. To ensure that our nation's students and library patrons have access to high-speed broadband and to further the Commission's goal of bridging the digital divide for all Americans, it permanently extends the category two budget approach, which has provided certainty and more equitable funding to schools and libraries for the last five funding years. Doing so avoids a return

to the two-in-five rules. Furthermore, informed by the Commission's experience with administering the category two budgets during the five-year test period, it simplifies and streamlines the category two budget approach to allow applicants to make more effective use of category two funding and to reduce administrative burdens. As part of these improvements, the Commission also provides more equitable, consistent support for small, rural schools and libraries within the existing category two services budget and make permanent the eligibility of managed internal broadband services, caching, and basic maintenance of internal connections.

4. As detailed in the following, to ensure a smooth transition to the new rules, the Commission establishes rules for funding year 2020 that extend the five-year test period for an additional year and provide a prorated amount of category two support to all applicants. In this way, the Commission balances the desire to meaningfully improve the category two budget approach while minimizing the impact associated with such changes for the upcoming funding year. Thus, the new rules the Commission adopts for the category two budget approach will apply beginning in funding year 2021, at which time the budgets will reset for all applicants as the Commission moves to fixed five-year funding cycles, the first of which will run from funding years 2021 to 2025.

5. Based on a review of the record, the Commission first adopts its proposal to make the category two budget approach permanent, thus ensuring that the two-in-five rules will not come back into effect for any applicants following funding year 2019. Doing so is supported by the record and consistent with the findings of the Bureau's *Category Two Budget Report.* Commenters unanimously support the category two budget approach, and no commenter expressed a desire to return to the problematic two-in-five rules. In particular, commenters state that the benefits of the category two budget approach far outweigh any benefits of the alternative two-in-five rules approach. This view is consistent with the Bureau's finding that, since funding year 2015, funding has gone to all fifty states and all discount levels in a manner that more closely approximates the composition of participating schools and libraries in the E-Rate program overall.

6. Moreover, there is agreement that the category two budget approach ''has led to wider, more robust deployment of broadband services within schools and libraries.'' Likewise, the category two budget approach has ''enabled all applicants, regardless of their place on the E-Rate discount matrix, to receive funding for broadband equipment and services inside their school and library buildings.'' With respect to libraries, ALA observed that ''for the first time in over fifteen years our libraries are assured of receiving C2 funding. The result is that all libraries, whether in rural remote areas or urban centers, have access to much needed funding for their in-building network requirements.'' Commenters also note that extending the category two budget approach permanently will give ''both applicants and service providers confidence that category two funding will continue in a reliable and predictable manner.''

7. Finally, the record contains no evidence of any significant economic costs associated with a transition to a permanent category two budget approach. Accordingly, the economic benefits of transitioning to a permanent category two budget are expected to outweigh the costs. For all of these reasons, the Commission makes the category two budget approach permanent.

8. Recognizing that the category two budget approach, while successful during the five-year test period, can be improved upon, the Commission takes this opportunity to simplify the budgets and make category two funding even more effective than during the last five funding years. Specifically, beginning in funding year 2021, the Commission resets all applicant budgets and begin fixed five-year budget cycles. As part of this modification, the Commission also adopts district-wide and library system-wide budget calculations, which will relieve applicants of some of the most significant administrative burdens associated with the category two application process and management of the budgets. Furthermore, to ensure the needs of schools with low student counts and small libraries, particularly those in rural areas, are met and to promote their increased participation, the Commission increases the category two funding floor to $25,000. The Commission maintains the per-student budget multipliers that served schools well during the five-year test period and adopt a single budget multiplier for libraries, all of which will be adjusted for inflation every five years. Additionally, the Commission makes managed internal broadband services, caching, and basic maintenance of internal connections permanently eligible, and confirm their eligibility for all applicants in funding year 2020.

9. First, to facilitate the transition to the new rules, the Commission will reset all budgets to the full amount eligible under the new rules, which will provide applicants the opportunity to deploy internal connections and make it easier for them to track their category two budgets in the new funding cycle. All applicants will start with a new five-year budget cycle beginning in funding year 2021, regardless of whether they completed their previous five-year budget cycle during the test period.[1] The Commission agrees with commenters that resetting the budgets at the end of the test period will alleviate confusion, whereas rolling over remaining funds from the test period would be difficult to track given the changes to the rules and the budget calculations.

10. Next, as part of the improvements to the category two budget approach the Commission makes in this document, and to ease the administration of the budgets, the Commission adopts fixed five-year budget cycles, with the first such cycle running from funding year 2021 through funding year 2025. Applicants may submit applications in any funding year during this five-year cycle. In the *2019 Category Two Notice,* 84 FR 34107, July 17, 2019, the Commission sought comment on using rolling budgets, or setting fixed five-year budget cycles, as part of the permanent category two budget rules, and asked if fixed five-year cycles would be easier to administer. Commenters largely support fixed five-year cycles, noting that fixed budgets present the ''clearest and cleanest approach,'' and that a ''simplified, fixed timeframe for budget expenditure for all applicants will alleviate much of the confusion'' created by rolling budgets. The Commission agrees and now adopts fixed five-year budget cycles to simplify the administration of the budgets and eliminate a source of confusion for applicants. Fixed cycles also present natural beginning and ending points for budgets, making it easier to make changes and updates to the budgets in future funding years should the need to do so arise. These changes will allow for the smoothest transition to the new rules, and the Commission agrees with commenters who stated that the risks associated with a fresh start and fixed budgets are minimal.

11. The Commission notes that no commenter supported rolling budgets that begin the first year a school or

[1] The budget reset applies to all applicants, including those applicants who were subject to the relief the Commission provided in the response to Hurricanes Harvey, Irma, and Maria.

library requests category two funding and look back four years, as described in the *2019 Category Two Notice.* Some commenters, however, supported rolling over unused funds from the five-year test period into new, fixed five-year cycles. The Commission concludes, however, that the administrative burden of carrying unused funds from one budget period to another far outweigh the benefits of doing so, and the program would be easier to administer with clear starting and ending points to budget periods. Other commenters support rolling budgets to the extent that fixed budgets will present challenges with schools opening or closing during a five-year period. The Commission disagrees and finds instead that fixed five-year cycles present the simplest rules to administer, and in fact minimize the confusion caused by a school opening or closing mid-cycle. Under a rolling scenario, that school district's budget would need to reflect changes caused by a school opening or closing for an extended period of time, while fixed budget cycles reset at the conclusion of the five-year cycle, giving the district an opportunity to start fresh calculating its budget. Overall, the benefits some applicants may receive from carrying over a portion of unused funding, or from being able to start calculating budgets on a rolling basis, are outweighed by the ability of all applicants to calculate budgets on a clear, predictable basis, with established beginning and ending points that also present clear opportunities for future modifications, should the need arise.

12. Next, as part of the permanent rules that will go into effect in funding year 2021, the Commission adopts district-wide and library system-wide category two budgets—a change that nearly all commenters support. Specifically, school districts and library systems will now have a single budget to administer, and the district or library system will have the flexibility to allocate category two funding among its schools and libraries as it sees fit, vastly simplifying the planning and application process for category two services. This change will simplify some of the more complicated aspects of administering the budgets and applying for funding (such as dividing the costs of shared services among multiple entities, estimating student counts at new schools, and counting part-time students), without eliminating protections against waste, fraud, and abuse, which continue to apply with respect to each individual school and library included in the school district-wide and library system-wide budgets. In particular, calculating the budgets in this way will largely eliminate the need for applicants to maintain and administer separate budgets for each school or library in a district or library system and minimize instances where funding requests are delayed or denied because they exceeded the budget for a particular school or library. Further, as commenters noted, different schools have different technological needs, and a single district-level or system-level budget will allow the school district or library system to determine how best to account for these differences. By affording applicants the flexibility to determine how best to allocate funding within their districts and library systems, the Commission ensures a more effective use of E-Rate funds.

13. In adopting district-wide budgets, the Commission provides general guidance on what constitutes a ''school district.'' Given that applicants are likely to be in the best position to apply this guidance to their particular circumstances, the Commission does not strictly define the term for the purposes of applying for and calculating a district-wide budget. In response to the Commission's request for comment on how applicants and USAC should determine which entities are part of a school district for calculating category two budgets, the Commission received several comments, but no clear consensus. To provide administrative ease and flexibility to account for differing scenarios and consistent with the manner in which applicants currently calculate district-wide discount rates, applicants should consider all schools that fall under the control of a central administrative agency as a district for the purpose of calculating a shared, district-wide budget.

14. Under this approach, private schools and charter schools that operate independently of a public school district or a central administrative agency, and are individually responsible for their finances and administration, should separately calculate their category two budgets and apply for funding. Independent charter schools, private schools, and other eligible educational facilities that seek support for more than one school building should factor all students in facilities under the control of their central administrative agency or entity into the category two budget calculation. For example, if a group of parochial schools shares administration and finances, they should calculate a single, ''district-wide'' category two budget for all students under the central administrative entity or agency.

15. To address issues that may arise regarding changes to school districts and library systems during a five-year budget cycle, as well as issues that may arise in accommodating states' varied definitions of school or library districts, the Commission directs the Bureau to provide clarifying guidance consistent with the terms of the Order, and publish clarifications or additional guidance with respect to the implementation and administration of district-wide and library system-wide category two budgets to the extent necessary.

16. *Full-Time Enrollment.* In another effort to streamline both the application filing and review process, going forward the Commission will base student counts on full-time enrollment only and eliminate the need for schools or school districts to count part-time students in their enrollment numbers. Commenters support this change as a simplification that stems from district-wide budgets. More specifically, because the district-wide budgets will allow school districts greater flexibility in allocating category two support, it is no longer necessary for schools with lower full-time enrollment, but high part-time enrollment to take the often difficult and time-consuming steps to count and verify their part-time enrollment numbers in order to obtain category two funding. Using district-wide budgets, the Commission believes that all schools in a district will have adequate support to ensure appropriate deployment of local area networks.

17. The Commission also will no longer permit school districts to estimate the number of students for buildings under construction because those students will otherwise be accounted for by the district enrollment numbers. However, an independent school with its own entity-level budget will still be allowed to estimate its enrollment numbers in order to be able to request category two support while construction is underway. As presently required by the Commission's rules, if an applicant overestimates the number of students who enroll in that school, it must return to USAC any funding in excess of that which it was entitled based on the actual enrollment by the end of the next funding year.

18. To ensure that all E-Rate applicants, including small schools and libraries in rural areas, have the funding they need to deploy their internal connections networks within the existing E-Rate program budget for category two services, the Commission takes several steps to make access to category two funding more equitable and, in turn, result in a more consistent distribution of support for small, rural

schools and libraries. First, the Commission raises the category two budget funding floor from $9,200 to $25,000. Second, the Commission eliminates the funding disparity between urban and rural libraries inherent in the current bifurcated approach that disadvantages rural libraries and adopt a unified budget multiplier for all libraries.

19. *Funding Floor.* To ensure that small schools and libraries have sufficient funding to deploy their internal connections, the Commission increases the funding floor to a pre-discount level of $25,000 over the five-year funding cycle beginning in funding year 2021. In the *2019 Category Two Notice,* the Commission sought comment on whether the funding floor should be increased to $25,000. The Commission agrees with commenters that the existing funding floor level of $9,200, combined with the overall administrative burden of requesting category two support, resulted in a low participation rate by small and rural entities with low student enrollment or small square footage. For instance, from funding year 2015 through funding year 2019, school sites nationwide, on average, used 60% of their category two funding support, but small sites that only qualify for the funding floor, on average, used only 33% of their category two funding support, in large part because so little funding was available to them or because the benefits of the funding at the floor were often lower than the costs associated with the application process.

20. To illustrate why few entities at the funding floor (which include many rural schools and libraries) took advantage of category two funding during the five-year test period, the Commission considers a small school at an 85% discount rate with 61 students. During that period, which set the budget floor at $9,200, such a school would have been eligible to receive category two support of just $7,820 despite having many of the same technical needs for its Wi-Fi networks as larger schools. In fact, one commenter estimates that it would cost $24,350 to deploy switches, wireless access points, wireless access point controllers, routers, and cabling to a small school with 61 students. The Commission agrees with those commenters that argue that a budget floor of $25,000 is sufficient to ensure that those small sites that previously did not participate can deploy internal connections networks. With a $25,000 funding floor, that same small school at an 85% discount rate will receive $21,250 in E-Rate support. The Commission expects that this additional funding, in addition to the increased flexibility of district-wide and library system-wide budgeting generally, will make it attractive and beneficial for small schools and libraries to take advantage of category two funding support. And the Commission finds that this increase in the funding floor can be done within the existing E-Rate program budget for category two services in combination with its other reforms to the category two budget approach.

21. *School Multiplier.* Consistent with the findings in the *Category Two Budget Report,* the Commission continues to believe that the existing category two budget mechanism is generally sufficient for schools, and thus the Commission adopts its proposal to maintain the $150 per student school budget multiplier adjusted for inflation from the five-year test period, and—for administrative simplicity—adjust that amount ($166.44) up to $167 per student for the new five-year funding cycle beginning in funding year 2021. The Commission finds that maintaining the same per-student level of support as was available in the previous category two budget cycle is sufficient to meet schools' internal connections needs. This level of support enabled 85% of school sites to receive category two funding support during the funding year 2015 through funding year 2019 budget cycle. Many schools required less funding than the $167 per student budget multiplier the Commission adopts in this document—in fact, 50% of schools used less than $131 per student over those five years.

22. Some commenters argue that a higher budget multiplier is needed for schools to build their Wi-Fi networks. The Commission disagrees. The Commission finds that increasing per-student budgets beyond the rate of inflation is not necessary at this juncture, particularly given the other changes the Commission makes to the category two budget approach in the Order. In fact, the Commission believes that the changes made in this document will lead to additional category two funding support being available for those schools that need it.

23. The streamlined district-wide budget approach the Commission adopts in this document empowers school districts to allocate category two funding support to the sites that need it most. Entity-specific budgets have constrained category two funding support to be directed to specific sites based on enrollment numbers or square footage without the ability to make adjustments for level of need. If there was a school in a district that required less than the per-site budget allocation to deploy a Wi-Fi network and another school in the district that required more than the per-site allocation, the district could not re-direct the unused funding to complete the more expensive network, which meant that part of the category two budget support for the district went unspent and an identified need went unmet. Implementing district-wide budgets lifts this restriction and allows applicants to allocate category two funding to the sites that most need it, which, in turn, permits them to take advantage of a greater portion of their category two budgets. For example, Funds For Learning estimates that adopting school district and library system-wide budgets will make an additional $94.1 million per year in category two funding available to applicants. Further, by increasing the funding floor, the Commission is providing additional category two funds to some of the smallest schools in the country. As a result, under the Commission's new approach, these small schools do not need an increase in the per-student allocation to receive an increase in the category two funding available to them.

24. *Library Multiplier.* To eliminate the funding disparity between rural and urban libraries inherent in the existing bifurcated approach to calculating budgets for libraries and to ease administration, the Commission establishes a single pre-discount budget multiplier for all libraries of $4.50 per square foot over the five-year funding cycle beginning in funding year 2021. Currently, the library multipliers differ based on geography. Specifically, libraries located in cities and urbanized areas with a population of 250,000 or more, as identified by the Institute of Museum and Library Services (IMLS) locale codes of 11, 12, and 21, receive $5.00 per square foot, adjusted annually for inflation, and libraries in all other locations receive $2.30 per square foot, adjusted annually for inflation.

25. As demonstrated by the record, the cost to deploy a Wi-Fi network does not vary significantly based on geography. As internal connections are provided *within* school and library buildings, which are similar regardless of location, the Commission is now persuaded by experience from the test period that the costs to install the equipment and the type of equipment needed to provide connections within these buildings should also be comparable regardless of location. Indeed, some commenters contend that internal connections deployment costs are higher in rural areas than urban areas, and even those commenters that

favor a higher budget multiplier for libraries in highly-concentrated urban areas recognize that an increase in the budget multiplier for rural libraries is needed. Accordingly, the Commission finds that experience has not borne out the prediction that costs would be higher and the need for support would be greater in highly concentrated urban areas than for libraries in the rest of the country.

26. Moreover, the Commission's experience during the five-year test period shows that a lower budget multiplier for rural applicants creates a considerable disparity in access to the amount of category two funding support available for rural libraries. As the Bureau's *Category Two Budget Report* found, rural libraries seek category two funding support at a much lower rate than urban libraries. Commenters attributed rural libraries' lack of participation to insufficient budgets and recommended an increase to the multiplier for rural libraries. Raising the budget multiplier for libraries outside of highly-concentrated urban areas, therefore, is a necessary step towards ensuring that they have sufficient funding to deploy their internal connections.

27. Finally, setting a single budget multiplier for all libraries simplifies the library budget calculations for applicants and will reduce the application review burden for USAC. Without the need to determine the IMLS locale code for each E-Rate supported library and the overall budget multiplier for a library system, applicants and USAC should be able to increase the efficiency and pace of the filing and processing of applications.

28. To provide a single budget multiplier for all libraries within the existing budget, the Commission adopts a pre-discount multiplier of $4.50 per square foot for all libraries. The Commission calculated this number, first, by estimating the potential total of all pre-discount library budgets from funding year 2015 to funding year 2019 using all public libraries. The Commission then divided this potential total of all pre-discount library budgets by the total square footage of all public libraries. The Commission provided a slight upward adjustment to $4.50 per square foot to reflect the anticipated participation rates of libraries requesting category two funding under the E-Rate program. This new budget multiplier, coupled with the increased funding floor, will make additional category two support available for those small and rural libraries that did not participate during the five-year test period.

29. The Commission's experience indicates that a pre-discount multiplier of $4.50 per square foot will minimally impact libraries in highly concentrated urban areas while providing sufficient additional funding to enable other libraries to deploy internal connections networks. Given that 91% of libraries in highly concentrated urban areas used less than $3.99 per square foot from funding years 2015 through 2019, the Commission expects that this reduction will affect only a small proportion of libraries in those areas. Indeed, those applicants will still be under budget, even with a budget of $4.50 per square foot. Moreover, as with schools, introducing library system-wide budgets will give library systems enhanced flexibility to allocate funding throughout their sites as they see fit, and raising the funding floor will provide greater funding for small libraries, even if their per square foot allocations are reduced slightly.

30. *Calculating District-Wide and Library System-Wide Budgets.* Based on the changes to the budget multipliers and funding floor the Commission makes in this document, the Commission details how applicants will calculate their budgets under the district-wide and library system-wide budget methodology. Specifically, to ease administration and to recognize that school and library systems are in fact systems with generally unified budgets that have the ability to direct support to whatever school or library in the system needs it most, the Commission requires school districts and library systems to calculate total budgets using their aggregate student count or square footage and the ''aggregate funding floor'' (*i.e.,* the aggregate number of schools or libraries times the funding floor).[2] Therefore, a school district or library system need only determine the aggregate number of students or square footage throughout the system as well as the total number of eligible schools and libraries in the system, without detailing the precise number of students or square footage attributable to any individual school or library. The Commission expects most school districts and library systems to receive funding significantly above the aggregate funding floor and to appropriately allocate funds to those that need it most. In addition, the Commission recognizes that smaller school districts and library systems have less access to shared resources and are more likely to be located in rural areas where funding is scarce. As such, the Commission creates an exception for small school districts and library systems. Specifically, the Commission gives school districts and library systems with 10 or fewer sites the option to calculate their budgets on a per-site basis by adding together the budgets of each eligible site within the district or library system.

31. To illustrate how the calculation would work, the Commission considers a school district with five schools, three of which have 200 students each and two of which have 100 students each. Using the $167 budget multiplier for schools and the $25,000 funding floor for funding year 2021, the school district would have a total pre-discount budget of $150,200, to spend across the five schools over the five-year period.[3] Giving small systems this option will ensure that small, rural school districts and library systems can take full advantage of the increased funding floor, with only minimal increases to administrative complexity for applicants and for USAC.[4]

32. *Inflation Adjustment.* For both budget multipliers and the funding floor, the Commission amends its rules to make a one-time adjustment for inflation before the start of the filing window for each five-year funding cycle. Commenters generally agree that

[2] In other words, a school district with 10,000 students would normally have an aggregate budget of $1,670,000. If those students were spread across 100 schools, then its budget would instead be $2,500,000 (the aggregate funding floor). Accordingly, the funding floor only comes into play if the aggregate budget for the system would fall under the aggregate funding floor for the system.

[3] Each school with 100 students would be eligible for a $16,700 budget (which is less than what they would receive under the funding floor) and each school with 200 students would be eligible for a $33,400 budget. Hence the aggregate budget here is $2 \times \$25{,}000 + 3 \times \$33{,}400 = \$150{,}200$. Without this exception, the school district's aggregate budget would be determined by multiplying the aggregate number of students in the district $((3 \times 200) + (2 \times 100) = 800)$ by the school multiplier ($167). Hence, the aggregate budget would be $800 \times \$167 = \$133{,}600$, which is less than what the district's budget would be under the exception.

[4] Although the Commission recognizes that allowing site-by-site calculations increases the number of auditable issues for applicants and USAC and could lead some applicants to shuffle headcounts to maximize support, they find such concerns of little consequence for the smaller school districts and library systems for which this option was created. The Commission's experience with USAC audits persuades the Commission that the administrative burdens on USAC are likely to be manageable if the Commission limit this option to school districts and library systems with 10 or fewer locations, particularly given that those districts and systems present fewer opportunities for shifting headcount and, on that basis, gaming the funding support rules. Thus, although the record does not enable the Commission to precisely identify the ''ideal'' number of locations at which to draw this line, the Commission finds that its choice of 10 or fewer reasonably balances its interest in managing the administrative burden of the program and guarding against the risk of gaming.

a one-time inflation adjustment over a five-year cycle will reduce confusion surrounding the category two budget calculations, although commenters suggested different approaches for calculating inflation. The Commission rejects suggestions that use either predictions or other inflation indicators as too complex. Instead, the Commission finds that the simplest, most effective, and most accurate approach is to adjust for inflation before the start of the filing window for each five-year funding cycle, providing notice to applicants about the upcoming budget multipliers and funding floor. Adjusting for inflation in this way will simplify the budget calculation, and will ensure that subsequent five-year funding cycles accurately reflect historical inflation rates. To ensure that applicants know their budgets well in advance of funding year 2021, the Commission announces the budget multipliers and the funding floor in the Order. The Commission's calculations of the budget multipliers and funding floor account for future inflation through funding year 2021 using estimated inflation adjustments. Accordingly, these figures will not be further adjusted for inflation between now and the funding year 2021 filing window, or again during this initial five-year funding cycle.[5]

33. For future funding years, before the start of every five-year funding cycle, the Commission directs the Bureau to calculate and announce the inflation adjustments. Specifically, the Bureau will announce the budget multipliers and funding floor as adjusted for inflation at least 60 days before the start of the filing window for the next five-year funding cycle. For funding year 2026 and beyond, the Commission shall use the last four quarters of available data on the Gross Domestic Product Chain-type Price Index (GDP–CPI) compared with the equivalent quarters from the beginning of the five-year funding cycle. The increase shall be rounded to the nearest 0.1% and shall be used to calculate the category two budget multipliers and funding floor for that five-year funding cycle. The budget multipliers and funding floor will also be rounded to the nearest cent to eliminate confusion surrounding the calculation, as supported by commenters.

34. *Student Counts and Square Footage.* To further reduce administrative burdens, and consistent with the record, the Commission will require applicants to provide student counts and library square footage for schools and libraries only once (calculated at the time that the discount is calculated that funding year) during a five-year funding cycle beginning with the first such cycle that starts in funding year 2021. Specifically, under the fixed, five-year budgets the Commission adopts in this document, the Commission will require applicants to validate their student counts or library square footage for each school and library in the district or library system in the first year an applicant applies for category two support during the relevant five-year cycle. Applicants, if they choose to do so, can update their student counts or square footage information in subsequent funding years to reflect, for example, an increased budget due to increased student enrollment. Applicants, however, are not required to do so, and can instead keep the student count and square footage information for the entire five years of the budget cycle. The Commission notes, contrary to what was suggested in the record, that the requirement that the category two budget enrollment numbers only be validated once every five years has no impact on the requirement that schools update their enrollment and National School Lunch Program or Community Eligibility Provision numbers for purposes of calculating discount rates each year.

35. In the *2019 Category Two Notice,* the Commission proposed to permanently extend the eligibility of managed internal broadband services, caching, and basic maintenance of internal connections under a category two budget approach consistent with the Commission's determination in 2014 to make these services eligible for support through funding year 2019. Commenters expressed broad support for retaining the eligibility of these three services. Consistent with the Commission's determinations in the *2014 First E-Rate Order,* 79 FR 49160, August 19, 2014, it finds that category two budgets allay concerns about wasteful spending on these three services, and the Commission therefore sees continued benefit for the functionality of networks within schools and libraries in making these services eligible for category two support. Accordingly, the Commission adopts the proposal to make these services eligible for category two support under the permanent category two budget approach.

36. The *2019 Category Two Notice* sought comment on whether additional services should be made eligible for category two funding. In response, commenters urged the Commission to make eligible several additional services. For example, several commenters requested that the Commission makes eligible under category two the filtering technology necessary for compliance with the Children's Internet Protection Act. But the Commission has previously explained that the Children's Internet Protection Act prohibits recipients from obtaining discounts under the universal service support mechanism for the purchase or acquisition of technology protection measures necessary for compliance with the Children's Internet Protection Act. Others requested that the Commission makes eligible services that it has either previously made ineligible or that the Commission has previously declined to make eligible. The Commission declines to make additional services eligible under category two so that E-Rate eligible entities continue to focus requests for category two funding on the internal connections that are truly necessary to deliver high-speed broadband to students and library patrons via local area networks and wireless local area networks, consistent with the Commission's reasoning in the *2014 First E-Rate Order.* And the Commission finds that the requests of still other commenters to make additional services eligible for category one support are beyond the scope of this proceeding.

37. At the request of several commenters, the Commission directs the Bureau to address ongoing issues related to the application of its eligible services rules with respect to category two services by providing clarifications in instances where the terminology used in the Commission's rules does not align with the terminology used by service providers in the context of bid responses and invoicing or has otherwise caused applicant uncertainty or confusion about how to request category two services.

38. *Equipment Transfer Rule.* Consistent with the Commission's efforts to streamline the process for requesting support for category two services, it now eases the Commission's equipment transfer rule to lessen the paperwork burden on school districts and library systems. As the Commission stated in the *2019 Category Two Notice,* and supported by the record, the original concerns that led to the adoption of a prohibition on equipment transfers for a period of three years after purchase—namely, that applicants might replace or upgrade their equipment more often than necessary or

[5] Specifically, as discussed above, the Commission establishes a school budget multiplier of $167, a library budget multiplier of $4.50, and a funding floor of $25,000 for funding year 2021.

to circumvent the then-existent two-in-five rules—are no longer relevant under a district-wide and library system-wide category two budget approach. Under the district-wide and library system-wide category two budget approach, the category two purchases for all individual schools within the district fall under the same budget, so there will no longer be the incentive to purchase a piece of equipment for one site and move it to another. This incentive existed under the two-in-five rules because there were limits on the internal connections funding that each individual school could receive. Under those rules, if an individual school did not request equipment when it had the opportunity to do so, another school in the same district could circumvent the two-in-five rule by requesting that equipment and moving it to the facility where it was needed. As the two-in-five rules no longer apply, the provisions of the equipment transfer rules that prevent its circumvention are no longer needed.

39. The Commission therefore modifies section 54.513(d) of the Commission's rules, effective for funding year 2021, to allow districts and library systems to transfer equipment between schools within a district and libraries within a system. Importantly, transferors no longer must notify USAC of the transfer, but both the transferor and recipient must maintain detailed records documenting the transfer and the reason for the transfer for a period of five years as required by the Commission's rules. Additionally, as a reminder to all applicants, under section 54.516(a) of the Commission's rules, schools, libraries, and consortia are required to maintain asset and inventory records of equipment purchased and the actual locations of such equipment for a period of 10 years after purchase.

40. *Non-Instructional Facilities.* In the *2019 Category Two Notice,* the Commission noted that the cost allocation of the shared costs of a piece of equipment located in a non-instructional facility could be more easily handled in a district-wide category two budget because the district-wide approach relieves the burden of allocating costs among the budgets of eligible entities. Under the per-entity budget rules, district-wide applicants requesting funding for equipment that would be shared district-wide but housed in a non-instructional facility determined each school's use of the shared equipment as well as the non-instructional building's use of the shared equipment, deducted the cost of the non-instructional building's use of the shared equipment, and submitted funding requests from each school for each portion of eligible funding. USAC then reviewed each funding request to ensure that funding is only provided for equipment used by eligible entities. Under the district-wide budget approach adopted in this document, applicants will only need to deduct the cost of the non-instructional facility's use of the shared network equipment.

41. In response to the *2019 Category Two Notice,* commenters agreed that cost allocation of the use of shared equipment is burdensome, and requested that the Commission allow all buildings associated within a district or library system, including non-instructional facilities, to qualify for category two funding support because the category two budget places a ceiling on the amount that can be spent on category two services. The Commission declines to modify its rules regarding whether non-instructional facilities or the administrative buildings of libraries qualify for category two funding support. The district-wide budgets the Commission adopts in this document will reduce the administrative burden on applicants that use non-instructional facilities or other administrative buildings to house network equipment shared district-wide and will make it easier for USAC to review such requests by eliminating the need to allocate among eligible entities in a district. However, the Commission is not persuaded that the administrative burden associated with deducting the cost of the non-instructional building's use of shared network equipment warrants eliminating a rule designed to ensure that E-Rate support is only provided to eligible entities for eligible purposes. The relatively simple task of subtracting the cost of the non-instructional facility's use of the shared network element is unlikely to significantly burden either applicants or USAC. Accordingly, the Commission will continue to require applicants to deduct the cost of non-instructional facilities' use of shared equipment from their requests for E-Rate support, as required by the current rules.

42. In this document, the Commission extends the five-year test period for the category two budget approach through funding year 2020 and provide a prorated portion of category two funding for each applicant for that additional year. This approach ensures a smooth transition to the permanent rules effective in 2021 while providing applicants with sufficient funding to deploy internal connections in funding year 2020.

43. In the *2019 Category Two Notice,* the Commission sought comment on using funding year 2020 as a bridge year between the five-year test period and the permanent extension of the category two budget approach. The Commission has weighed the costs and benefits of attempting to allow applicants to begin requesting E-Rate program support for category two services under these permanent rules—including the district-wide approach it adopts in this document—in funding year 2020 and finds that the costs of doing so far outweigh the benefits. In particular, implementing new rules for funding year 2020 would likely cause delays in funding commitments, and USAC would likely need to conduct manual application reviews to accommodate any rule changes. The Commission therefore adopts rules extending the five-year test period by one additional year and provide prorated E-Rate support for funding year 2020 while the Bureau and USAC take the necessary steps to ensure effective implementation of the permanent rules beginning funding year 2021. By extending the test period into funding year 2020, and making additional category two support available during that funding year, the Commission provides needed certainty and predictability to E-Rate participants while allowing the Commission and USAC adequate time to implement and ensure a smooth transition to the permanent rules the Commission adopts in this document.

44. First, to implement the permanent rules, the Commission recognizes that they and USAC will need time to update (1) E-Rate program forms in compliance with the Paperwork Reduction Act; (2) USAC's IT systems, including the E-Rate Productivity Center (EPC), to track the district-wide and library system-wide budgets and ensure funding requests that are over budget are reduced; and (3) administrative processes, such as Program Integrity Assurance procedures, to ensure consistent review for all five years of the funding cycle. Implementing the Commission's new rules as quickly as possible will, at best, take them into next year before completion. While SECA and SHLB suggest that USAC perform manual workarounds, including performing manual calculations of district-wide and library-wide budgets, the Commission disagrees. Doing so would require USAC to make such calculations for approximately 50,000 schools. Moreover, manual review of applications in the first year of a five-year funding cycle introduces risks of improper payments and the potential

inability for USAC to properly track the category two budgets until the end of the funding cycle. Because these are fixed five-year budgets, any error that occurs in the first funding year has the potential to impact multiple funding years. Such an outcome would introduce further complexity and thus directly contradict the Commission's overall goal to simplify and streamline the category two budget approach.

45. Moreover, implementation of new rules has a strong potential to significantly delay the application filing window for funding year 2020. Despite the statements from some commenters that this months-long delay would be preferable to the community, the Commission finds that the potential harms, including delaying commitments for category one funding requests—which, this funding year, represented nearly $2 billion's worth of high-speed broadband service and equipment—are unacceptable. A delay in funding commitments would create delays in the deployment of E-Rate supported services, to the detriment of schools and libraries.

46. The Commission also is unpersuaded by arguments that extending the five-year test period will cause more confusion than rushing the implementation of the permanent rules with insufficient outreach to stakeholders. Instead, to give certainty to applicants in advance of the expected opening of the filing window for funding year 2020 and to smooth the transition to new, permanent rules, the Commission finds that the public interest would be served by an extension of the test period through funding year 2020. Since funding year 2015, over 90,000 schools and 4,900 libraries have used category two support to deploy Wi-Fi networks for the benefit of students and library patrons. The Commission largely makes no changes to how applicants should apply for support for category two services in funding year 2020, allowing applicants to move forward using their existing knowledge of the category two budget approach and providing an amount of funding equivalent to a single funding year's budget to aid applicants whose budgets would have ended in funding year 2019. The Commission also sets its clear guidance on the budget calculations for funding year 2021, allowing applicants to begin much-needed technology planning.

47. The Commission finds that the benefits of clear rules for funding year 2021 strongly outweigh the costs and risks associated with new rules implemented without adequate outreach to applicants and subsequent delays in funding commitments. By using funding year 2020 as a bridge to a permanent set of rules for category two services, the Commission will be able to ensure that the permanent rule changes are carefully and thoroughly implemented and administered, and that applicants are given a smooth transition period and notice for planning technology changes or upgrades. As a result of the Commission's extension of the test period, all applicants will continue to be able to request category two support under the existing category two budget approach in funding year 2020, and the Commission will not revert back to the two-in-five rules for any applicants.

48. The Commission provides a prorated portion of category two funding to all applicants in funding year 2020, which it will treat as a sixth year of the test period. In the *2014 First E-Rate Order,* the Commission established a pre-discount category two budget for schools of $150 per student over five funding years, or 20% of the total funding per student annually. Accordingly, in extending the five-year test period by an additional year, the Commission provides an additional 20% in funding to schools and libraries, as well as to the funding floor. The Commission directs the Bureau to release updates to the category two budget multipliers and funding floor for the test period, adjusted for inflation and proration and rounded to the nearest cent, consistent with the Order, within 15 days of publication of the Order in the **Federal Register**. As in previous years of the test period, the available category two funding that will be available to applicants in funding year 2020 will be the updated budget multipliers and funding floor that the Bureau calculates minus the category two funding that applicants spent earlier in the test period.[6]

49. This action will ensure that all applicants, including those who have exhausted their category two budgets or completed their five-year budget cycles, can request category two support in funding year 2020. While ALA argued against making additional funds available during a bridge year, the Commission finds providing support for this one funding year more equitable and appropriate than denying funding to applicants that in good faith managed their five-year budgets over a five-year period (and did not anticipate a sixth year).

[6] The Commission notes that this same calculation is applicable to applicants whose category two budget was reset based on relief the Commission granted in the *2017 Hurricane Relief Order,* 82 FR 55767, November 24, 2017.

50. Moreover, this approach is consistent with the Commission's intent in the *2014 First E-Rate Order* to provide approximately $1 billion per year in category two support to ensure applicants had access to funding for internal connections on a predictable, consistent, and equitable basis. Demand for category two services has tracked closely to this initial target. By providing a prorated portion of funding for funding year 2020, the Commission can make available approximately $1 billion for category two services, providing applicants with funding that may be needed to maintain their local area networks while the Commission transitions to permanent category two rules. The Commission also finds that providing a prorated portion of category two funding to all applicants treats all entities equitably because every entity will be eligible for the same amount of category two support during the six-year test period. Finally, this approach provides both applicants and USAC with a single calculation for all entities, which simplifies the administration in funding year 2020 for requesting and reviewing category two funding requests and reduces the chances of overpayments.

51. The Commission finds that good cause exists here to make those portions of the Order that codify the permanent eligibility of managed internal broadband services, caching, and basic maintenance of internal connections for support in funding year 2020 and beyond and the proration of budget multipliers and the funding floor for funding year 2020 effective upon publication in the **Federal Register**. A rule may be made effective prior to thirty days from publication in the **Federal Register** for good cause found and published with the rule. Here, to ensure that applicants have sufficient notice of the services that will be eligible and the prorated funding that will be available to them before they file their funding year 2020 applications, it is necessary to implement those portions of the Order as soon as possible following release of the Order. The filing window for E-Rate funding applications typically opens in mid-January each year to ensure adequate time for USAC to process such applications and issue funding commitments or denials. Therefore, in light of the need to enable the release of the Eligible Services List and notification of budget multipliers and the funding floor with sufficient time to make applicants aware of what services are eligible and the amount of support available before the opening of the filing

window, the Commission finds that good cause exists to make the portions of the Order addressing eligible services and proration of budget multipliers and the funding floor for funding year 2020 effective upon publication in the **Federal Register**. Moreover, making the eligibility of managed internal broadband service, caching, and basic maintenance of internal connections and the budget multipliers and a funding floor for funding year 2020 effective immediately will not impose any implementation burden on applicants given that these services were eligible and budget multipliers and a funding floor were used during the initial five-year test period.

52. In addition, to ensure that the application filing window for funding year 2020 is not unduly delayed by implementation of the Commission's decisions herein, it waives the requirement in section 54.502(d) of the Commission's rules that the Eligible Services List be released at least 60 days prior to the opening of the application filing window. Section 1.3 of the Commission's rules allows the Commission to waive a rule on its own motion for good cause shown. The Bureau may find it necessary to release the Eligible Services List less than 60 days before the opening of the application filing window to ensure that the filing window opens with enough time to allow USAC to process applications for funding year 2020. Applicants will benefit from this waiver because it will help to ensure that their applications are processed in a timely manner. The Commission finds that the adoption of the Order at this time and its impact on a number of eligible services constitute special circumstances that warrant waiver of the 60-day requirement, and that doing so is in the public interest.

III. Procedural Matters

A. Paperwork Reduction Analysis

53. This document contains new and modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. It will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies will be invited to comment on the new and modified information collection requirements contained in the proceeding. In addition, the Commission notes that pursuant to the Small Business Paperwork Relief Act of 2002, it previously sought specific comment on how the Commission might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.''

B. Congressional Review Act

54. The Commission has determined, and the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, concurs that this rule is ''non-major'' under the Congressional Review Act, 5 U.S.C. 804(2). The Commission will send a copy of the Order to Congress and the Government Accountability Office pursuant to 5 U.S.C. 801(a)(1)(A).

55. As required by the Regulatory Flexibility Act of 1980 (RFA), as amended, the Federal Communications Commission (Commission) included an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in the *2019 Category Two Notice* in WC Docket No. 13–184. The Commission sought written public comment on the proposals in the *2019 Category Two Notice,* including comment on the IRFA. The Commission did not receive any relevant comments in response to the IRFA. The Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

56. The Commission is required by Section 254 of the Communications Act of 1934, as amended, to promulgate rules to implement the universal service provisions of Section 254. On May 8, 1997, the Commission adopted rules to reform its system of universal service support mechanisms so that universal service is preserved and advanced as markets move toward competition. Specifically, under the schools and libraries universal service support mechanism, also known as the E-Rate program, eligible schools, libraries, and consortia that include eligible schools and libraries may receive discounts for eligible telecommunications services, internet access, and internal connections.

57. Taking steps to close the digital divide is a top priority for the Commission. The E-Rate program provides a vital source of support to schools and libraries, ensuring that students and library patrons across the nation have access to high-speed broadband and essential communications services. In the Order, the Commission permanently extends the category two budget approach and adopts several proposals that will reduce the burden on small entities, such as a move to district-wide or library-system wide budgets and fixed budget cycles to allow careful planning from E-Rate applicants. The Commission also extends the five-year test period for the category two budget approach for a sixth year to include funding year 2020 to provide funding for applicants in funding year 2020 while the Commission and USAC implement permanent rules for funding year 2021. During this funding year, with limited exceptions, the existing category two budget rules will continue to be in effect. Permanent rules for the category two budget approach to go into effect in funding year 2021.

58. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the rules, as adopted. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A small business concern is one that: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

59. *Small Businesses, Small Organizations, Small Governmental Jurisdictions.* The Commission's actions, over time, may affect small entities that are not easily categorized at present. The Commission therefore describes here, at the outset, three broad groups of small entities that could be directly affected herein. First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the SBA's Office of Advocacy, in general a small business is an independent business having fewer than 500 employees. These types of small businesses represent 99.9% of all businesses in the United States which translates to 28.8 million businesses.

60. Next, the type of small entity described as a ''small organization'' is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' Nationwide, as of August 2016, there were approximately 356,494 small organizations based on registration and tax data filed by nonprofits with the Internal Revenue Service (IRS).

61. Finally, the small entity described as a ''small governmental jurisdiction'' is defined generally as ''governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.'' U.S. Census Bureau

data from the 2012 Census of Governments indicate that there were 90,056 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States. Of this number there were 37,132 General purpose governments (county, municipal and town or township) with populations of less than 50,000 and 12,184 Special purpose governments (independent school districts and special districts) with populations of less than 50,000. The 2012 U.S. Census Bureau data for most types of governments in the local government category show that the majority of these governments have populations of less than 50,000. Based on this data the Commission estimates that at least 49,316 local government jurisdictions fall in the category of ''small governmental jurisdictions.''

62. The small entities that may be affected are Schools and Libraries, Telecommunications Service Providers, internet Service Providers (ISPs), and Vendors of Internal Connections.

63. The Commission expects that the rules adopted in the Order will result in modified reporting, recordkeeping, or other compliance requirements for small or large entities. The Order takes two major actions. First, it permanently extends the existing category two budget approach for all entities, while adopting a number of steps to simplify how applications for category two services are filed, reviewed, and ultimately invoiced beginning in funding year 2021. These changes will result in modifications to information collections that decrease the compliance costs for small entities. And, second, it adopts rules extending the current five-year funding cycle for one additional year into for funding year 2020 to ensure that support for category two services is available and funding for other services are not delayed. For the funding year 2020 rules, both small and large entities will apply for category two funding in the same manner as in previous years with no changes to reporting, recordkeeping, or other compliance requirements. The Commission does not believe that small entities will have to hire attorneys, engineers, consultants, or other professionals to comply.

64. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): ''(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.''

65. In the Order, the Commission has taken steps to minimize the economic impact on small entities with the rule changes that it has adopted by permanently extending the category two budget approach and working to simplify the administration of the budgets. In the following, the Commission outlines many of the adopted simplifications that will aid small entities in compliance.

66. *District-Wide or Library System-Wide Budgets.* The Commission adopts a rule providing that school districts and library systems shall calculate their budgets for the entire district or system, allowing applicants to use funds efficiently at the schools and libraries that need the funding. This dramatically reduces the requirements for the application review process, including, but not limited to, eliminating reporting of part-time students, eliminating complicated cost allocations for equipment that is shared by members of a district or system, and overall simplification of the application process from start to finish.

67. *Modification of the Equipment Transfer Rule.* In addition to the district- and system-wide budgets, the Commission amends its rule allowing districts and systems to transfer equipment among their own schools and libraries and eliminating the need to report such transfers to USAC. This removes a reporting requirement for all applicants, but keeps rules in place that requires schools and libraries to maintain asset inventories of all E-Rate supported equipment.

68. *Modification of the Library Budget Multiplier.* The Commission amends its rules to have a single library budget multiplier. Currently, there are two multipliers, depending on the urban status of the library. A single multiplier allows for a simpler calculation of the library budgets, streamlining the application and its review.

69. *Increase of the Funding Floor.* The Commission adopts an increase in the funding floor, which is aimed at encouraging participation by small entities. Many commenters argued that the burden of program compliance outweighed the benefit of receiving the current funding floor, which was also inadequate to meet their needs. Increasing the funding floor and simplifying the category two budget approach will allow more small entities to participate.

70. *Simplification of the Budget Calculation.* The Commission adopts fixed, five-year budgets that refresh every five years, eliminating the need for applicants and USAC to calculate the budgets annually with a series of different variables including inflation, changing student counts, and funding years at issue. This dramatically decreases the burden on applicants to calculate the budget and apply for E-Rate support.

71. The Order also extends the five-year test period for the category two budget approach into a sixth year and sets out the budget calculation in the Order to simplify how to calculate the amount of funding available to applicants in advance of the funding year 2020 filing window. While stakeholders advocated for a faster transition to the new rules as an alternative to rules for one funding year, the Commission finds that this approach causes the least disruption to the overall program and provides it and USAC with sufficient time and resources to successfully implement the many permanent changes the Commission adopts for funding year 2021. The Commission takes steps to minimize the burden of the funding year 2020 rules by simplifying the budget calculation slightly and otherwise maintaining current category two budget rules. As a result, there is no additional burden or cost to small entities because the program rules that are familiar to them are unchanged. Further, absent the rule changes in the Order, the category two budget rules would begin to sunset in funding year 2020, meaning that small entities would have to navigate two sets of rules. The rule changes in the Order prevent this sunsetting from taking place, thus preventing a potential source of burden and cost to small entities.

IV. Ordering Clauses

72. Accordingly, *it is ordered* that, pursuant to the authority contained in sections 1 through 4, 201 through 202, 254, 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 151–154, 201–202, 254, 303(r), and 403, the Order *is adopted*, and § 54.502(c) of the Commission's rules, 47 CFR 54.502(c), is *amended* as set forth in the following, and such rule amendments shall be effective thirty (30) days after the publication of the Order in the **Federal Register**, except amendments to the budget multipliers and funding floor, which shall be effective immediately and except to the extent expressly addressed in the following.

73. *It is further ordered,* that pursuant to the authority contained in sections 1 through 4, 201 through 202, 254, 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 151–154, 201–202, 254, 303(r), and 403, §§ 54.502(d)–(e) and 54.513(d) of the Commission's rules, 47 CFR 54.502(d)–(e) and 54.513(d), *are amended* as set forth in the following, effective upon announcement of approval by OMB under the Paperwork Reduction Act. The Commission directs the Bureau to announce the effective date for these information collections in a document published in the **Federal Register** announcing OMB approval.

74. *It is further ordered* that, pursuant to the authority contained in sections 1 through 4, 201 through 202, 254, 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 151–154, 201–202, 254, 303(r), and 403, sections of the Order addressing eligible services and proration of budgets for funding year 2020 in paragraphs 35, 36, and 48 *shall become effective* immediately upon publication of the Order in the **Federal Register**, pursuant to 5 U.S.C. 553(d)(3); and 47 CFR 1.427(b).

75. *It is further ordered,* that pursuant to the authority contained in sections 1 through 4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. 151–154 and 254, and pursuant to the authority in § 1.3 of the Commission's rules, 47 CFR 1.3, that § 54.502(d), 47 CFR 54.502(d) *is waived,* and such waiver *shall become effective* upon release.

List of Subjects in 47 CFR Part 54

Communications common carriers, Health facilities, Infants and children, Internet, Libraries, Reporting and recordkeeping requirements, Schools, Telecommunications, Telephone.

Federal Communications Commission.

Marlene Dortch,

Secretary.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 54 as follows:

PART 54—UNIVERSAL SERVICE

Subpart F—Universal Service Support for Schools and Libraries

■ 1. The authority citation for part 54 continues to read as follows:

Authority: Sections 1, 4(i), 5, 201, 205, 214, 219, 220, 254, 303(r), and 403 of the Communications Act of 1934, as amended, and section 706 of the Communications Act of 1996, as amended; 47 U.S.C. 151, 154(i), 155, 201 205, 214, 219, 220, 254, 303(r), 403, and 1302 unless otherwise noted.

■ 2. Amend § 54.502 by revising paragraph (c) and redesignating paragraph (d) as paragraph (e) and adding new paragraph (d) to read as follows:

§ 54.502 Eligible services.

* * * * *

(c) *Funding year 2020.* Libraries, schools, or school districts with schools that receive funding for category two services in funding year 2020 shall be eligible for support for category two services pursuant to paragraphs (c)(1) through (6) of this section.

(1) *Six-year funding cycle.* Each eligible school or library shall be eligible for a budgeted amount of support for category two services over a six-year funding cycle. Each school or library shall be eligible for the total available budget less the pre-discount amount of any support received for category two services in the prior funding years of that school's or library's six-year funding cycle.

(2) *School budget.* Each eligible school shall be eligible for support for category two services up to a pre-discount price of $150 plus an additional prorated 20% (adjusted for inflation dating back to funding year 2015) over six funding years that will be completed at the end of funding year 2020. Applicants shall provide the student count per school, calculated at the time that the discount is calculated each funding year. New schools may estimate the number of students but shall repay any support provided in excess of the maximum budget based on student enrollment the following funding year.

(3) *Library budget.* Each eligible library located within the Institute of Museum and Library Services locale codes of ''11—City, Large,'' defined as a territory inside an urbanized area and inside a principal city with a population of 250,000 or more, ''12—City, Midsize,'' defined as a territory inside an urbanized area and inside a principal city with a population less than 250,000 and greater than or equal to 100,000, or ''21—Suburb, Large,'' defined as a territory outside a principal city and inside an urbanized area with population of 250,000 or more, shall be eligible for support for category two services, up to a pre-discount price of $5.00 per square foot plus an additional prorated 20% (adjusted for inflation dating back to funding year 2015) over six funding years that will be completed at the end of funding year 2020. All other eligible libraries shall be eligible for support for category two services, up to a pre-discount price of $2.30 per square foot plus an additional prorated 20% (adjusted for inflation dating back to funding year 2015) over a six-year funding cycle that will be completed at the end of funding year 2020. Libraries shall provide the total area for all floors, in square feet, of each library outlet separately, including all areas enclosed by the outer walls of the library outlet and occupied by the library, including those areas off-limits to the public.

(4) *Funding floor.* Each eligible school and library will be eligible for support for category two services of at least a pre-discount price of $9,200 plus an additional prorated 20% (adjusted for inflation dating back to funding year 2015) over six funding years that will be completed at the end of funding year 2020.

(5) *Requests.* Applicants shall request support for category two services for each school or library based on the number of students per school building or square footage per library building. Category two funding for a school or library may not be used for another school or library. The costs for category two services shared by multiple eligible entities shall be divided reasonably between each of the entities for which support is sought in that funding year.

(6) *Non-instructional buildings.* Support is not available for category two services provided to or within non-instructional school buildings or separate library administrative buildings unless those category two services are essential for the effective transport of information to or within one or more instructional buildings of a school or non-administrative library buildings, or the Commission has found that the use of those services meets the definition of educational purpose, as defined in § 54.500. When applying for category two support for eligible services to a non-instructional school building or library administrative building, the applicant shall allocate the cost of providing services to one or more of the eligible school or library buildings that benefit from those services being provided.

(d) *Funding year 2021 and beyond.* Schools, school districts, libraries, and library systems shall be eligible for support for category two services pursuant to the five-year budgets described in paragraphs (d)(1) through (6) of this section.

(1) *Fixed five-year funding cycle.* Beginning in funding year 2021, each eligible school, school district, library, or library system shall be eligible for a budgeted amount of pre-discount support for category two services over a five-year funding cycle that will reset in

funding year 2026 and subsequently, after every five funding years. Each school, school district, library, or library system shall be eligible for the total available budget less the pre-discount amount of any support received for category two services in the prior funding years of that fixed five-year funding cycle.

(2) *School and school district multipliers.* Each eligible school district and schools operating independently of a school district shall be eligible for support for category two services up to a pre-discount price of $167 per student over a five-year funding cycle. The amount of support will be calculated at the time that the discount is calculated in the first funding year of the five-year cycle in which the applicant requests category two support, unless the school or school district elects to seek additional program support using updated enrollment numbers in subsequent funding years in the five-year cycle. School districts shall provide the total number of students within the school district. Independent charter schools, private schools, and other eligible educational facilities that operate under the control of a central administrative agency shall provide the total number of students under the control of that agency. Schools that are not affiliated financially or operationally with a school district or central administrative agency shall provide the total number of students in the school.

(3) *Library and library system multipliers.* Library systems and libraries operating independently of a system shall be eligible for support for category two services, up to a pre-discount price of $4.50 per square foot over a five-year funding cycle. The amount of support will be calculated at the time that the discount is calculated in the first funding year of the five-year cycle in which the applicant requests category two support, unless the library or library system elects to seek additional program support using updated square footage in subsequent funding years in the five-year cycle. Library systems shall provide the total area for all floors, in square feet, of all of its library outlets, including all areas enclosed by the outer walls of the library outlet and occupied by the library, including those areas off-limits to the public. Independent libraries shall provide the total area for all floors, in square feet, of all areas enclosed by the outer walls of the library outlet and occupied by the library, including those areas off-limits to the public.

(4) *Funding floor.* Each eligible school and library shall be eligible for support for category two services of at least a pre-discount price of $25,000 over five funding years.

(5) *Calculation increase.* Before funding year 2026 and every subsequent five-year funding cycle, the Wireline Competition Bureau shall announce the multipliers and funding floor as adjusted for inflation at least 60 days before the start of the filing window for the next five-year funding cycle. The Bureau shall use the last four quarters of data on the Gross Domestic Product Chain-type Price Index (GDP–CPI) compared with the equivalent quarters from the beginning of the five-year funding cycle. The increase shall be rounded to the nearest 0.1 percent and shall be used to calculate the category two budget multipliers and funding floor for that five-year funding cycle. The multipliers and funding floor shall be rounded to the nearest cent.

(6) *Non-instructional buildings.* Support is not available for category two services provided to or within non-instructional school buildings or separate library administrative buildings unless those category two services are essential for the effective transport of information to or within one or more instructional buildings of a school or non-administrative library buildings, or the Commission has found that the use of those services meets the definition of educational purpose, as defined in § 54.500. When applying for category two support for eligible services to a non-instructional school building or library administrative building, the applicant shall deduct the cost of the non-instructional building's use of the category two services or equipment.

(e) *Eligible services list process.* The Administrator shall submit by March 30 of each year a draft list of services eligible for support, based on the Commission's rules for the following funding year. The Wireline Competition Bureau will issue a Public Notice seeking comment on the Administrator's proposed eligible services list. The final list of services eligible for support will be released at least 60 days prior to the opening of the application filing window for the following funding year.

■ 3. Amend § 54.513 by revising paragraph (d) to read as follows:

§ 54.513 Resale and transfer of services.

* * * * *

(d) Eligible services and equipment components of eligible services purchased at a discount under this subpart shall not be transferred, with or without consideration of money or any other thing of value, for a period of three years after purchase, except that eligible services and equipment components of eligible services may be transferred to another eligible school or library in the event that the particular location where the service originally was received is permanently or temporarily closed, or is part of the same eligible school district or library system as the location receiving the eligible services or equipment components of eligible services. If an eligible service or equipment component of a service is transferred pursuant to this paragraph, both the transferor and recipient must maintain detailed records documenting the transfer and the reason for the transfer for a period of five years.

[FR Doc. 2019–27219 Filed 12–19–19; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MB Docket Nos. 17–105, 18–202, FCC 19–67; FRS 16308]

Children's Television Programming Rules

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 collections associated with the rules adopted in the *Report and Order* in MB Docket Nos. 18–202 and 17–105, FCC 19–67, *In the Matter of Children's Television Programming Rules; Modernization of Media Regulation Initiative,* which stated that the Commission would publish a document in the **Federal Register** announcing the effective date of those rules.

DATES: The amendments to 47 CFR 73.671(c)(5) and (7) and (e)(1) and (2) (amendatory instruction 3), 73.673 (amendatory instruction 4), and 73.3526(e)(11)(ii) and (iii) (amendatory instruction 5) published at 84 FR 41917, August 16, 2019, are effective January 21, 2020.

FOR FURTHER INFORMATION CONTACT: Kathy Berthot, *Kathy.Berthot@fcc.gov,* Media Bureau, Policy Division, at (202) 418–7454, or email: *kathy.berthot@fcc.gov.*

SUPPLEMENTARY INFORMATION: This document announces that OMB approved the information collection requirements in §§ 73.671(c)(5) and (7) and (e)(1) and (2), 73.673, and

73.3526(e)(11)(ii) and (iii) on December 3, 2019 and December 5, 2019. These rules were modified in the *Report and Order* in MB Docket Nos. 18–202 and 17–105, FCC 19–67, *In the Matter of Children's Television Programming Rules; Modernization of Media Regulation Initiative,* published 84 FR 41917, August 16, 2019. The Commission publishes this document as an announcement of the compliance date of the rules. The other rule amendments adopted in the *Report and Order,* which did not require OMB approval, became effective on September 16, 2019.

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, regarding OMB Control Numbers 3060–0214, 3060–0316, 3060–0750, and 3060–1065. Please include the applicable OMB Control Number(s) 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 and December 5, 2019, for the information collection requirements contained in §§ 73.671(c)(5) and (7) and (e)(1) and (2), 73.673, and 73.3526(e)(11)(ii) and (iii). 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 Numbers for the information collection requirements in these rules are 3060–0214, 3060–0316, 3060–0750, and 3060–1065.

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: 3060–0214.

OMB Approval Date: December 3, 2019.

OMB Expiration Date: December 31, 2022.

Title: Sections 73.3526 and 73.3527, Local Public Inspection Files; Sections 73.1212, 76.1701 and 73.1943, Political Files.

Form Number: N/A.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities; Not for profit institutions; State, Local or Tribal government; Individuals or households.

Number of Respondents: 23,984 respondents; 62,839 responses.

Estimated Time per Response: 1–52 hours.

Frequency of Response: On occasion reporting requirement, Recordkeeping requirement, Third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for these collections is contained in Sections 151, 152, 154(i), 303, 307 and 308 of the Communications Act of 1934, as amended.

Total Annual Burden: 2,043,805 hours.

Total Annual Cost: None.

Privacy Impact Assessment: The Commission prepared a system of records notice (SORN), FCC/MB–2, ''Broadcast Station Public Inspection Files,'' that covers the PII contained in the broadcast station public inspection files located on the Commission's website. The Commission will revise appropriate privacy requirements as necessary to include any entities and information added to the online public file in this proceeding.

Nature and Extent of Confidentiality: Most of the documents comprising the public file consist of materials that are not of a confidential nature. Respondents complying with the information collection requirements may request that the information they submit be withheld from disclosure. If confidentiality is requested, such requests will be processed in accordance with the Commission's rules, 47 CFR 0.459.

In addition, the Commission has adopted provisions that permit respondents subject to the information collection requirement for Shared Service Agreements to redact confidential or proprietary information from their disclosures

Needs and Uses: On July 10, 2019, the Commission adopted a *Report and Order* in MB Docket Nos. 18–202 and 17–105, FCC 19–67, *In the Matter of Children's Television Programming Rules; Modernization of Media Regulation Initiative,* which modernizes the children's television programming rules in light of changes to the media landscape that have occurred since the rules were first adopted. The *Report and Order* revises the following information collection requirements:

Pursuant to 47 CFR 73.3526(e)(11)(ii), commercial TV and Class A TV broadcast stations must maintain records sufficient to permit substantiation of the station's certification, in its license renewal application, of compliance with the commercial limits on children's programming established in 47 U.S.C. Section 303a and 47 CFR 73.670. In the *Report and Order,* the Commission revises this rule to permit these stations to place such records in their public files annually rather than quarterly and to permit the filing of these records within 30 days after the end of the calendar year. The Commission also revises 47 CFR 73.3526(e)(11)(iii) to require commercial television stations to place in their public files the Children's Television Programming Report (Report) (FCC Form 2100 Schedule H) on an annual rather than quarterly basis, within 30 days after the end of the calendar year and to eliminate the requirement to publicize the existence and location of the Report.

All other information collection requirements contained under 47 CFR 73.1212, 73.3526, 73.3527, 73.1943, and 76.1701 are still a part of the information collection and remain unchanged since last approved by OMB.

OMB Control Number: 3060–0316.

OMB Approval Date: December 3, 2019.

OMB Expiration Date: December 31, 2022.

Title: 47 CFR 76.5, Definitions, 76.1700, Records to Be Maintained Locally by Cable System Operators; 76.1702, Equal Employment Opportunity; 76.1703, Commercial Records on Children's Programs; 76.1707, Leased Access; 76.1711, Emergency Alert System (EAS) Tests and Activation.

Form Number: N/A.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents: 3,000 respondents/3,000 responses.

Estimated Time per Response: 14 hours.

Frequency of Response: Recordkeeping requirements.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this information collection is contained in sections 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573 of the Communications Act of 1934, as amended.

Total Annual Burden: 42,000 hours.

Total Annual Cost: None.

Privacy Impact Assessment: No impacts.

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Needs and Uses: On July 10, 2019, the Commission adopted a *Report and Order* in MB Docket Nos. 18–202 and 17–105, FCC 19–67, *In the Matter of Children's Television Programming Rules; Modernization of Media Regulation Initiative,* which modernizes the children's television programming rules in light of changes to the media landscape that have occurred since the rules were first adopted. The *Report and Order* revises the following information collection requirements:

Pursuant to 47 CFR 76.1703, cable operators that air children's programming must maintain records sufficient to verify compliance with 47 CFR 76.225 and make such records available to the public. Such records must be maintained for a period sufficient to cover the limitations period specified in 47 U.S.C. Section 503(b)(6)(B). In the *Report and Order,* the Commission revises the rules to permit cable television operators to file their certifications of compliance with the commercial limits in children's programming annually rather than quarterly and to permit the filing of these certifications within 30 days after the end of the calendar year.

All other information collection requirements contained under 47 CFR 76.5, 76.1700, 76.1702, 76.1703, 76.1707, and 76.1711 are still a part of the information collection and remain unchanged since last approved by OMB.

OMB Control Number: 3060–0750.

OMB Approval Date: December 5, 2019.

OMB Expiration Date: December 31, 2022.

Title: 47 CFR 73.671, Educational and Informational Programming for Children; 47 CFR 73.673, Public Information Initiatives Regarding Educational and informational Programming for Children.

Form Number: N/A.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents: 1,770 respondents/1,125,720 responses.

Estimated Time per Response: 0.017–0.084 hours.

Frequency of Response: Third-party disclosure requirements.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this collection is contained in Sections 154(i), 303, and 336 of the Communications Act of 1934, as amended.

Total Annual Burden: 57,560 hours.

Total Annual Cost: None.

Privacy Impact Assessment: No impacts.

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Needs and Uses: On July 10, 2019, the Commission adopted a *Report and Order* in MB Docket Nos. 18–202 and 17–105, FCC 19–67, *In the Matter of Children's Television Programming Rules; Modernization of Media Regulation Initiative,* which modernizes the children's television programming rules in light of changes to the media landscape that have occurred since the rules were first adopted. The *Report and Order* revises the following information collection requirements:

Pursuant to 47 CFR 73.671(c)(5), each commercial television broadcast station must identify programming as specifically designed to educate and inform children by the display on the television screen throughout the program of the symbol E/I. This requirement is intended to assist parents in identifying educational and informational programming for their children. Noncommercial television broadcast stations are no longer be required to identify Core Programming by displaying the E/I symbol throughout the program.

Pursuant to 47 CFR 73.671(e), each television broadcast station that preempts an episode of a regularly scheduled weekly Core Program on its primary stream will be permitted to count the episode toward the Core Programming processing guidelines if it reschedules the episode on its primary stream in accordance with the requirements of 47 CFR 73.671(e). Similarly, each television broadcast station that preempts an episode of a regularly scheduled weekly Core Program on a multicast stream will be permitted to count the episode toward the Core Programming processing guidelines if it reschedules the episode on the multicast stream in accordance with the requirements of 47 CFR 73.671(e). Among other requirements, the station must make an on-air notification of the schedule change during the same time slot as the preempted episode. The on-air notification must include the alternate date and time when the program will air. This requirement will help to ensure that parents and children are able to locate the rescheduled program.

Pursuant to 47 CFR 73.673, each commercial television broadcast station licensee must provide information identifying programming specifically designed to educate and inform children to publishers of program guides. This requirement is intended to improve the information available to parents regarding programming specifically designed for children's educational and informational needs. Commercial television broadcast station licensees are no longer be required to provide program guide publishers an indication of the age group for which the programming is intended. The *Report and Order* finds that very few program guides include this information.

OMB Control Number: 3060–1065.

OMB Approval Date: December 3, 2019.

OMB Expiration Date: December 31, 2022.

Title: Section 25.701 of the Commission's Rules, Direct Broadcast Satellite Public Interest Obligations.

Form Number: N/A.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents: 2 respondents; 2 responses.

Estimated Time per Response: 1–10 hours.

Frequency of Response: Recordkeeping requirement; on occasion reporting requirement; one-time reporting requirement; annual reporting requirement; Third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority which covers this information collection is contained in Section 335 of the Communications Act of 1934, as amended.

Total Annual Burden: 48 hours.

Total Annual Cost: None.

Privacy Impact Assessment: No impacts.

Nature and Extent of Confidentiality: Although the Commission does not believe that any confidential information will need to be disclosed in order to comply with the information

collection requirements, applicants are free to request that materials or information submitted to the Commission be withheld from public inspection. (See 47 CFR 0.459).

Needs and Uses: On July 10, 2019, the Commission adopted a *Report and Order* in MB Docket Nos. 18–202 and 17–105, FCC 19–67, *In the Matter of Children's Television Programming Rules; Modernization of Media Regulation Initiative,* which modernizes the children's television programming rules in light of changes to the media landscape that have occurred since the rules were first adopted. The *Report and Order* revises the following information collection requirements:

Pursuant to 47 CFR 25.701(e)(3), DBS providers that air children's programming must maintain records sufficient to verify compliance with this rule and make such records available to the public. Such records must be maintained for a period sufficient to cover the limitations period specified in 47 U.S.C. Section 503(b)(6)(B). In the *Report and Order,* the Commission revises the rules to permit DBS operators to file their certifications of compliance with the commercial limits in children's programming annually rather than quarterly and to permit the filing of these certifications within 30 days after the end of the calendar year.

All other information collection requirements contained under 47 CFR 25.701 are still a part of the information collection and remain unchanged since last approved by OMB.

Federal Communications Commission.

Marlene Dortch,

Secretary.

[FR Doc. 2019–27390 Filed 12–19–19; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 216 and 300

[Docket No. 191203–0099]

RIN 0648–BH48

International Fisheries; Pacific Tuna Fisheries; Procedures for the Active and Inactive Vessel Register

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

ACTION: Final rule.

SUMMARY: NMFS is issuing regulations under the Tuna Conventions Act of 1950 (TCA), as amended, and Marine Mammal Protection Act (MMPA), as amended, to implement International Maritime Organization (IMO) requirements in Inter-American Tropical Tuna Commission (IATTC) Resolution C–18–06 (*Resolution (Amended) on a Regional Vessel Register*) and amendments to existing regulations governing inclusion on the IATTC Regional Vessel Register (Vessel Register) by purse seine vessels fishing in the eastern Pacific Ocean (EPO). This final rule would expand the IMO number requirements to include certain categories of smaller U.S. vessels fishing for tuna and tuna-like species in the EPO. This final rule would also relax the restrictions on retention of incidental catch by purse seine vessels. These revisions would provide more clarity and make U.S. regulations more consistent with the IATTC management framework, while allowing controlled operational flexibility for the U.S. industry.

DATES: The final rule is effective January 21, 2020, except for amendatory instructions 2 and 6, which are delayed. NMFS will publish a document in the **Federal Register** announcing the effective date.

ADDRESSES: Copies of supporting documents are available via the Federal eRulemaking Portal: *http://www.regulations.gov,* docket NOAA–NMFS–2018–0030, or by contacting Daniel Studt, NMFS West Coast Region, 501 W Ocean Blvd., Suite 4200, Long Beach, CA 90802, or emailing *WCR.HMS@noaa.gov.*

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this rule may be submitted to the NMFS West Coast Region Long Beach Office at the address listed above, by email to *OIRA_Submission@omb.eop.gov,* or by fax to (202) 395–5806.

FOR FURTHER INFORMATION CONTACT: Daniel Studt, NMFS, West Coast Region, 562–980–4073.

SUPPLEMENTARY INFORMATION:

Background

On April 16, 2019, NMFS published a proposed rule in the **Federal Register** (84 FR 15556) to implement IMO requirements in IATTC Resolution C–18–06, amendments to existing regulations related to the Vessel Register, and prohibition and incidental catch provisions for purse seine vessels fishing in the EPO. The 30-day public comment period for the proposed rule closed on May 16, 2019. Two comments were received and are addressed below. NMFS is finalizing the rule as proposed, except for minor revisions in response to comments, as described below. The preamble to the proposed rule contains additional background information, including information on the IATTC, the international obligations of the United States as an IATTC member, and the need for regulations.

This final rule is implemented under authority of the TCA (16 U.S.C. 951 *et seq.*) and MMPA (16 U.S.C. 1361 *et seq*). The authority of the Secretary of Commerce to promulgate such regulations has been delegated to NMFS. This rule implements IMO requirements of IATTC Resolution C–18–06 and amends several regulations that govern listing of U.S. commercial fishing vessels on the IATTC Vessel Register for vessels that fish for tuna or tuna-like species in the IATTC Convention Area (Convention Area). The Convention Area is defined as waters of the EPO within the area bounded by the west coast of the Americas and by 50° N latitude, 150° W longitude, and 50° S latitude. NMFS notes that some of the requirements described below that include new or revised information collections (*i.e.,* those contained in amendatory sections 2 and 6) will become effective upon further publication of an effective date in the **Federal Register**.

New Requirements

IMO Numbers

This final rule requires that the owner of a fishing vessel of the United States engaging in fishing activities for tuna or tuna-like species in the Convention Area, and for which a high seas fishing permit under 50 CFR 300.333 is required, shall ensure that an IMO number has been issued for the vessel if the vessel's total internal volume is less than 100 gross registered tons (GRT) or less than 100 gross tons (GT) but equal to or greater than 12 meters in overall length. Vessel measurements are based on the vessel's Certificate of Documentation issued under 46 CFR part 67, or State documentation. Currently, IMO numbers are issued on behalf of the IMO by IHS Markit, formerly known as IHS Maritime, at no cost to the vessel owner (*https://imonumbers.lrfairplay.com/*). The instructions for requesting an exemption at 50 CFR 300.22(b)(3)(iv) also apply to the vessels subject to this requirement.

Purse Seine Well Volume Capacity Correction

This final rule makes a technical correction to the vessel capacity limit for the U.S. tuna purse seine fishery

operating in the EPO, to ensure the limit is consistent with the amount authorized by the IATTC. This adds 91 cubic meters to the current U.S. fleet capacity limit of 31,775 cubic meters, bringing the limit to 31,866 cubic meters. The additional 91 cubic meters of capacity is a result of an IATTC revision to the historical U.S. fleet capacity.

Inactive Vessels on the Vessel Register

This final rule updates the regulations to clarify that purse seine vessels listed as inactive or sunk on the Vessel Register count towards the United States' 31,866 cubic meter fleet-wide capacity limit.

Additionally, this final rule sets a time limit of 2 consecutive calendar years for vessels holding inactive or sunk status, after which a request by such a vessel to be listed on the Vessel Register would be subject to the prioritization hierarchy at 50 CFR 300.22(b)(4)(v) as added by this rule. Requests for listing on the Vessel Register for the following year received between August 1 and November 30 will be prioritized in the following order: Currently active, currently inactive, first-come first-served, and, lastly, those who made a frivolous request, as described below, or were listed as inactive or sunk for more than two consecutive calendar years. This revision is consistent with the intent of the inactive status provision (*i.e.,* to allow for vessel replacement or repair while not paying a full active vessel assessment fee), while preventing an indefinite hold on capacity.

This final rule allows an owner or managing owner of a purse seine vessel that has sunk but is listed as active on the Vessel Register to request the vessel be listed as sunk and categorized as inactive on the Vessel Register within 30 days of its sinking. Previous regulations required sunken vessels to be immediately removed from the Vessel Register. Under this final rule, if a request is not made to list the vessel as sunk within 30 days of its sinking, the vessel may be removed from the Vessel Register by the NMFS West Coast Regional Administrator.

Frivolous Request Requirements for Small Purse Seiner Vessels

A request for a small purse seine vessel (*i.e.,* vessel with a carrying capacity of 400 short tons (362.8 metric tons) or less) to be listed as active on the Vessel Register for the following year will be considered frivolous if both of the following conditions apply: (1) The vessel has been listed as active during current and previous calendar years; and (2) the vessel has not landed tuna caught in the Convention Area in the calendar year prior to the request through November 15th of the year in which the request is made. For example, a request for active status made in 2019 to fish in 2020 for a small purse seine vessel that has already been on the active list of the Vessel Register for two calendar years or more would require one landing of tuna between January 1, 2018, and November 15, 2019, or the request would be considered frivolous. If a small purse seine vessel meets the two conditions described above and requests active status on the Vessel Register, the request is considered frivolous and subject to the prioritization hierarchy of requests under 50 CFR 300.22(b)(4)(v). This will prioritize inclusion on the Vessel Register of vessels that are actively fishing and landing tuna. The frivolous request provision for small purse seine vessels allows considerations of force majeure or other extraordinary circumstances that may have prevented a vessel from making a landing during the two year time period. Extraordinary circumstances may include lack of tuna availability, or other unique situations as determined by the Regional Administrator. If the Regional Administrator determines that extraordinary circumstances prevented a vessel from making a landing, the frivolous request provision would not apply and the vessel may be listed on the Vessel Register.

Revisions to Regulations on Bycatch

This final rule revises the regulatory text at 50 CFR 300.24(f) and (g) and 300.27(b) to be more consistent with IATTC Resolution C–04–05. For example, in 50 CFR 300.24(f) and 300.27(b), this final rule amends the release requirements so that they no longer apply to tuna-like species. Exempting tuna-like species from the release requirement allows purse seine vessels to retain tuna-like species, such as Pacific bonito and black skipjack, while remaining consistent with the goal of the Resolution to conserve non-target species. The prohibition on landing non-tuna species is also removed from 50 CFR 300.24(g) to allow for the landing of tuna-like species. Purse seine vessels are still prohibited from landing non-tuna species, other than tuna-like species, because the prohibition on failing to release any non-tuna species other than tuna-like species remains in 50 CFR 300.24(f) and 50 CFR 300.27(b). The continued requirement to release fish other than tuna and tuna-like species, and those retained for consumption on board the vessel, is necessary to comply with the Resolution and to promote the conservation of such species.

Advance Notice of Vessel Departure

This final rule amends the 5-day advance notice of vessel departure requirement under 50 CFR 216.24(b)(8)(iv)(A) for purposes of facilitating use of the EPO tuna fleet capacity. If a vessel would like to use an IATTC and Western and Central Pacific Fisheries Commission (WCPFC) cross-endorsed observer when fishing in the IATTC Convention Area, the notification must also include a request for the placement of a cross-endorsed observer pursuant to the Memorandum of Cooperation between the IATTC and WCPFC.

Vessel Assessment Fees, Notifications to NMFS, and Housekeeping Revisions

This final rule amends regulatory text at 50 CFR 300.22(b)(4)(i), 300.22(b)(4)(iii), 216.24(b)(6)(iii) and 216.24(b)(8) to clarify that vessel owners must coordinate with NMFS to pay the vessel assessment fee directly to the IATTC, and not to NMFS. As established by the IATTC and implemented in existing regulations, the vessel assessment fee supports maintenance of the observer program and the placement of observers on tuna purse seine vessels.

This final rule also amends notification requirements to facilitate requests for active and inactive status on the Vessel Register. A business email address is now required, to assist in communications between NMFS and vessel owners. NMFS does not specify which notification method to use in sending requests for active status, or requests under the aging fleet provision, to the NMFS West Coast Regional Administrator. Written notifications not related to payment of the vessel assessment fee or permit applications are directed to the Highly Migratory Species (HMS) Branch of the NMFS West Coast Region to facilitate communication. The HMS Branch definition in 50 CFR 300.21 is amended to include the branch email address, *wcr.hms@noaa.gov.*

Regulations at 50 CFR 216.24(b)(4) will now specify that applicants have the option of submitting eastern tropical Pacific Ocean (ETP) vessel permit applications to NMFS by either fax, email, or via an online application including online payment by credit card as described below.

This final rule amends text in 50 CFR 300.22(b)(7) to clarify that the carrying capacity of inactive purse seine vessels is counted towards the U.S. fleet

capacity limit, for reasons explained above. Text in 50 CFR 300.22(b)(1) is also amended to clarify that the vessel carrying capacity of a purse seine vessel that is permitted and authorized under an alternative international tuna purse seine fisheries management regime in the Pacific Ocean and authorized to exercise an option to fish with purse seine gear to target tuna in the Convention Area is not counted towards the U.S. carrying capacity limit. This rule further clarifies that any vessel exercising this single trip exception must follow the procedures described in 50 CFR 300.22(b)(4), where applicable.

The regulatory text of the proposed rule included a revision to the definition of *tuna* at 50 CFR 300.21, which is currently defined as any fish of the genus Thunnus and the species *Euthynnus (Katsuwonus)* pelamis. NMFS did not explain this proposed revision in the preamble to the proposed rule, which was an oversight. NMFS is revising the definition of *tuna* to any fish of the genus Thunnus and the species *Katsuwonus pelamis,* removing the reference to *Euthynnus* because *Euthynnus* is no longer commonly used by taxonomers. The revision to the definition is a technical correction, and has no effect on the regulated community or fishery resources.

This final rule also removes the phrase ''Eastern Pacific Fisheries'' from the section headings for 50 CFR 300.22 and 50 CFR 300.23, because the heading for 50 CFR part 300, subpart C, clearly identifies that the entire subpart deals with ''Eastern Pacific Tuna Fisheries.''

This final rule also reorganizes, and amends, 50 CFR 300.22(b)(4) and 50 CFR 300.22(b)(7) to implement changes to purse seine Vessel Register listings and procedures for replacing purse seine vessels removed from the Vessel Register, as described above.

Public Comments and Responses

NMFS received comments from two entities during the 30-day comment period of the proposed rule. The summarized comments from both entities and NMFS' responses are below. Changes made to the proposed regulatory text in response to these comments may be found in the following section.

Comment 1: One commenter expressed concern that the aging fleet provision does not address a situation where the replacement vessel has a greater carrying capacity than the vessel it is replacing, and noted that vessel owners may wish to replace with a larger vessel. The commenter suggested that the replacement vessel should be granted priority for the same capacity that the existing vessel had on the Vessel Register, but noted that if there was available capacity, the replacement vessel should be eligible to request the use of this capacity. The commenter further noted that a replacement vessel could seal off wells to reduce the carrying capacity of the vessel, as permitted by the IATTC, until there was enough carrying capacity available to accommodate opening of those wells.

Response: NMFS understands that vessel owners may wish to purchase larger replacement vessels and agrees that any replacement vessels should only be granted priority use of the capacity that the existing vessel previously held. NMFS has changed the proposed regulatory text such that the regulatory text would now state that replacement vessels may have a carrying capacity greater than the vessel being replaced, but that the replacement vessel must have wells sealed in accordance with the protocol adopted by the IATTC, prior to being granted active status, such that the carrying capacity is equal to or less than that granted to the vessel it is replacing. The current IATTC protocol for sealing wells is described in IATTC Resolution C–12–08 (*Protocol for sealing wells on purse-seine vessels*). If additional carrying capacity becomes available, the replacement vessel may request additional carrying capacity subject to the prioritization hierarchy of requests as described in 50 CFR 300.22(b)(4)(v). NMFS notes that the vessel assessment required for listing a vessel as active or inactive on the Vessel Register may be based on the volume of both sealed and non-sealed vessel wells.

Comment 2: The second commenter suggested that vessel owners should not have to commit to fishing in the Convention Area before leaving port in response to the advanced notice of vessel departure requirement revision.

Response: An advanced notice of a vessel's departure to fish in the Convention Area has been a requirement since 2004 (69 FR 55288, September 13, 2004) and the rationale for this notice remains unchanged. Large purse seine vessels (*i.e.,* vessels with a carrying capacity of more than 400 short tons (362.8 metric tons)), and certain other vessels fishing in the Convention Area are obligated to carry an approved observer, and the advanced notice of departure facilitates the placement of an approved observer onboard the vessel. If an advanced notice of departure is not received, then the placement of an IATTC-approved observer could not occur. The new requirement to supplement the vessel departure notification with the request for a cross-endorsed observer if the vessel intends to also fish in both the IATTC and Western and Central Pacific Fisheries Commission (WCPFC) Convention Areas during the same trip further facilitates the placement of such an approved observer. There are a limited number of cross-endorsed observers (those approved to observe in both the IATTC and WCPFC Convention Areas) and it benefits the fleet to coordinate placement of such observers on vessels fully authorized and intending to fish in both Convention areas, so as not to require the placement of two approved observers (*i.e.,* one for each Convention Area).

Comment 3: The second commenter also requested the ability to apply for an eastern tropical Pacific Ocean (ETP) vessel permit online and for the ability to pay for the permit with a credit card.

Response: NMFS agrees and has modified the regulatory text at 216.24(b)(4) to allow applicants the option of submitting ETP vessel permit applications to NMFS by either fax, email, or via an online application including online payment by credit card. To apply for an ETP vessel permit online, the applicant must first email a request to *wcr.hms@noaa.gov.* Depending on the availability of permits, detailed instructions for applying online will then be supplied to the applicant.

Changes From the Proposed Rule

Aging Fleet Provision

NMFS agrees with comment 1, above, that the proposed aging fleet provision did not address a situation in which a vessel is to be replaced by one with a greater carrying capacity, therefore NMFS has changed the text from the proposed rule to take into account such a situation. In instances where the replacement vessel has a greater carrying capacity than that of the vessel being replaced, the replacement vessel will be eligible to be listed as active on the Vessel Register at the same or lesser carrying capacity as that of the vessel it is replacing. If the replacement vessel has a carrying capacity greater than the vessel being replaced, the vessel owner or managing owner may request additional carrying capacity be allocated to the vessel in accordance with the listing hierarchy for vessels on a first-come, first-served basis, under 50 CFR 300.22(b)(4)(v)(D). If additional carrying capacity is not available at the time the request to be listed as active on the Vessel Register is received by the Regional Administrator, the replacement vessel must reduce its carrying capacity to no more than the

previously authorized carrying capacity of the vessel being replaced, by complying with the protocol for sealing wells adopted by the IATTC, prior to it being listed as active on the Vessel Register. Such a vessel may apply for additional carrying capacity as it becomes available, under the procedures described in 50 CFR 300.22(b)(4)(v)(D). Other processes of the aging fleet provision described in the preamble of the proposed rule remain unchanged.

ETP Vessel Permit Application

As described above, in response to comment 3, through this final rule NMFS is modifying the regulatory text at 216.24(b)(4) to allow ETP vessel permit applications to be submitted by email to NMFS at *wcr.hms@noaa.gov,* or through an online permit system. Previously, only faxed applications were allowed. The online application option would require payment of permit fees by credit card. Applications by fax or email require payment by check or money order. To apply for an ETP vessel permit online, the applicant must first email a request to *wcr.hms@noaa.gov.* Directions for applying online will then be supplied to the applicant. First contacting NMFS to request application online is necessary to ensure that there is enough capacity to accommodate the vessel on the Vessel Register prior to processing of a credit card payment for a permit.

Classification

The NMFS Assistant Administrator, in consultation with the Department of State and the U.S. Coast Guard, has determined that this final rule is consistent with the TCA and other applicable laws.

This final rule has been determined to be not significant for purposes of Executive Order 12866. This rule is not an Executive Order 13771 regulatory action because this rule is not significant under Executive Order 12866.

This final rule contains revised collection-of-information requirements subject to review and approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA) under control number 0648–0387. A request for revision to account for the additional information and updated notification requirements that would be required pursuant to this rule is under OMB review. Public reporting burden for obtaining an IMO number (50 CFR 300.22(b)(3)(iii)), for making an IMO exemption request (50 CFR 300.22(b)(3)(iv)), for making a sunk status request (50 CFR 300.22(b)(4)(iii)(D)), and for making an aging fleet provision request (50 CFR 300.22(b)(9)(iii)), are each estimated to average 30 minutes per response. This includes time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Public reporting burden for requesting utilization of a cross-endorsed observer at 50 CFR 216.24(b)(8)(iv)(A) is estimated to add 2 minutes to the vessel departure notification requirement, which is estimated to average 10 minutes per response. Additionally, revisions to 50 CFR 216.24(b)(4) requiring an email notification to NMFS to request an online ETP vessel permit application is expected to add 1 minute per response. Revisions made to the vessel register annual notification and vessel permit application fees at 50 CFR 216.24(b)(6)(iii) and 216.24(b)(6)(8)(iv) are not expected to change the public reporting burden.

Comments regarding these burden estimates, or any other aspects of the collection of information should be sent to the NMFS West Coast Region Long Beach office at the addresses above, by email to *OIRA_Submission@omb.eop.gov,* or by fax to (202) 395–5806. All currently approved NOAA collections of information may be viewed at: *http://www.cio.noaa.gov/services_programs/prasubs.html.*

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that, for purposes of the Regulatory Flexibility Act, this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. No comments were received about the certification. As such, no information received during the public comment period changes NMFS' analysis. Therefore, the initial certification published with the proposed rule—that this rule is not expected to have a significant economic impact on a substantial number of small entities—remains unchanged. As a result, a regulatory flexibility analysis was not required and none was prepared.

List of Subjects in 50 CFR Parts 216 and 300

Fish, Fisheries, Fishing, Fishing vessels, Reporting and recordkeeping requirements.

Dated: December 3, 2019.

Samuel D. Rauch III,

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

For the reasons set out in the preamble, 50 CFR parts 216 and 300 are amended as follows:

PART 216—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

■ 1. The authority citation for part 216 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.,* unless otherwise noted.

■ 2. In § 216.24, revise paragraphs (b)(4), (b)(6)(iii)(A) through (D), (b)(6)(iii)(F), and (b)(8)(iv)(A) to read as follows:

§ 216.24 Taking and related acts in commercial fishing operations including tuna purse seine vessels in the eastern tropical Pacific Ocean.

* * * * *

(b) * * *

(4) *Application for vessel permit.* ETP tuna purse seine vessel permit application forms and instructions for their completion are available from NMFS. To apply for an ETP vessel permit, a vessel owner or managing owner must complete, sign, and submit the appropriate form via fax to (562) 980–4047, by email to *wcr.hms@noaa.gov,* or through an online permit system, allowing at least 15 days for processing. To submit an ETP vessel permit application online, a request must first be made to *wcr.hms@noaa.gov,* and NMFS will give instructions about whether and how an online application can be made. To request that a vessel in excess of 400 st (362.8 mt) carrying capacity be categorized as active on the Vessel Register under § 300.22(b)(4)(ii) of this title in the following calendar year, the owner or managing owner must submit the vessel permit application, payment of the vessel permit application fee, and payment of the vessel assessment fee no later than September 15 for vessels for which a DML is requested for the following year, and no later than November 30 for vessels for which a DML is not requested for the following year.

* * * * *

(6) * * *

(iii) * * *

(A) The owner or managing owner of a purse seine vessel for which a DML has been requested must submit the vessel assessment fee to the IATTC, no later than September 15 of the year prior to the calendar year for which the DML is requested. Payment of the vessel

assessment fee must be consistent with the fee for active status on the Vessel Register under § 300.22(b)(4) of this title.

(B) The owner or managing owner of a purse seine vessel for which active or inactive status on the Vessel Register, as defined in § 300.21 of this title, has been requested, but for which a DML has not been requested, must submit payment of the vessel assessment fee to the IATTC, no later than November 30 of the year prior to the calendar year in which the vessel will be listed on the Vessel Register. Payment of the vessel assessment fee is required only if the vessel is listed as active and is required to carry an observer, or if the vessel is listed as inactive and exceeds 400 st (362.8 mt) in carrying capacity. Payment of the vessel assessment fee must be consistent with the vessel's status, either active or inactive, on the Vessel Register in § 300.22(b)(4) of this title.

(C) The owner or managing owner of a purse seine vessel that is permitted and authorized under an alternative international tuna purse seine fisheries management regime in the Pacific Ocean must submit the vessel assessment fee to the IATTC, prior to obtaining an observer and entering the ETP to fish. Consistent with § 300.22(b)(1) of this title, this class of purse seine vessels is not required to be listed on the Vessel Register under § 300.22(b)(4) of this title in order to purse seine for tuna in the ETP during a single fishing trip per calendar year of 90 days or less. Payment of the vessel assessment fee must be consistent with the fee for active status on the Vessel Register under § 300.22(b)(4)(ii) of this title.

(D) The owner or managing owner of a purse seine vessel listed as inactive on the Vessel Register at the beginning of the calendar year and who requests active status on the Vessel Register under § 300.22(b)(4) of this title during the year, must pay the vessel assessment fee associated with active status, less the vessel assessment fee associated with inactive status that was already paid, before NMFS will request the IATTC Director change the status of the vessel from inactive to active. Payment of the vessel assessment fee is required only if the vessel is required to carry an observer.

* * * * *

(F) Payments will be subject to a 10 percent surcharge if received under paragraph (b)(6)(iii)(E) of this section for vessels that were listed as active on the Vessel Register in the calendar year prior to the year for which active status was requested; or if received after the dates specified in paragraph (b)(6)(iii)(A) or (B) of this section for vessels for which active status is requested if the vessel was listed as active during the year the request was made. Payments will not be subject to a 10 percent surcharge if received under paragraph (b)(6)(iii)(C) or (D) of this section, or if received under paragraph (b)(6)(iii)(E) of this section for vessels that were not listed as active on the Vessel Register in the calendar year prior to the year for which active status was requested. Payments will also not be subject to a 10 percent surcharge if received after the date specified in paragraph (b)(6)(iii)(B) of this section for vessels for which inactive status is requested, or for vessels for which active status is requested if the vessel was not listed as active during the year the request was made. Payment of all vessel assessment fees described in this section must be made to the IATTC.

* * * * *

(8) * * *

(iv) * * *

(A) The vessel permit holder of each permitted vessel must notify the Administrator, West Coast Region, or the IATTC contact designated by the Administrator, West Coast Region, at least 5 days in advance of the vessel's departure on a fishing trip to allow for observer placement on every trip. If the vessel permit holder would like to use an IATTC and Western and Central Pacific Fisheries Commission (WCPFC) cross-endorsed observer when fishing in the IATTC Convention Area, the notification must also include a request for the placement of a cross-endorsed observer pursuant to the Memorandum of Cooperation between the IATTC and WCPFC.

* * * * *

PART 300—INTERNATIONAL FISHERIES REGULATIONS

Subpart C—Eastern Pacific Tuna Fisheries

■ 3. The authority citation for part 300, subpart C, continues to read as follows:

Authority: 16 U.S.C. 951 *et seq.*

■ 4. In § 300.21, revise the definitions of ''Highly Migratory Species (HMS) Branch'' and ''Tuna'' to read as follows:

§ 300.21 Definitions.

* * * * *

Highly Migratory Species (HMS) Branch means the Chief of the HMS Branch of the Sustainable Fisheries Division, National Marine Fisheries Service West Coast Region, Suite 4200, 501 W Ocean Blvd., Long Beach, CA 90802, and *wcr.hms@noaa.gov.*

* * * * *

Tuna means any fish of the genus Thunnus and the species *Katsuwonus pelamis.*

* * * * *

■ 5. In § 300.22:

■ a. Revise paragraphs (b)(1) and (2), (b)(3)(v), (b)(4), and (b)(5)(ii) through (viii);

■ b. Add paragraph (b)(5)(ix);

■ c. Revise paragraphs (b)(7) and (8); and

■ d. Add paragraph (b)(9).

The revisions and addition read as follows:

§ 300.22 Recordkeeping and reporting requirements.

* * * * *

(b) * * *

(1) *Exception.* Once per year, a vessel that is permitted and authorized under an alternative international tuna purse seine fisheries management regime in the Pacific Ocean may exercise an option to fish with purse seine gear to target tuna in the Convention Area without the vessel's capacity counted towards the cumulative carrying capacity described under paragraph (b)(4)(i)(A) of this section. This exception is for a single fishing trip that does not exceed 90 days in duration. At any time during the calendar year, a vessel exercising this exception shall follow the procedures, where applicable, described in paragraphs (b)(4) of this section. No more than 32 of such trips are allowed each calendar year. After the commencement of the 32nd such trip, the Regional Administrator shall announce, in the **Federal Register** and by other appropriate means, that no more such trips are allowed for the remainder of the calendar year. Under § 216.24(b)(6)(iii)(C) of this title, vessel assessment fees must be paid for vessels exercising this option.

(2) *Requirements for inclusion of purse seine vessels on the Vessel Register.* The tuna purse seine portion of the Vessel Register shall include, consistent with resolutions of the IATTC, only vessels that fished in the Convention Area prior to June 28, 2002. Inclusion on the tuna purse seine portion of the Vessel Register is valid through December 31 of each year. New tuna purse seine vessels may be added to the Vessel Register at any time to replace those previously removed by the Regional Administrator, provided that the total capacity of the replacement vessel or vessels does not exceed that of the tuna purse seine vessel or vessels being replaced.

(3) * * *

(v) *Exemption process.* Upon receipt of a request for an exemption under paragraph (b)(3)(iv) of this section, the Regional Administrator will, to the extent he or she determines appropriate, assist the fishing vessel owner in requesting an IMO number. If the Regional Administrator determines that the fishing vessel owner has followed all appropriate procedures and yet is unable to obtain an IMO number for the fishing vessel, he or she will issue an exemption from the requirements of paragraph (b)(3)(iii) of this section for the vessel and its owner and notify the owner of the exemption. The Regional Administrator may limit the duration of the exemption. The Regional Administrator may rescind an exemption at any time. If an exemption is rescinded, the fishing vessel owner must comply with the requirements of paragraph (b)(3)(iii) of this section within 30 days of being notified of the rescission. If the ownership of a fishing vessel changes, an exemption issued to the former fishing vessel owner becomes void.

(4) *Purse seine Vessel Register listing.* For a tuna purse seine vessel to be listed on the Vessel Register and to be categorized as either ''active'' or ''inactive'' in the following calendar year, the vessel owner or managing owner must submit to the Regional Administrator the required permit applications, written notifications, and fees as described under § 216.24(b) of this title and under paragraphs (b)(4)(ii) and (iii) of this section as well as payment of the vessel assessment fee, where applicable, to the IATTC.

(i) *Restrictions.* The following restrictions apply:

(A) The cumulative carrying capacity of all tuna purse seine vessels on the Vessel Register may not exceed 31,866 cubic meters in a given year; and

(B) A purse seine vessel in excess of 400 st (362.8 mt) carrying capacity may not be added to active status on the Vessel Register unless the captain of the vessel has obtained a valid operator permit under § 216.24(b)(2) of this title.

(ii) *Active status.* As early as August 1 of each year, vessel owners or managing owners may request that a purse seine vessel qualified to be listed on the Vessel Register under paragraph (b)(2) of this section be categorized as active for the following calendar year. To request a purse seine vessel in excess of 400 st (362.8 mt) carrying capacity be listed on the Vessel Register and be categorized as active, the vessel owner or managing owner must submit to the Regional Administrator the vessel permit application and payment of the permit application fee and submit to the IATTC payment of the vessel assessment fee.

(A) To request a purse seine vessel of 400 st (362.8 mt) carrying capacity or less be listed on the Vessel Register and be categorized as active, the vessel owner or managing owner must submit to the HMS Branch written notification including, but not limited to, a vessel photograph, the vessel information as described under paragraph (b)(3) of this section, and the owner or managing owner's signature, business email address, and business telephone and fax numbers. If a purse seine vessel of 400 st (362.8 mt) carrying capacity or less is required by the Agreement on the IDCP to carry an observer, the vessel owner or managing owner must also submit payment of the vessel assessment fee to the IATTC.

(B) The Regional Administrator must receive the vessel permit application or written notification and payment of the permit application fee and payment confirmation of the vessel assessment fee no later than September 15 for vessels for which a DML was requested for the following year and no later than November 30 for vessels for which a DML was not requested for the following year. Submission of the vessel permit application or written notification and payment of the vessel assessment fee and permit application fee will be interpreted by the Regional Administrator as a request for a vessel to be categorized as active.

(iii) *Inactive status.* (A) From August 1 through November 30 of each year, vessel owners or managing owners may request that purse seine vessels qualified to be listed on the Vessel Register under paragraph (b)(2) of this section be categorized as inactive for the following calendar year. To request a purse seine vessel in excess of 400 st (362.8 mt) carrying capacity be listed on the Vessel Register and categorized as inactive for the following calendar year, the vessel owner or managing owner must submit to the IATTC payment of the associated vessel assessment fee. Payment of the vessel assessment fee consistent with inactive status will be interpreted by the Regional Administrator as a request for the vessel to be categorized as inactive.

(B) To request a tuna purse seine vessel of 400 st (362.8 mt) carrying capacity or less be listed on the Vessel Register and categorized as inactive for the following calendar year, the vessel owner or managing owner must submit to the HMS Branch a written notification including, but not limited to, the vessel name and registration number and the vessel owner or managing owner's name, signature, business address, business email address, and business telephone and fax numbers. Payment of the vessel assessment fee is not required for vessels of 400 st (362.8 mt) carrying capacity or less to be categorized as inactive.

(C) At any time during the year, a vessel owner or managing owner may request that a tuna purse seine vessel qualified to be listed on the Vessel Register under paragraph (b)(2) of this section be categorized as inactive for the remainder of the calendar year, provided the cumulative carrying capacity described in (b)(4)(i)(A) of this section is not exceeded. To request a purse seine vessel in excess of 400 st (362.8 mt) carrying capacity be listed on the Vessel Register and categorized as inactive for the remainder of the calendar year, the vessel owner or managing owner must submit to the IATTC payment of the associated vessel assessment fee. To request a tuna purse seine vessel of 400 st (362.8 mt) carrying capacity or less be listed on the Vessel Register and categorized as inactive for the remainder of the calendar year, the vessel owner or managing owner must submit to the HMS Branch written notification as described in (b)(4)(iii)(A) of this section. Payment of the vessel assessment fee is not required for such vessels.

(D) [Reserved]

(E) A vessel listed as inactive or sunk on the Vessel Register for more than two consecutive calendar years after January 21, 2020 requesting active status will be prioritized according to the hierarchy under paragraph (b)(4)(v) of this section. A vessel listed as inactive or sunk on the Vessel Register for more than two consecutive calendar years after January 21, 2020 will be removed from the Vessel Register as described in paragraph (b)(5)(ix) of this section.

(iv) *Frivolous requests.* (A) Except as described under paragraph (b)(4)(iv)(B) of this section, requests for active status under paragraph (b)(4)(ii) of this section will be considered frivolous if, for a vessel categorized as active on the Vessel Register in a given calendar year:

(*1*) Less than 20 percent of the vessel's total landings, by weight, in that same year is comprised of tuna harvested by purse seine in the Convention Area; or

(*2*) The vessel did not fish for tuna at all in the Convention Area in that same year.

(B) Requests described under paragraph (b)(4)(iv)(A) of this section will not be considered frivolous requests if:

(*1*) The vessel's catch pattern fell within the criteria described in

paragraph (b)(4)(iv)(A) of this section as a result of force majeure or other extraordinary circumstances as determined by the Regional Administrator; or

(*2*) The vessel's carrying capacity is 400 st (362.8 mt) or less and there was at least one documented landing of tuna caught by the vessel in the Convention Area in the calendar year prior to the year in which the request is made and through November 15 of the year of the request, unless the vessel was not able to make a landing as a result of force majeure or other extraordinary circumstances as determined by the Regional Administrator.

(*3*) The vessel was listed as inactive before January 21, 2020 and has not been listed as inactive for more than two consecutive calendar years since January 21, 2020.

(v) *Listing hierarchy.* Requests for active status and inactive status will be prioritized according to the following hierarchy:

(A) Requests received for replacement vessels with a carrying capacity equal to or less than a vessel removed from the Vessel Register under a request described in paragraph (b)(9) of this section;

(B) Requests received for vessels that were categorized as active in the previous year, unless the request was determined to be frivolous by the Regional Administrator under paragraph (b)(4)(ii) of this section;

(C) Requests received for vessels that were categorized as inactive under paragraph (b)(4)(iii) of this section in the previous year, unless that vessel has been listed as inactive or sunk under paragraph (b)(4)(iii) of this section for more than 2 consecutive calendar years after January 21, 2020;

(D) Requests for vessels not described in paragraphs (b)(4)(v)(A) through (C) of this section, and requests, if applicable, by replacement vessels for the portion of the carrying capacity greater than the amount authorized to the vessel that was replaced under paragraph (b)(9) of this section, will be prioritized on a first-come, first-served basis according to the date and time of receipt, provided that the associated vessel assessment fee is paid by the applicable deadline described in § 216.24(b)(6)(iii) of this title; and

(E) Requests received from owners or managing owners of vessels that were determined by the Regional Administrator to have made a frivolous request for active status under paragraph (b)(4)(iv) of this section or that have been listed as inactive or sunk as described in paragraph (b)(4)(iii) of this section for more than two consecutive calendar years after January 21, 2020.

(5) * * *

(ii) Upon written request by the vessel's owner or managing owner;

(iii) Following a final agency action on a permit sanction for a violation; and

(iv) For failure to pay a penalty or for default on a penalty payment agreement resulting from a final agency action for a violation.

(v) If the U.S. Maritime Administration or the U.S. Coast Guard notifies NMFS that:

(A) The owner has submitted an application for transfer of the vessel to foreign registry and flag; or

(B) The documentation for the vessel will be or has been deleted for any reason.

(vi) If the vessel does not have a valid state registration or U.S. Coast Guard certificate of documentation;

(vii) For tuna purse seine vessels, upon receipt of written notification from the owner or managing owner of the intent to transfer the vessel to foreign registry and flag, as described in paragraph (b)(8) of this section; or

(viii) For tuna purse seine vessels, if the request for active status on the Vessel Register has been determined to be a frivolous request; or

(ix) If the vessel has been listed as inactive or sunk on the Vessel Register for more than two consecutive calendar years after January 21, 2020.

* * * * *

(7) *Procedures for replacing purse seine vessels removed from the Vessel Register.* (i) A purse seine vessel that was previously listed on the Vessel Register, but not included for a given year or years, may be added back to the Vessel Register and categorized as inactive at any time during the year, provided the cumulative carrying capacity described in (b)(4)(i)(A) of this section is not exceeded. The owner or managing owner of a purse seine vessel of more than 400 st (362.8 mt) carrying capacity must pay the vessel assessment fee associated with inactive status. The owner or managing owner of a purse seine vessel of 400 st (362.8 mt) carrying capacity or less must submit written notification as described in paragraph (b)(4)(iii) of this section.

(ii) A purse seine vessel may be added to the Vessel Register and categorized as active in order to replace a vessel or vessels removed from active or inactive status under paragraph (b)(5) of this section, provided the total carrying capacity described in (b)(4)(i)(A) of this section is not exceeded and the owner submits a complete request under paragraph (b)(7)(iv) or (v) of this section.

(iii) Notification of available capacity after a purse seine vessel has been removed from the Vessel Register will be conducted as follows:

(A) After a purse seine vessel categorized as active or inactive is removed from the Vessel Register, the Regional Administrator will notify owners or managing owners of vessels eligible for, but not included on, the Vessel Register that replacement capacity is available on the active or inactive list of the Vessel Register.

(B) When a purse seine vessel categorized as active or inactive on the Vessel Register has been removed from the Vessel Register under the procedures described in (b)(9) of this section, the Regional Administrator will not make available the capacity of the vessel removed from the Vessel Register, and will reserve that capacity for a replacement vessel for a period of 2 years from the date of notification described in (b)(9)(iv) of this section. The replacement vessel will be eligible to be listed as active on the Vessel Register at the same carrying capacity or less as that of the vessel it is replacing. If the replacement vessel has a carrying capacity greater than the vessel being replaced, the vessel owner or managing owner may request additional carrying capacity allocated to the vessel in accordance with paragraph (b)(4)(v)(D) of this section. If additional carrying capacity is not available, the replacement vessel must reduce its carrying capacity to no more than the previously authorized carrying capacity amount for the vessel being replaced by complying with the protocol for sealing wells adopted by the IATTC, prior to it being listed as active on the Vessel Register. Such a vessel may apply for additional carrying capacity as it becomes available under the procedures described in (b)(4)(v)(D) of this section.

(iv) Vessel owners or managing owners may request a purse seine vessel of 400 st (362.8 mt) carrying capacity or less be categorized as active to replace a vessel or vessels removed from the Vessel Register by submitting to the HMS Branch written notification as described in paragraph (b)(4)(ii) of this section and, only if the vessel is required by the Agreement on the IDCP to carry an observer, payment of the vessel assessment fee to the IATTC within 10 business days after submission of the written notification. The replacement vessel will be eligible to be categorized as active on the Vessel Register at the same carrying capacity or less as that of the vessel or vessels it is replacing. If the replacement vessel has a carrying capacity greater than the vessel being replaced, the vessel owner

or managing owner may request additional carrying capacity allocated to the vessel in accordance with paragraph (b)(4)(v)(D) of this section. If additional carrying capacity is not available, the replacement vessel must reduce its capacity to no more than the previously authorized carrying capacity for the vessel or vessels being replaced by complying with the protocol for sealing wells adopted by the IATTC, prior to it being listed as active on the Vessel Register. Such a vessel may apply for additional carrying capacity as it becomes available. Payments received will be subject to a 10 percent surcharge for vessels that were listed as active on the Vessel Register in the previous calendar year, but not listed as inactive at the beginning of the calendar year for which active status was requested.

(v) Vessel owners or managing owners may request a purse seine vessel in excess of 400 st (362.8 mt) carrying capacity be categorized as active to replace a vessel or vessels removed from the Vessel Register by submitting to the Regional Administrator the vessel permit application as described under § 216.24(b) of this title and payment of the vessel assessment fee to the IATTC and payment of the permit application fee to the Regional Administrator within 10 business days after submission of the vessel permit application for the replacement vessel. The replacement vessel will be eligible to be categorized as active on the Vessel Register at the same carrying capacity as that of the vessel or vessels it is replacing. If the replacement vessel has a carrying capacity greater than the vessel being replaced, the vessel owner or managing owner may request additional carrying capacity allocated to the vessel in accordance with paragraph (b)(4)(v)(D) of this section. If additional carrying capacity is not available, the replacement vessel must reduce its carrying capacity to no more than the previously authorized carrying capacity for the vessel or vessels being replaced by complying with the protocol for sealing wells adopted by the IATTC, prior to it being listed as active on the Vessel Register. Such a vessel may apply for additional carrying capacity as it becomes available. The replacement vessel will also only be eligible to be categorized as active on the Vessel Register if the captain of the replacement vessel possesses an operator permit under § 216.24(b) of this title. Payments received will be subject to a 10 percent surcharge for vessels that were listed as active on the Vessel Register in the previous calendar year, but not listed as inactive at the beginning of the calendar year for which active status was requested.

(vi) The Regional Administrator will forward requests to replace vessels removed from the Vessel Register within 15 days of receiving each request.

(8) *Transfers to a foreign registry and flag.* The owner or managing owner of a purse seine vessel listed on the Vessel Register must provide written notification to the Regional Administrator prior to submitting an application for transfer of the vessel to foreign registry and flag. Written notification must be submitted to the Regional Administrator at least 10 business days prior to submission of the application for transfer. The written notification must include the vessel name and registration number; the expected date that the application for transfer will be submitted; and the vessel owner or managing owner's name and signature. Vessels that require approval by the U.S. Maritime Administration prior to transfer of the vessel to foreign registry and flag will not be subject to the notification requirement described in this paragraph.

(9) *Aging fleet provision.* (i) The vessel owner or managing owner of a purse seine vessel listed as active or inactive on the Vessel Register may request to replace the current vessel with a new or used vessel without losing the vessel's placement in the hierarchy of requests for active status as described in paragraph (b)(4)(v) of this section. The replacement vessel will be eligible to be listed as active on the Vessel Register at the same carrying capacity or less as that of the vessel it is replacing. If the replacement vessel has a carrying capacity greater than the vessel being replaced, the vessel owner or managing owner may request additional carrying capacity be allocated to the vessel in accordance with paragraph (b)(4)(v)(D) of this section. If additional carrying capacity is not available at the time the request to be listed as active on the Vessel Register is received by the Regional Administrator, the replacement vessel must reduce its carrying capacity to no more than the previously authorized carrying capacity of the vessel being replaced by complying with the protocol for sealing wells adopted by the IATTC, prior to it being listed as active on the Vessel Register. Such a vessel may apply for additional carrying capacity as it becomes available under the procedures described in paragraph (b)(4)(v)(D) of this section. This aging fleet provision may be used only once per vessel by the vessel owner or managing owner.

(ii) A request made under this provision may include a request to remove the vessel from the Vessel Register. The Regional Administrator will ensure the amount of carrying capacity equal to or less of the vessel being replaced will be available for the replacement vessel for up to 2 years from the date of notification described in paragraph (b)(9)(iv) of this section.

■ 6. Section 300.22 is further amended by revising paragraphs (b)(3)(iii) and (iv) and adding paragraphs (b)(4)(iii)(D), (b)(5)(i), and (b)(9)(iii) and (iv) to read as follows:

§ 300.22 Recordkeeping and reporting requirements.

* * * * *

(b) * * *

(3) * * *

(iii) *Requirements for IMO numbers.* The owner of a fishing vessel of the United States used for commercial fishing for tuna and tuna-like species in the IATTC Convention Area shall ensure that an IMO number has been issued for the vessel if the vessel's Certificate of Documentation issued under 46 CFR part 67 indicates that the vessel's total internal volume is 100 gross register tons or greater or 100 gross tonnage or greater. In addition, the owner of a fishing vessel of the United States engaging in fishing activities for tuna or tuna-like species in the IATTC Convention Area, and for which a high seas fishing permit under § 300.333 is required, shall ensure that an IMO number has been issued for the vessel if the vessel's total internal volume is less than 100 gross registered tons or less than 100 gross tons, but equal to or greater than 12 meters in overall length, as indicated in the vessel's Certificate of Documentation issued under 46 CFR part 67 or State documentation. A vessel owner may request that an IMO number be issued for a vessel by following the instructions given by the administrator of the IMO ship identification number scheme; those instructions are currently available on the website of IHS Markit, *https://imonumbers.lrfairplay.com/.*

(iv) *Request for exemption.* In the event that a fishing vessel owner, after following the instructions given by the designated manager of the IMO ship identification number scheme, is unable to ensure that an IMO number is issued for the fishing vessel, the fishing vessel owner may request an exemption from the requirement from the Regional Administrator. The request must be sent by mail to NMFS HMS Branch, West Coast Region, 501 W Ocean Blvd., Suite 4200, Long Beach, CA 90802, or by email to *wcr.hms@noaa.gov,* and must include the vessel's name, the vessel's

official number, a description of the steps taken to request an IMO number, and a description of any responses from the administrator of the IMO ship identification number scheme.

* * * * *

(4) * * *

(iii) * * *

(D) The vessel owner or managing owner of a purse seine vessel listed as active on the Vessel Register that has sunk may request the vessel be listed as sunk and categorized as inactive on the Vessel Register. To request the vessel be listed as sunk and categorized as inactive on the Vessel Register, the vessel owner or managing owner must submit to the HMS Branch written notification within 30 days of the vessel's sinking. Written notification shall include, but is not limited to, the vessel name, date of sinking, registration number, the vessel owner or managing owner's name, signature, business address, business email address, and business telephone and fax numbers. For subsequent calendar years, vessel assessment fee payment shall be made as described in paragraph (b)(4)(iii) of this section.

* * * * *

(5) * * *

(i) If the vessel has sunk, and the vessel owner or managing owner has not submitted written notification as described in paragraph (b)(4)(iii)(D) of this section;

(9) * * *

(iii) To request a vessel be replaced under this provision, the vessel owner or managing owner must submit to the HMS Branch written notification including, but not limited to, the vessel name and registration number, the vessel owner or managing owner's name, signature, business address, business email address, and business telephone and fax numbers, and the expected month and year the replacement vessel will be ready to fish in the Convention Area.

(iv) Within 30 days of receiving each request described in (b)(9)(iii) of this section, the Regional Administrator shall notify the vessel owner or managing owner in writing whether the request has been accepted or denied, and the reasons therefore.

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■ 7. In § 300.23, revise the section heading to read as follows:

§ 300.23 Persons and vessels exempted.

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■ 8. In § 300.24, revise paragraph (f) and remove and reserve paragraph (g).

The revision reads as follows:

§ 300.24 Prohibitions.

* * * * *

(f) When using purse seine gear to fish for tuna in the Convention Area, fail to release any fish species (excluding mobulid rays, tuna, tuna-like species, and those being retained for consumption aboard the vessel) as soon as practicable after being identified on board the vessel during the brailing operation as required in § 300.27(b).

* * * * *

■ 9. In § 300.27, revise paragraph (b) to read as follows:

§ 300.27 Incidental catch and tuna retention requirements.

* * * * *

(b) *Release requirements for fish species on purse seine vessels.* All purse seine vessels must release, as soon as practicable after being identified on board the vessel during the brailing operation, all billfish, rays (not including mobulid rays, which are subject to paragraph (i) of this section), dorado (*Coryphaena hippurus*), and other fish species. This requirement does not apply to tuna or tuna-like species, or to other fish retained for consumption aboard the vessel. Sharks caught in the IATTC Convention Area and that are not retained for consumption aboard the vessel must be released according to the requirements in paragraph (k) of this section. Tuna caught in the IATTC Convention Area are subject to the retention requirements in paragraph (a) of this section.

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[FR Doc. 2019–26394 Filed 12–19–19; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 223

[Docket No. 161109999–8845–02]

RIN 0648–BG45

Sea Turtle Conservation; Shrimp Trawling Requirements

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

ACTION: Final rule.

SUMMARY: We, the NMFS, are issuing a final rule to amend the alternative tow time restriction to require all skimmer trawl vessels 40 feet and greater in length to use turtle excluder devices (TEDs) designed to exclude small sea turtles in their nets. The purpose of this rule is to reduce incidental bycatch and mortality of sea turtles in the southeastern U.S. shrimp fisheries, and to aid in the protection and recovery of listed sea turtle populations. We are also amending the definition of tow time to better clarify the intent and purpose of tow times to reduce sea turtle mortality, and we are refining additional portions of the TED requirements to avoid potential confusion.

DATES: This final rule is effective on April 1, 2021.

ADDRESSES: Public comments and other supporting materials are available at *www.regulations.gov* identified by docket number NOAA–NMFS–2016–0151, or by submitting a request to Michael Barnette, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701.

FOR FURTHER INFORMATION CONTACT: Michael Barnette, 727–551–5794, *michael.barnette@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Background

Under the Endangered Species Act (ESA) and its implementing regulations, taking (*e.g.,* harassing, injuring or killing) sea turtles is prohibited, except as identified in 50 CFR 223.206 in compliance with the terms and conditions of a biological opinion issued under section 7 of the ESA, or in accordance with an incidental take permit issued under section 10 of the ESA. Incidental takes of threatened and endangered sea turtles during shrimp trawling are exempt from the taking prohibition of section 9 of the ESA so long as the conservation measures specified in the sea turtle conservation regulations (50 CFR 223.206; 50 CFR 224.104) are followed.

On March 15, 2016 (81 FR 13772), we published a notice of intent to prepare an environmental impact statement to analyze potential revisions to the sea turtle conservation regulations, and conducted five scoping meetings in April 2016. We then incorporated the information and public comments gathered during that process into a draft environmental impact statement (DEIS), the notice of availability of which was published on December 16, 2016 (EIS No. 20160294; 81 FR 91169). The analysis included in this DEIS demonstrated that withdrawing the alternative tow time restriction and requiring TEDs in all skimmer trawls, pusher-head trawls, and wing nets (butterfly trawls) rigged for fishing, with the exception of vessels participating in the Biscayne Bay wing net fishery prosecuted in Miami-Dade County,

Florida, would reduce the incidental bycatch and mortality of sea turtles in the southeastern U.S. shrimp fisheries. Therefore, it may be a necessary and advisable action to conserve threatened and endangered sea turtle species. Accordingly, we published a proposed rule (81 FR 91097; December 16, 2016) to withdraw the tow time restriction and include the required TED specifications for these gear types, as well as amend the tow time definition and clarify the names of the allowable TED openings and webbing flaps to improve understanding.

Changes From the Proposed Rule

Based on public comment raising performance and safety issues with TED use on smaller vessels and regarding the economic impacts of the proposed rule, and new information indicating significantly lower levels of sea turtle mortality in the offshore fleet, we have revised the regulation to limit the TED requirements to skimmer trawl vessels 40 feet and greater in length. After reviewing concerns about applying TED testing data from skimmer trawl operations to pusher-head trawls and wing nets, coupled with a lack of observer data for these vessels, we have decided to maintain the tow time-requirement option for these other types of vessels. This final rule only requires TEDs on skimmer trawl vessels 40 feet and greater in length. This rule will achieve a significant conservation benefit for listed sea turtles, while affecting significantly fewer vessels and imposing far fewer costs upon industry. Because fewer TEDS will need to be manufactured to supply the vessels covered under the final rule, this rule can be implemented in far less time than the proposed rule, allowing for more focused and expedient sea turtle conservation. For purposes of this rule, vessel length is the length specified on the vessel's state vessel registration or U.S. Coast Guard vessel documentation required to be onboard the vessel while fishing.

The proposed rule also included a revision to the tow time definition that would have required vessels to remove their entire net and rigging from the water at specific intervals, instead of just the tail bag as is often done by skimmer trawl vessel operators. For small vessels that lack hydraulics, this process takes significant time and potentially makes the vessel unstable while raising the nets, which could introduce safety issues. Therefore, we revised our proposed tow time definition to avoid these potential scenarios while allowing for a more complete inspection of the net for captured sea turtles and clarifying what is required to end a tow under the regulations. For vessels using pusher-head trawls or wing nets, vessels less than 40 feet in length using skimmer trawls, or vessels considered as live bait shrimpers operating under the allowable tow time exemption, we are requiring the net to be emptied of catch on the deck within the specified time. This prevents vessels from lifting the tail bag clear of the water and potentially lowering it quickly back in due to concerns about the sufficiency of the shrimp catch. We believe this will result in the intended identification and safe release of any sea turtle captured in a net while minimizing issues to trawling operations, and more clearly identifies what is required of vessels to comply with tow time limits.

The proposed rule anticipated a six-month delay in effectiveness and solicited public input on different options for the phased implementation of the final rule. The revisions between the proposed and final rule have reduced the number of affected fishers by 82 percent, reduced the total economic effect by 73 percent, and are expected to result in a conservation benefit of 801–1,168 sea turtles annually in the Southeastern U.S. shrimp fisheries. The complete analysis for this alternative is included in a final environmental impact statement (FEIS), the notice of availability of which was published on November 15, 2019 (EIS No. 20190270; 84 FR 62530). We believe delaying the effectiveness of the rule until April 1, 2021 is warranted, as that will be an adequate period to allow for the manufacture of the necessary number of TEDs and for fishers, particularly lower income fishers, to financially prepare for the regulation.

Summary of Comments

We held 6 public hearings on the proposed rule in January 2017. Approximately 70 individuals attended the January 9 Larose, Louisiana meeting; 80 attended the January 10 Gretna, Louisiana meeting; 50 attended the January 10 Belle Chasse, Louisiana meeting; 50 attended the January 11 Biloxi, Mississippi meeting; 15 attended the January 12 Bayou La Batre, Alabama meeting; and 15 attended the January 18 Morehead City, North Carolina meeting. We conducted additional presentations on February 8 in Houma, Louisiana for the Louisiana Shrimp Task Force meeting and on February 16 for the Gulf of Mexico Fishery Management Council's Shrimp Advisory Panel. During the comment periods on the DEIS and proposed rule, we received approximately 38,500 comments encompassed in 1,200 submissions (*e.g.,* one submission was a petition with 33,807 signatures; one submission consisted of 3,408 individual comments; other submissions summarized comments from multiple individuals). Below we summarize these comments, as well as comments received during the six public hearings and two additional presentations. We received additional comments advocating sea turtle conservation measures not related to the southeastern U.S. shrimp fisheries. Given the lack of relevance to this regulatory action, they are not addressed in the following responses. The public comment period on the DEIS officially ended on January 30, 2017, and the public comment period on the proposed rule officially ended on February 14, 2017.

General Comments

Comment 1: Numerous comments support the required use of TEDs designed to exclude small turtles in skimmer trawls, pusher-head trawls, and wing nets.

Response: We agree that use of TEDs in skimmer trawls will benefit sea turtle populations and that use of TEDs on pusher heads and wing nets might benefit sea turtle populations, but due to a lack of data further study is required. At this time, there is a need to further explore efficacy and safety issues related to TED use on pusher-head trawls and wing nets, as well as small skimmer trawl vessels. Therefore, this final rule will only require TEDs on skimmer trawl vessels 40 feet and greater in length. Existing tow time requirements are maintained for pusher-head trawls, wing nets, and smaller skimmer trawl vessels.

Comment 2: All bottom trawls operating in the southeast region should be required to have TEDs, not just selected gear in the shrimp fisheries; NOAA should expand the TED requirement to all trawls; NOAA should require TEDs in try nets; NOAA should consider narrower TED bar spacing.

Response: We are continually evaluating fisheries that have the potential to impact sea turtle populations to assess if there are practical ways to minimize bycatch and mortality to the maximum extent practicable. Trawl fisheries in the Atlantic and the Gulf of Mexico have been documented to frequently interact with sea turtles due to the spatial and temporal overlap of the fisheries with sea turtle habitat. As a result, we are currently testing TEDs for try nets in the shrimp fisheries, as well as TEDs in other trawl fisheries (*e.g.,* mid-Atlantic croaker fisheries). We have also

conducted testing of narrower TED bar spacing in the past. In some fishing conditions, however, narrower bar spacing results in excessive catch loss and reduced gear performance. The TED bar spacing requirements in this rule and existing regulations are based on the segment of sea turtle populations that may be encountered by these particular fisheries and their respective fishing conditions.

Comment 3: Numerous comments support the status quo and oppose the required use of TEDs designed to exclude small turtles in skimmer trawls, pusher-head trawls, and wing nets. Similar comments suggest current tow times are sufficient to avoid sea turtle bycatch mortality, as evidenced by the growing number of Kemp's ridley nests.

Response: We have observer data that document sea turtle mortality resulting from incidental capture in skimmer trawls during tows that were compliant with tow time limits, as well as during tows that exceeded tow time limits. Incidentally-captured sea turtles are often released alive, which is one reason tow time restrictions were previously accepted as a mitigation measure. However, best available information and expert opinion (discussed in detail in the FEIS) indicate that persistent or delayed effects can lead to mortality (post-interaction mortality), including deaths of some turtles that appear to be in good health at the time of release (Stacy, *et al.,* 2015 as referenced in the FEIS). Analysis of the behavioral condition of the turtles caught by skimmer trawls, using current criteria for estimating post-interaction mortality for trawl fisheries (as described in NMFS Procedural Directive 02–110–21), indicated that mortality could be more than triple the number estimated based on dead and comatose turtles alone. This indicates tow time limits may not be as effective in reducing sea turtle bycatch and mortality as previously thought. Furthermore, as sea turtle populations increase, interactions between skimmer trawl vessels and sea turtles are expected to likewise increase. While Kemp's ridley sea turtle nesting numbers have increased significantly in the past several decades, the trend has leveled off in recent years.

We believe the most effective protective measure for threatened and endangered sea turtle populations is to reduce the total time sea turtles are entrained in a skimmer trawl by using TEDs. TEDs are an effective tool in reducing this mortality, as demonstrated in other sectors of the shrimp fisheries. Gear research has shown that they reduce sea turtle bycatch with only minor reductions in target catch. At this time, TEDs will not be required on skimmer trawl vessels less than 40 feet in length, or in any pusher-head trawl or wing net.

Comment 4: NOAA should invest in sea turtle hatcheries to rebuild sea turtle populations (instead of requiring TEDs).

Response: In situ nests, or nests in their original place, are preferred over hatcheries whenever the natural beach can support successful nest incubation. Hatcheries are not a preferred alternative because of their limited conservation value when conditions are favorable for *in situ* incubation. Hatcheries can alter the physical environment of the nest, which can affect nest success and hatchling sex ratios. Predation rates are increased when releases of hatchlings from hatcheries are concentrated in limited areas. Regardless, hatchlings released from hatcheries must still survive to reproduce and, without TEDs, would remain subjected to increased mortality in trawls operating without TEDs. In the southeast U.S., nest success is high and is not a limiting factor that supports the use of hatcheries. Furthermore, sea turtle hatchlings (first year of life) have lower survival rates than older life stages. TEDs provide a greater conservation benefit to sea turtles than hatcheries as they reduce bycatch and mortality of older life stages that have already survived past the most vulnerable years.

Comment 5: The regulation may have significant adverse economic effects for an industry that has been struggling due to many other issues.

Response: We acknowledge the regulation may have significant adverse economic effects on the shrimp industry, as documented in the DEIS and FEIS. We believe the need to reduce mortalities of threatened and endangered sea turtles observed in vessels using skimmer trawls, however, warrants the required use of TEDs as specified in this final rule. This final rule has been modified from the proposed rule, and achieves a significant conservation benefit but has substantially reduced adverse economic effects on industry. Specifically, the revisions between the proposed and final rule have reduced the number of affected fishers by 82 percent, reduced the total economic effect by 73 percent, and are expected to result in a conservation benefit of 801–1,168 sea turtles annually in the Southeastern U.S. shrimp fisheries.

Comment 6: Sea turtles are not observed (*i.e.,* do not occur) in areas where many skimmer trawls operate.

Response: Observer effort on skimmer trawl vessels indicates sea turtles occur in most areas where skimmer trawl vessels operate. At this time, we do not have sufficient information to confidently identify areas where sea turtle interactions would not occur, and where we could exempt TED use based on the possible absence of sea turtles. Therefore, at this time, TED exemptions by discrete area are not considered necessary and advisable.

Comment 7: TEDs will not work in skimmer trawls due to shallow water, due to a change in TED angle if running in shallow water and where the top of grid (and the escape opening) is exposed. Further, there can be excessive debris, particularly crab traps and after storm events.

Response: Based on TED testing conducted aboard commercial skimmer trawl vessels, we expect TEDs will work in the majority of areas and under the majority of fishing conditions. Greater than one-third of the vessels participating in TED testing from 2013 through 2015 operated in depths of 3 feet or less under the vessel with skimmer frames reaching out to shallower water (Gearhart in press). TEDs continued to perform effectively under these conditions. We expect TEDs installed at 55 degrees to operate as intended in water depths as shallow as 2.18 feet of water; TEDs installed at less steep angles would be able to operate in shallower water (*e.g.,* TEDs installed at 45 degrees could operate in water as shallow as 1.89 feet).

We acknowledge skimmer trawl vessels with and without TEDs may encounter debris such as lost and abandoned crab traps and vegetative debris in the shallow, coastal waters where they operate. A common practice in the fishery is to install zippers, when TEDs are not installed, to help with removing crab traps. Zippers can still be installed with TEDs. Further, TEDs may offer some benefits, such as those discussed below, over zippers, since zippers can be difficult to open because of sand and sedimentation, where the potential benefits of TEDs occur regardless of sedimentation.

Our TED testing found that the diameter of the trawl ahead of the TED when properly installed is approximately 24 inches or less. This does not allow crab traps to make it to the TED and cause blockage. For skimmer trawl vessels with and without TEDs, once the blockage is removed the catch can be washed down to the tailbag where it can be dumped easily.

Crab traps and other debris can damage nets with or without TEDs. In areas where crab traps are abundant, fishers may have to inspect their nets

more often to remove entrained crab traps.

Comment 8: The proposed regulations are subject to Executive Order 13771, which would require the elimination of two existing regulations.

Response: The Memorandum: Implementing Executive Order 13771, Titled ''Reducing Regulation and Controlling Regulatory Costs'' states that a significant regulatory action as defined in Section 3(f) of Executive Order 12866 is an Executive Order 13771 regulatory action and, therefore, must be offset according to the requirements of the executive order. This action was determined to be significant for purposes of Executive Order 12866 following publication of the proposed rule, and will be offset as appropriate and as soon as practicable after publication to comply with Executive Order 13771.

Comment 9: NOAA should provide translated materials for Vietnamese American fishers (per Executive Order 13166 and Title VI of the Civil Rights Act), who comprise a significant portion of the skimmer trawl fisheries.

Response: We acknowledge a significant portion of affected skimmer trawl fishers may not rely on English as their primary language. However, we are not required under Executive Order 13166 or Title VI of the Civil Rights Act of 1964, which deal with Federal financial assistance programs, to translate these regulatory materials to other languages. However, we are translating our *Fishery Bulletin,* compliance guide, and other outreach materials to assist the Vietnamese fishing community.

Comment 10: With increasing sea turtle populations, sea turtle bycatch will increase—bycatch will never be zero—how much bycatch reduction is enough?

Response: While nesting data indicate many sea turtle populations may be increasing, all species of sea turtles in U.S. waters are threatened or endangered under the ESA. In order to promote the continued conservation of these populations, we must continue to implement programs that provide adequate protection for sea turtle populations, including efforts to reduce sea turtle bycatch and mortality. The ESA requires us to issue regulations deemed necessary and advisable to provide for the conservation of any species listed as threatened and broadly authorizes the promulgation of regulations as may be appropriate to enforce the Act. Therefore, while these species remain threatened or endangered under the ESA, we are required to pursue efforts to recover them. Specific recovery metrics that would result in downlisting or delisting from the ESA are in the recovery plans for each sea turtle species.

Social and Economic Environment Effects Comments

Comment 11: The descriptions of the alternatives starting with Alternative 3 in the third column on page 91102 of the proposed rule do not match the alternative numbers in parentheses and do not match the descriptions in the DEIS.

Response: We acknowledge the summary text of the IRFA starting on page 91102 may have introduced some confusion. The summary compares the preferred alternative to the other six alternatives considered in the DEIS, which resulted in an apparent inconsistency in labeling the alternatives (Alternative 3 (the Preferred Alternative in the DEIS) is the basis, resulting in Alternative 4 becoming the ''third alternative to the action''). The language in the classification section of the proposed rule diverged from standard protocol, which would have avoided this confusion. We remedy this issue in this rule.

Comment 12: NOAA's economic analysis does not take into consideration loss of other bycatch species (*e.g.,* drum, crabs, flounder, *etc.*) and resulting income due to TED use.

Response: To date, TED testing studies have not collected sufficient data to generate scientifically acceptable estimates of the reduction in marketable incidental (*i.e.,* non-shrimp) catch. In addition, although the states collect landings and revenue data for incidentally harvested species when the catch is sold, most states do not collect landings data when the harvests are retained for personal use (*e.g.,* consumption). Thus, the landings and value of harvests retained for personal use are unknown. As a result, the economic analysis focuses on the economic effects caused by the reduction in harvest of the primary target species (*i.e.,* shrimp) due to TED use. Revenue resulting from the harvest and sale of incidentally harvested non-shrimp species by vessels participating in the southeast shrimp fisheries are accounted for in the economic analysis as illustrated in the description of the economic environment (see Section 3.4 of the FEIS).

Comment 13: The economic analysis underestimates the adverse effects on processors. The assertion that processors can substitute imports for domestic product if landings are reduced because of the regulations is inaccurate because imports are not a good substitute or cannot be substituted for domestic product.

Response: We disagree that the adverse economic effects on processors in the FEIS are underestimated. We consider those estimates to represent the best available data. Further, the claims that imports are not a good substitute for domestic product and that the processing sector cannot substitute imports in place of reduced domestic landings are not supported by the available data and research (Keithly *et al.,* 2015 as referenced in the FEIS). All research conducted to date, as well as the industry's statements, support the conclusion that imports compete with and are, therefore, substitutes for domestic product, as reflected by the fact that increases in imports have historically caused reductions in domestic shrimp prices. The data also indicate that the processing sector has increased its use of imports when domestic production has declined, and thus imports are used as a substitute for domestic product. However, we agree that the processing sector has become more dependent on domestic production in recent years. Larger processors are also better able to substitute imports for domestic production. We also agree it may be difficult for small processors to substitute imports for lost domestic production or otherwise mitigate the adverse effects from such reductions, particularly if some vessels cease operations because of this regulatory action. We discuss these conclusions in Sections 4.3 and 5.4 of the FEIS.

Comment 14: The proposed regulations would reduce public access to domestic shrimp, particularly from smaller vessels that market shrimp directly.

Response: Based on the economic analysis in the FEIS, we expect landings by vessels directly affected by this rule to decrease. To the extent the affected vessels act as their own dealers and sell shrimp directly to the public, a reduction in public access to domestic shrimp is expected. Many of these vessels are relatively small within the context of the fleets in the southeast shrimp fisheries. However, this final rule affects nearly 82 percent fewer vessels and the total expected loss in domestic landings is about 66 percent less relative to the preferred alternative in the DEIS. Thus, these adverse effects have been reduced as a result of the change to the preferred alternative.

Comment 15: NOAA's economic analysis underestimates shrimp loss.

Response: The economic analysis uses estimates of shrimp loss resulting from extensive testing of TEDs in skimmer

trawls. We discuss these results in Sections 3.1 and 4.3.8 of the FEIS. The analysis of economic effects resulting from shrimp loss presented in the FEIS represents the best available information on the subject. Therefore, we believe the current estimates of shrimp loss in the FEIS to be accurate given the availability of current information. These results are also discussed below in the classification section of this rule.

Comment 16: NOAA fails to analyze the broader economic effects of the proposed TED requirements on coastal communities, including loss of jobs.

Response: The expected economic impacts of the proposed TED requirements in terms of expected reductions in employment (jobs), income, total value added, and output for the Gulf of Mexico and South Atlantic are provided in the Regulatory Impact Review (RIR) (see Section 5.5 of the DEIS and Section 5.7 of the FEIS). We revised these estimates in the FEIS to reflect the new preferred alternative. A national economic impacts model or state models can generate these estimates. If economic impacts are estimated state by state using the state models, the total economic impacts from the rule would be underestimated because potentially significant relationships between businesses across states would not be taken into account, unlike the national model which does account for those relationships. We chose to use the national model so as not to underestimate the total economic impacts of the rule. Our economic impacts models do not generate these estimates at the community level, as we do not have the necessary business relationship and activity data at that level. Section 3.5 of the FEIS describes communities that are the most likely to experience effects through the identification of top communities by regional quotient, licenses, and active fishers and through the identification of communities with processors. In addition, we added qualitative text on the loss of jobs at the community level to Section 4.4 of the FEIS in response to this comment.

Comment 17: NOAA's economic analysis does not take into account the long-term economic effect of vessels ceasing operations.

Response: We discuss the expected long-term economic effects if some vessels cease operations under all considered alternatives in Section 4.3.11 of both the DEIS and FEIS. The analyses consider direct effects on the harvesting sector (vessels) and indirect effects on the onshore sector (dealers, processors, and TED manufacturers). We discuss additional information regarding the expected long-term economic effects of the rule if certain vessels cease operations in the RIR, which we update in the FEIS to reflect the new preferred alternative.

Comment 18: NOAA's economic analysis does not take into consideration vessel devaluation due to the proposed TED requirements.

Response: We acknowledge that the new TED requirements in this rule can reduce the profitability of the adversely affected vessels and, thus, their market value. However, we do not have models that would allow us to project the potential magnitude of such decreases, particularly as most of the affected vessels do not have Federal permits and we only have one year of recent data regarding the market value of such vessels in the Gulf of Mexico. The reductions could be significant if some vessels shut down due to this regulatory action. On the other hand, the TED requirement would also eliminate the competitive advantage the affected vessels have had over otter trawl vessels, which have been required to use TEDs for many years. Thus, this change is not necessarily a cost to society. Nevertheless, we have included qualitative statements regarding these expected effects in the FEIS where applicable. Additionally, the change to the preferred alternative is expected to result in significantly fewer vessels being devalued compared to the proposed rule.

Comment 19: A six percent loss in shrimp is not trivial given the margins of the inshore skimmer trawl fisheries.

Response: We agree that a six percent loss in shrimp catch due to the new TED requirements is not trivial. The expected adverse economic effects resulting from shrimp loss are discussed in Section 4.4 of the FEIS, in the RIR (Section 5 of the DEIS and FEIS), and the Initial and Final Regulatory Flexibility Act Analyses (Section 6 of the DEIS and FEIS). The significance of these effects is discussed in absolute terms as well as in relative terms (*i.e.,* given the different profit margins for various types of vessels in the shrimp fisheries, as discussed in Section 3.4 of the DEIS and FEIS). The magnitude of these adverse economic effects is further reflected by our expectation that about 32 percent of the affected part-time vessels could cease operations due to this rule, generating even greater reductions in landings and gross revenue to the industry. The change in the preferred alternative, however, has significantly reduced the total adverse economic effects expected to result from shrimp loss.

Comment 20: An independent cost estimate of the proposed regulations determined the average initial TED acquisition cost of $32,648 per vessel. Another comment estimated $20,000 to outfit TEDs in their nets. Yet another states many skimmer vessels use Dyneema and a single net can cost $5,000 for materials alone; to have 4–6 nets ready to fish could cost over $30,000 for just one vessel.

Response: Without specific information on these referenced estimates, we cannot provide a detailed response. However, it appears that these cost estimates may include vessel rigging modification and/or the purchase of new nets, which would not be necessary under the proposed regulation. TEDs can be easily installed into existing trawls between the trawl body and tail bag. Based on TED testing aboard commercial vessels, modifications to vessel rigging to accommodate TED use are unnecessary or minor and rarely occur. The estimates in the DEIS were based on the cost to purchase TEDs for actively fished nets and one set of spare nets for each vessel (*i.e.,* four total TEDs if a vessel uses two nets). The prices ranged based on vessel size (*i.e.,* smaller vessels assumed to fish with smaller, less expensive TEDs than larger vessels). We based the cost estimates on ''average'' TEDs constructed of conventional materials that are currently available to fishers. TEDs can vary in price based on design (*e.g.,* flat bar TED). Vessels that desire to purchase additional TEDs beyond the minimum needed to continue fishing under this rule would incur additional costs.

Comment 21: NOAA's economic analysis overestimates shrimp loss (*i.e.,* NOAA should include catch loss rates from 4-inch TED testing).

Response: As previously stated, we believe the economic effects resulting from shrimp loss presented in the DEIS represents the best available information on the subject. We disagree with the assertion that we should include catch loss rates from previous four-inch bar spacing TED testing. This action would require skimmer trawl vessels 40 feet and greater in length to use TEDs with 3-inch bar spacing instead of tow times. Research results on designs not authorized under this action are not appropriate for this analysis.

Comment 22: NOAA fails to take into consideration (*i.e.,* benefit) the lack of tow times could offset shrimp loss.

Response: We do not expect the removal of a tow time limit to offset shrimp loss. Fishers can attempt to make up shrimp loss stemming from the use of TEDs by increasing the number

and duration of tows, and thereby increasing their total catch and revenue, however, this could increase costs, such as fuel and labor. In addition, catch rates (*i.e.,* catch per unit of effort) tend to decrease as towing time (effort) increases in the same area and, in turn, revenue per unit of effort is expected to decrease as towing time increases. Neither economic theory nor the available economic data can help us to determine whether the additional revenues from towing longer will exceed the additional costs.

Comment 23: NOAA overestimates the number of vessels affected by the proposed TED requirements; NOAA should exclude vessels anticipated to cease operations because of the TED requirements from the economic analysis.

Response: Although there are consistency issues between some data sources, we have determined the estimates of the number of affected vessels under the alternatives considered in the DEIS and FEIS are the best available estimates. We disagree that we should exclude vessels anticipated to cease operations from the economic analysis. If vessels cease operations as a result of the action, that is an effect of the action which needs to be considered per the requirements of Executive Order 12866, the Regulatory Flexibility Act, and the National Environmental Policy Act. To exclude and ignore this effect would distort the analysis and misinform managers and the public.

Comment 24: NOAA inconsistently estimates the per-vessel costs of TEDs and does not clearly explain how many TEDs each vessel will need.

Response: The explanation of how many TEDs each vessel will need and how the estimates of per-vessel TED costs were generated is provided in both the DEIS (pp. 156–157) and the proposed rule. Specifically, the analysis assumes each affected vessel would be required to acquire TEDs for each net fished plus one spare for each net. TED costs vary by vessel size and type. Practically all vessels affected under this rule fish with two nets, which would result in each vessel acquiring four TEDs in total. Thus, the average cost of TEDs per vessel is approximately $1,300 under this rule. Larger vessels would likely use larger TEDs, which cost more, and larger vessels typically use more nets (four). More large otter trawl vessels are affected under Alternatives 6 and 7, resulting in a higher average TED cost per vessel (approximately $1,700) compared to the other considered alternatives.

Comment 25: NOAA should analyze the economic effects of full-time and part-time vessels separately versus averaging across all vessels.

Response: The analysis of economic effects for all alternatives considered in the DEIS and FEIS looks at average effects across all vessels as well as average effects separately for different types of vessels, including part-time vessels (those in the Q1, Q2, and Q3 categories) and full-time vessels (all other categories).

Comment 26: NOAA should expand the economic analysis to include the benefits of TEDs (*e.g.,* improved fuel efficiency due to reduced drag from excluding debris and bycatch; increased price due to improved condition of catch; reduced sorting time) and value of sea turtles beyond simple ''conservation value'' of the species (*e.g.,* tourism).

Response: We agree that there are other potential benefits from the use of TEDs such as improved fuel efficiency, reduced sorting time, and increased value of product. For example, we anticipate some ancillary benefits from TED use in high debris areas, as the reduction of debris trapped in the tailbag would prevent damage to the catch, thereby increasing the quality (*e.g.,* promoting harvest of whole shrimp rather than pieces) and potentially increasing the price per pound. We also acknowledge that sea turtles are a source of demand for ecotourism in the region. However, based on the existing peer-reviewed literature, there is no theoretical or empirical basis for asserting that the expected reductions in sea turtle mortalities under this rule will result in increased ecotourism and concomitant economic benefits. In addition, we currently lack data and models to quantitatively estimate these ancillary benefits. We have summarized these issues qualitatively and have addressed this comment in Section 5 (RIR) of the FEIS.

Comment 27: The use of TEDs by skimmer trawls would remove the Monterey Bay Aquarium Seafood Watch's Red Listing of Gulf of Mexico shrimp harvested by skimmer trawls and expand industry markets, and likely increase profits.

Response: Monterey Bay Aquarium and several environmental groups provided comments on the proposed rule, which stated that sea turtle bycatch is a serious concern in the fisheries and contributed to the current red list rating of the skimmer trawl fisheries. We agree that the use of TEDs by skimmer trawl vessels could result in a different listing by the Monterey Bay Aquarium Seafood Watch program. However, this regulatory action does not guarantee a change in the rating. Monterey Bay Aquarium has committed to promptly update their scientific assessment, but has not committed to the outcome of that assessment. Therefore, we cannot assume what the Monterey Bay Aquarium's rating for the skimmer trawl fisheries will be after implementing the final rule, nor the resulting economic benefits to the fisheries.

Comment 28: The use of TEDs by skimmer trawls would reduce additional bycatch aside from sea turtles, in turn benefitting other commercial and recreational fisheries.

Response: We agree that the use of TEDs by skimmer trawls would reduce additional bycatch other than sea turtles. Numerous studies indicate TEDs reduce finfish bycatch, crustaceans, and debris, resulting in benefits to the local ecosystem (see Section 4.2 of the FEIS).

Comment 29: NOAA should expand its environmental justice analysis by including additional analyses on how the proposed regulations may have high and disproportionate impacts on lower-income generating small fishing operations, expanding the analysis of effects to vessels that cease fishing operations as a result of the regulations, and summarizing the outreach efforts to foster public participation by minority and low income populations.

Response: The environmental justice analysis in the FEIS has been expanded. Specifically, new text has been added including a summary of the public participation process, a qualitative discussion of impacts to lower-income generating small fishing operations, and a qualitative discussion of the effects to vessels that cease fishing operations because of this action. As noted above, by limiting the TED requirement to vessels 40 feet and greater in length, the economic impact to industry is significantly reduced from the proposed rule to the final rule.

Data-Related Comments

Comment 30: The DEIS and proposed rule did not demonstrate whether or how the expected mortality reduction of ''small'' sea turtles will contribute to population recovery of the sea turtle species and DPSs that occur within the southeastern U.S. The proposed rule and DEIS did not define ''small'' for each sea turtle species. In addition, the DEIS and proposed rule lacked analyses based on stock assessment models showing how abundance trends respond to the projected reduction in sea turtle mortality attributable to the new regulations, and evaluations of relative reproductive values or adult equivalents of ''small'' female sea turtles

documented to have been incidentally captured and killed in skimmer trawls, pusher-head trawls, and wing nets within the southeastern U.S. shrimp fisheries.

Response: At present, we do not have stock assessment models for all sea turtle species impacted by this regulation. The conservation need for TEDs to reduce the bycatch of Kemp's ridley sea turtles in the skimmer trawl fisheries was identified in the Kemp's Ridley Recovery Plan (NOAA and USFWS 2011). A formal threats assessment identified skimmer trawls, among the trawl types not currently required to use TEDs, as a significant mortality threat, collectively resulting in an estimated annual mortality, adjusted for reproductive value, of 1,218 adult females annually (NOAA and USFWS 2011, Table A1–7). At the November 2014 meeting of the Kemp's Ridley Recovery Team (*https://www.fws.gov/kempsridley/pdfs/KempsRidley_BiNationalTeam_Nov2014.pdf*), the team identified requiring TEDs in the skimmer trawl fisheries (*i.e.,* the largest component of the trawl fisheries not currently required to use TEDs) as one of the four most critical recovery actions that needed to be completed.

With regard to size, observer data from skimmer trawl vessels show interactions with green sea turtles ranging from 21.0 cm to 33.5 cm curved carapace length (CCL) and Kemp's ridley sea turtles ranging from 19.3 cm to 45.6 cm CCL (Stokes and Gearhart 2016). We did not explicitly define ''small'' because the size range varies across species and can change over time. In general, the term ''small'' refers to the small juvenile stage.

Comment 31: NOAA's data is insufficient to support this regulation.

Response: While we disagree and believe sufficient information has been gathered and presented to the public, all of which warrants measures to reduce sea turtle bycatch and mortality in the skimmer trawl fisheries, we do note this final rule differs from the proposed rule due to further data analysis. We have presented four years of observer data that demonstrates skimmer trawls capture sea turtles in their nets, some of which resulted in mortalities. Likewise, we have included information indicating that post-interaction mortality may occur to trawl-caught sea turtles that are released alive and in seemingly otherwise normal condition. We have also conducted extensive TED testing on skimmer trawl vessels using a variety of configurations and fishing under a variety of different conditions to determine the resultant catch loss under each scenario. Additional economic and social data are included and discussed in the FEIS and these have been determined to be the best available data. A new analysis of sea turtle bycatch and bycatch mortality in the otter trawl shrimp fisheries (Babcock *et al.* 2018 as referenced in the FEIS) indicates bycatch by otter trawlers is significantly lower than previously estimated, and further supports the need for sea turtle conservation in the skimmer trawl fisheries; this information is discussed further in the FEIS. While more data is always beneficial and desired, we believe sufficient data has been gathered, analyzed, and presented to support this action. Where data was lacking or the efficacy of TEDs merited further evaluation, as was the case with requiring the use of TEDs in pusher-head trawls, wing-nets, and smaller skimmer trawls, we narrowed the scope of the final rule accordingly.

Comment 32: New regulations are unnecessary, as NOAA's own data indicates sea turtle populations are recovering under the status quo.

Response: While there have been improvements in nesting numbers of several species of sea turtles, we still have recovery goals to meet for all ESA-listed sea turtle species. As mentioned in our response to Comment 10, in order to promote the continued conservation of these populations, we must continue to consider and implement conservation measures that will provide adequate protection for sea turtle populations and help us achieve our ESA recovery goals and objectives. The ESA requires us to issue regulations deemed necessary and advisable to provide for the conservation of any species listed as threatened and broadly authorizes the promulgation of regulations as may be appropriate to enforce the Act. Therefore, while these species remain listed under the ESA, we are required to continue our efforts to recover these species. Specific recovery metrics that would result in downlisting or delisting from the ESA are in the recovery plans for each sea turtle species. In addition, as noted in our response to Comment 30, the Kemp's Ridley Recovery Team identified requiring TEDs in skimmer trawls as one of the four most critical recovery actions that needed to be completed. Therefore, implementing this requirement is consistent with our statutory duty to implement the recovery plan under section 4(f) of the ESA.

Comment 33: NOAA does not have sufficient evidence of tow time violations; most fishers abide by tow times for reasons other than possibility of sea turtle bycatch.

Response: We disagree, as there have been cited violations of tow time limits by skimmer trawl fishers. While we are unable to quantify the extent to which tow time violations occur, we do have evidence that it is an issue that needs to be addressed. Moreover, we have observer data that document sea turtle mortality has resulted from capture in skimmer trawl nets occurring within the tow time limits, as well as information indicating post-interaction mortality is at a significant level, even though captured sea turtles are released alive and may seem in healthy condition when released. Therefore, we believe tow time limits are not as effective in reducing sea turtle bycatch and mortality as previously thought.

Comment 34: NOAA's catch loss rates based on TED use are manipulated and vastly under-estimated. NOAA conducted TED testing at times that are not representative of peak fishing activity, which results in an underestimate of catch loss.

Response: We conducted extensive fishery-independent and fishery-dependent testing during the 2013, 2014, 2015, and 2016 fishing seasons using a variety of TED configurations and under a variety of fishery conditions off Louisiana, Mississippi, Alabama, and North Carolina. We used an established protocol to conduct this testing. Prior to analysis, data were reviewed and unsuccessful tows were removed from the dataset. Unsuccessful tows were comprised of bogged gear, bag untied, torn nets, hung gear, bags dumped together, and fouled tickler chain. Successful tows were defined as tows in which the gear worked properly and the trawl was hauled in perfect condition. Tows with TED obstructions such as debris or crab pots were not removed from the data set and were included for analysis. However, tows in which the TED was twisted were considered captain related gear handling errors and were removed prior to analysis. In addition, tows with less than 2 kg of shrimp per net for both nets were removed prior to analysis.

We also attempted to conduct fishery-dependent work during the opening of shrimp season where catch rates would be expected to be highest, but were unable to find vessels willing to participate; fishers desired to focus on the season opener to maximize fishing time and catch. We attempted several times to address this issue with industry. Therefore, the resulting data from this research represents the best available science, and we believe it adequately reflects average fishing conditions. We document these findings

in the FEIS and the primary study (Gearhart in press).

Comment 35: NOAA has not provided any data on wing nets or anchored vessels; TEDs will not work in vessels anchored and fishing tidal current.

Response: To date, we have not conducted TED testing on wing nets or anchored vessels. This gear fishes very differently from trawl vessels. This lack of research, among other reasons, has led us to change the preferred alternative in the FEIS and adjust our final rule accordingly.

Comment 36: Averaging observer catch data to all vessels, including small vessels that work in shallow water where sea turtles may not be as abundant, and extrapolating the skimmer trawl observer data to the wing net and pusher-head trawl fisheries is inappropriate.

Response: In order to determine the effects the shrimp fisheries have on threatened and endangered sea turtles, we must consider the entirety of the fisheries instead of just limited, observed vessels. Averaging limited data across an entire fishery is an acceptable practice, and has been conducted for numerous fisheries for several decades. We maintain the skimmer trawl observer data gathered over several years and in numerous states is the best available information on the skimmer trawl fisheries. Averaging these data helps to avoid overestimating or underestimating, which may occur when using data from a single year. We do not have discrete sea turtle abundance data that would lend itself to further refining catch rates by water depth or area to support or refute the commenter's assertion that sea turtles are not as abundant in shallow water. Therefore, we disagree with the first portion of this comment. We do agree, however, that applying observer data from skimmer trawls to wing nets and pusher-head trawls is problematic. In addition, comments raising safety and other practical concerns about using TEDs on small skimmer trawls factored into the decision to change the preferred alternative and modify the final rule to focus solely on skimmer trawl vessels 40 feet and greater in length.

Comment 37: NOAA grossly overestimates sea turtle mortality attributable to the skimmer trawl fisheries; the commenter asserts the average skimmer trawl vessel would experience one sea turtle mortality every eight years by only considering sea turtles released dead (n=3).

Response: We disagree with the commenter's assertion that sea turtle mortality is overestimated, and note the commenter fails to take into consideration post-interaction mortality in their estimate. We went to considerable lengths in the DEIS and FEIS to describe the process by which we estimated bycatch mortality using the best available information. Based on that information, we believe the combined skimmer trawl, pusher-head trawl, and wing net fisheries (*i.e.,* 5,837 total vessels) may result in 2,165–2,942 sea turtle mortalities per year. Averaged across the whole fleet evenly, this would result in one sea turtle mortality per vessel every 1.98–2.7 years. Annual fishing effort, however, is not evenly distributed among vessels in the fleet, so this rate is of limited utility. The majority of the skimmer trawl, pusher-head trawl, and wing net fleet consists of part-time vessels that do not fish as often as full-time vessels. Therefore, we expect the rate to be significantly higher among the smaller population of full-time skimmer trawl, pusher-head trawl, and wing net vessels, many of which are 40 feet and greater in length.

Comment 38: NOAA's observer data demonstrates otter trawls with installed TEDs resulted in higher sea turtle mortality than skimmer trawls without TEDs.

Response: We disagree with this comment. As noted previously, we take into consideration post-interaction mortality when considering the effect of the skimmer trawl fleet (*i.e.,* on vessels not using TEDs) on sea turtle populations. The period and sample sizes (*i.e.,* hours of fishing effort observed) differ between the otter and skimmer trawl fleets for calculating mortality rates by gear type. From 2011–2015, we observed 13 sea turtles released dead from otter trawls fishing with TED-equipped nets (*https://www.fisheries.noaa.gov/webdam/download/93552747*), while during 2012–2015 we observed 3 sea turtles released dead from skimmer trawl vessels fishing without TEDs. During the respective periods, however, we observed 86,658 hours of effort on otter trawlers (E. Scott-Denton, NMFS, pers. comm.), while only 2,699 hours of effort were observed on skimmer trawl vessels. That equates to one observed dead turtle released every 6,666 hours on otter trawlers versus one observed dead turtle released every 900 hours on skimmer trawl vessels. This indicates considerably more observed lethal sea turtle interactions with skimmer trawl vessels than otter trawlers.

A new analysis of sea turtle bycatch and bycatch mortality in the otter trawl shrimp fisheries (Babcock *et al.* 2018) indicates bycatch by otter trawlers is significantly lower than previously estimated in past biological opinions. Furthermore, the results suggest that skimmer trawlers working without TEDs may result in more sea turtle mortalities than otter trawlers working with TEDs, even with lower total annual effort. This information is discussed in more detail in the FEIS.

Comment 39: A six-month delay in effectiveness is unrealistic given NOAA's own data indicates it would take more than two years to fabricate enough TEDs for vessels to use.

Response: We agree, and while the estimates are based on the best available information, we acknowledge that there is considerable uncertainty associated with estimating how many new TEDs will actually be installed, as well as how quickly the necessary TEDs will be constructed. TED production time was one of the factors considered when we decided to change the preferred alternative to one that will affect nearly 82 percent fewer vessels and require much less production time for the necessary number of TEDs. We also have extended the delay in effectiveness until April 1, 2021.

Comment 40: NOAA must maintain oversight over the electronic logbook data program.

Response: Electronic logbooks (ELBs) are required under a fishery management plan developed by the Gulf of Mexico Fishery Management Council, pursuant to the Magnuson-Stevens Fishery Conservation and Management Act, only on selected vessels with a Federal Gulf of Mexico shrimp moratorium permit. The vast majority of vessels that use skimmer trawls do not have Federal permits and, thus, are not required to use ELBs. While we do maintain effective oversight over the ELB program, the program itself is not associated with this final rule.

Gear and Fishery-Related Comments

Comment 41: NOAA's proposed regulation is discriminatory against certain fishers since it maintains tow times for bait shrimpers.

Response: The proposed regulation, as well as the final rule, focuses on the segments of the shrimp fisheries that are documented to have levels of bycatch mortality that can be reduced using TEDs. The bait shrimp fishery operates with tow times shorter than the alternative tow-time requirements per 50 CFR 223.206(d)(2)(ii)(A), to ensure shrimp are captured and transferred to a live well alive and in good condition. Based on this information, we determined the bait shrimp fishery presents a low risk of sea turtle bycatch and mortality and does not warrant additional restrictions at this time.

Comment 42: Biscayne Bay wing net vessels should be restricted to a maximum tow time of 10 minutes with observers to evaluate potential bycatch issues.

Response: Biscayne Bay wing nets are limited by state law to a frame size much smaller than frames of wing nets in other states. They also fish by sight in surface waters, and use nets constructed of light monofilament webbing. We have initially concluded this fishery may not present a threat to sea turtles. However, further investigation is needed to make a final determination.

Comment 43: Beam trawl vessels operating in the Corpus Christi Bay, Texas bait shrimp fishery should be exempt from the proposed TED requirements, similar to the Biscayne Bay wing net fishery exemption.

Response: Beam trawl vessels are exempt from existing TED requirements if they comply with provisions at 50 CFR 223.206(d)(2)(ii)(B)(*1*). The proposed and final regulations do not change the requirements for beam trawlers, which are currently required to fish with TEDs, excluding those that comply with the aforementioned exception.

Comment 44: TED requirements present safety issues when used on small vessels (*e.g.,* walking out on frames to remove debris snagged in TEDs, extension can result in net getting entangled in the propeller, *etc.*).

Response: The TED is installed just in front of where the tail bag is brought alongside or onboard the vessel for dumping, so walking out on frames to remove debris from the TED is unnecessary. Further, this rule exempts skimmer trawl vessels less than 40 feet in length to allow us additional time to examine issues related to TED use on these smaller vessels, including potential safety issues, which may be more significant for them. Skimmer trawl vessels less than 40 feet in length will continue to be required to comply with the existing tow time requirements.

Comment 45: An installed TED on a small vessel may introduce issues with dumping the catch, as the TED extension may prevent the net from fully clearing the surface and complicate hauling it on deck. If the vessel is moving during the process, the TED may cause the net to twist tight, further complicating the situation.

Response: Skimmer trawl vessels less than 40 feet in length are exempt from the TED requirement in this final rule, but must continue to comply with the existing tow time requirements. We intend to examine issues that may be unique to these vessels to determine methods to mitigate those issues in the future. With respect to a twisting net, we found during TED testing this can be alleviated by either changing the location of the lazy line attachment on the trawl or changing the lifting point in the rigging to allow the TED to clear the water during haul back.

Comment 46: TEDs installed in skimmer nets exhibit a rolling action that twists the net and closes it, making it ineffective at catching anything.

Response: This rule will only authorize top-opening TEDs. Top-opening TEDs often begin with a half twist in the net when deployed. During active fishing with skimmer frames lowered and nets and bullets deployed, water flow opens the trawl and causes the TED to untwist and adjust into the proper fishing position. We anticipate that fishers will have to become familiar with how TEDs function and behave in their nets or under their specific fishing conditions, and adjust their activities to ensure their nets with installed TEDs are fishing correctly.

Comment 47: Excessive debris such as crab traps and tree limbs will accumulate on the TED grid and result in excessive catch loss.

Response: We acknowledge that the inshore/nearshore skimmer trawl fisheries encounter more debris while fishing compared to the offshore shrimp fisheries. Abandoned crab traps and debris, particularly debris after storms, currently present issues for skimmer trawl vessels. TEDs may actually help exclude some of this debris. In situations where there are numerous abandoned crab traps or excessive debris, fishers regularly check their nets to ensure entrained traps and debris are not negatively affecting their catch rates. We expect fishers to continue this practice with TEDs installed in their nets. Depending on the net and TED size, the diameter of the trawl just ahead of the TED is not large enough to allow crab traps or large debris to reach the TED. The use of TEDs facilitates crab trap and debris removal, alleviating the need for zippers that typically are used in skimmer trawls for debris removal, as discussed in response to Comment 7.

Comment 48: The proposed tow time definition presents issues for vessels without hydraulics (*i.e.,* time to raise/lower gear) or for small vessels due to safety (*e.g.,* raising and lowering rig constantly presents stability issues).

Response: We agree the proposed tow time definition may present issues for small vessels or vessels rigged without hydraulics. As a result, we have amended the tow time definition in this final rule to avoid issues related to constantly raising and lowering the skimmer trawl rig.

Comment 49: Small vessels cannot use a standard TED grid and need a smaller grid to fit in the nets.

Response: In response to comments relating to the feasibility of using TEDs on small vessels, and because we have not comprehensively tested TEDs on small vessels, we have changed our preferred alternative. As a result, skimmer trawl vessels less than 40 feet in length will have to continue to follow the tow time requirements. We will examine this and other issues related to TED use on small vessels and present solutions or adaptations to these potential issues so that TEDs could be effectively used on these smaller vessels in the future.

Comment 50: In some skimmer vessels, the entire net would have to be specially made to fit effective TEDs in the net.

Response: Nets used on skimmer trawl vessels 40 feet and greater in length can accommodate a standard TED, and as discussed in response to Comment 20, necessary modifications to rigging, if any, are expected to be minor.

Comment 51: Some skimmer vessels use A-frame rigging designed for short nets. The use of TEDs would require lengthening the net, and modifications to the A-frame rigging to pick up the nets, which could cost anywhere from $1,000–$10,000, depending on the size of vessel, extent of change, and costs of material and labor.

Response: The installation of a TED into a skimmer trawl adds four to five feet of length to the trawl. It may be necessary to install the TED farther forward in the trawl to partially compensate for the added length. Adjusting the lazy line attachment point on the tailbag may also be necessary to compensate for the added length. Each of these adjustments alleviates the need to change rigging configurations to compensate for TED installation.

Comment 52: The use of TEDs by small vessels with limited horsepower would slow the boat down to the point it would be ineffective.

Response: We do not expect skimmer trawl vessels to have difficulty pushing nets with TEDs installed due to limited horsepower. These vessels are typically powered to move trawls that contain significant amounts of catch. This catch increases the drag on the vessel. The addition of a TED is inconsequential with respect to the drag in the net relative to the catch. Instead, drag is reduced through TED use by reducing the amount of bycatch entrained in the net.

Comment 53: Fishers have serious concerns that TEDs would not work on their type or size of vessel and result in them having to convert to otter trawls, which would cost $20,000–$30,000.

Response: Results of TED testing indicates that TEDs will work effectively on vessels encompassed by this final rule (*i.e.,* skimmer trawl vessels 40 feet and greater in length). We do not believe the associated economic effects of TED use in skimmer trawls are sufficient to make switching gears necessary, particularly considering TEDs are already required in the otter trawl fisheries.

Recommendations

Comment 54: NOAA needs to prepare a detailed enforcement plan, including the number of officers and vessels needed; minimum/maximum enforcement levels by time and area; the use of partner agencies, observers, and trained volunteer patrols; use of onboard cameras; implementation of emergency closures if enforcement (compliance) is not adequate; and other approaches to achieve a 94 percent TED compliance level.

Response: Our Office of Law Enforcement (OLE) is committed to enforcing the laws and regulations associated with TEDs. On a continuing basis, OLE management is evaluating how it can best use its resources in meeting OLE's overall mission of protecting the marine resources of the United States. OLE meets this mission through formal and informal relationships with other enforcement partners. TED compliance is but one regulatory requirement OLE and its partners are responsible for enforcing. We have had extensive discussions on this subject with our enforcement partners, and have developed a TED Compliance Policy that we also intend to integrate for the skimmer trawl fisheries. The TED Compliance Policy (*https://www.fisheries.noaa.gov/webdam/download/93552419*) outlines what data will be used, the time periods for calculating compliance, and discusses measures that would be taken if TED effectiveness falls below the TED compliance thresholds designated in the April 18, 2014, biological opinion on the southeastern shrimp fisheries.

Comment 55: NOAA should conduct a detailed analysis of sea turtle abundance, fishing effort, and stranding patterns to determine hotspots of sea turtle mortality in the fishery.

Response: A detailed analysis of sea turtle mortality hot spots would be a valuable exercise. But given the annual variability in sea turtle distribution, population size, and seasonal influences such as water temperature, wind speed and direction, and prey availability, as well as numerous other factors, the recommended analysis would not likely change how this rule is implemented. The use of TEDs can significantly reduce fishery-related bycatch and mortality on a regular basis, regardless of variability in sea turtle distribution, hence it is our preferred action over other alternatives considered in the DEIS and FEIS.

Comment 56: NOAA should investigate and promptly enact appropriate time and area closures for the fishery to protect important sea turtle habitat and populations.

Response: We regularly investigate all significant events in an attempt to learn the causative factor(s) for sea turtle mortality. In some cases, these factors are not readily identifiable, even after several years of investigation. If we determine an activity or source of mortality and habitat impacts can be prevented or mitigated by time/area closures, we would explore that option at the appropriate time based on available information.

Comment 57: TED use should be based on inside/outside waters as defined by the Louisiana Statutes 45:495, and only required in outside waters.

Response: Fisheries observer data from skimmer trawl vessels demonstrate that sea turtles occur within areas defined as inside waters by the Louisiana Statutes. The inside/outside waters definition also does not correlate with bathymetric or other sea turtle habitat preferences in a manner that lends itself to practical consideration. This recommendation would not effectively achieve our recovery goals and objectives of reducing bycatch and mortality of sea turtles in the shrimp fisheries.

Comment 58: Maintain existing tow times and enforce them through mandatory use of electronic vessel monitoring.

Response: The use of electronic vessel monitoring systems (VMS) is a potential management option, but one that was not considered due to the inherent difficulties in requiring such a system on thousands of vessels of differing sizes and configurations. Whereas VMS could be more effective on a more homogenous fleet of larger vessels, we determined it was not viable for the skimmer trawl fisheries. We have also looked at other options, such as a data logger to monitor tow times. However, since the revised tow time definition included in this final rule allows the frame to continually fish, it is impractical to configure a data logger to monitor tow times. We have documented that sea turtle bycatch and mortality, including post-interaction mortality, can occur within the allowable tow time limits. Therefore, TEDs represent the most effective measure to reduce sea turtle bycatch and mortality in these fisheries.

Comment 59: NOAA should provide TEDs to all fishers and allow a one-year trial period before making the requirement effective.

Response: We are currently exploring avenues for financial support that could provide TEDs to affected fishers. We do expect that affected fishers could receive assistance from the Fishery Finance Program, which could provide low-interest loans for fishers to purchase the required TEDs, although the program has not been used for this type of gear purchase in the past. Given the number of fishers affected and number of TEDs required, we are delaying effectiveness of this final rule until April 1, 2021. While this delay in effectiveness is not considered a trial period, it does provide fishers additional time to adapt to fishing with TEDs in their specific fishing conditions.

Comment 60: NOAA should have mitigation measures for the loss of shrimp due to TED use, as well as economic assistance to purchase TEDs. NOAA should explore opportunities to provide fishers TED training or TEDs with funding allocated to one or more of the Trustee Implementation Groups under the DEEPWATER HORIZON oil spill program.

Response: As previously mentioned in Comment 59, we are exploring measures to provide financial support for affected fishers to acquire TEDs. We have also considered the need for outreach and training efforts to assist fishers with the installation and maintenance of TEDs in their nets. We will be scheduling and announcing future TED training workshops to be conducted during the phase-in period.

Comment 61: NOAA needs to conduct a sea turtle stock assessment to determine population levels to determine if additional regulations are necessary.

Response: We disagree with this comment. While stock assessments for all sea turtle species would be beneficial for management purposes, we are mandated to implement management measures deemed necessary and advisable to recover threatened and endangered species under our purview. Given that fisheries observer data indicates sea turtle bycatch and mortality is occurring in the skimmer trawl fisheries, delaying management

action to conduct stock assessments is not warranted.

Comment 62: If TEDs are required, implementation should be phased in over two to three years by breaking vessels into size classes or based on landings.

Response: We considered public comments such as this when determining how to implement the final rule. Since the revised final rule affects approximately 82 percent fewer fishers than the preferred alternative in the DEIS, we determined a single delayed implementation date would be most appropriate for fishers, management, and enforcement since this alternative requires much less production time for the necessary number of TEDs.

Comment 63: Due to issues with debris clogging in shallow water and the assumption a TED would lose angle, thereby increasing catch loss, NOAA should exempt TED use in waters 2–4 feet in depth.

Response: As mentioned in our response to Comment 7, TED testing aboard commercial vessels indicates that TEDs operate effectively in depths as shallow as 2 feet. Therefore, an exemption based on water depth is not warranted.

Comment 64: NOAA should exempt all skimmer trawls less than 40 feet in length from the TED requirements.

Response: Based on public comment and further deliberation, we revised our final rule to exempt skimmer trawl vessels less than 40 feet in length.

Comment 65: NOAA should look at other sea turtle issues such as vessel impacts, pollution, explosive demolition of oil rigs, and other fisheries including recreational fisheries, *etc.*

Response: Sea turtles face a variety of threats including vessel impacts, pollution, and bycatch in other fisheries. We address the impacts of various threats to sea turtles, and several other management actions that mitigate these impacts on sea turtle populations are discussed in Section 3 of the DEIS and FEIS.

Comment 66: Ban trawlers.

Response: We believe the use of TEDs in trawl nets reduces sea turtle bycatch in these fisheries to acceptable levels, which meets our goals and objectives for sea turtle conservation. A ban on all trawl gear is an extreme measure not warranted to support sea turtle conservation.

Comment 67: The TED implementation strategy should be based on what provides the greatest conservation benefit, and a phased approach may be necessary.

Response: Based on public comments raising performance and safety issues with TED use on smaller vessels and regarding the economic impacts of the proposed rule, and new information indicating significantly lower levels of sea turtle mortality in the offshore fleet, we have revised the regulation to now limit the TED requirements to skimmer trawl vessels 40 feet and greater in length. The more focused scope of the final rule will allow for faster implementation of the TED requirement and is expected to result in a significant conservation benefit of 801–1,168 sea turtles annually in the Southeastern U.S. shrimp fisheries. We may address other trawls, such as pusher-head trawls, wing nets, and try nets, as well as small skimmer trawl vessels, in future rulemaking.

Comment 68: Double rig trawlers should be banned in the lakes and inside waters.

Response: Double rig (otter) trawlers are currently required to use TEDs in their nets. As state shrimp fishery management issues unrelated to sea turtle bycatch and mortality are outside the purview of this action, we do not have any additional response to this comment.

Classification

This final rule has been determined to be significant for purposes of Executive Order 12866 because it may raise novel legal or policy issues out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. This significant regulation is considered regulatory under Executive Order 13771. Depending on the assumptions used, the estimated cost of this rule in 2016 dollars is between 3.24 and 3.85 million. A discussion on the basis for these estimates is in the FEIS.

We prepared a FRFA, as required by Section 603 of the Regulatory Flexibility Act (RFA), for this final rule. The FRFA describes the economic effects this final rule would have on small entities. A description of the action, why it is being considered, the objectives of, and legal basis for this final rule are contained at the beginning of this section in the preamble and in the **SUMMARY** section of the preamble. A copy of the full analysis is available from us (see **ADDRESSES**). A summary of the FRFA follows.

The ESA provides the statutory basis for this final rule. We did not receive any comments from the U.S. Small Business Administration's Office of Advocacy on the IRFA in the proposed rule. We received 18 comments from the public regarding the IRFA in the proposed rule and the economic effects analysis in the DEIS; see comments 11–28 in the preamble of this rule. Comment 39 regarding the delay in the effectiveness of this rule is also germane. These comments and our responses are incorporated here by reference. The preferred alternative and the tow time definition in this final rule were changed from the proposed rule, based in part on these comments. The reasons for these changes are discussed in the preamble and also incorporated here by reference.

No duplicative, overlapping, or conflicting Federal rules have been identified. This final rule would not establish any new reporting, record-keeping, or other compliance requirements beyond the requirement to use a TED when vessels 40 feet and greater in length use skimmer trawls to harvest shrimp in the southeastern United States. The net manufacturer typically installs TEDs, so fishers are not expected to have special skills. Some learning will likely be necessary for the maintenance and routine use of TEDs by fishers who have not historically had to use these devices. TEDs have been required in otter trawls for many years. A majority of the vessels directly regulated by this rule also used otter trawls between 2011 and 2014. Thus, many if not most vessel owners and captains are expected to be knowledgeable of how to maintain and use TEDs. As a result, the skills required for TED use are thought to be consistent with the skillset and capabilities of commercial shrimp fishers in general and special professional skills would not be expected to be necessary. Further, we plan to engage in significant outreach efforts (*e.g.,* TED workshops and complimentary inspections by our Gear Monitoring Team) to educate owners and captains of affected skimmer vessels regarding how to use and maintain TEDs.

This final rule is expected to directly regulate businesses that operate vessels 40 feet and greater in length using skimmer trawls in the southeastern U.S. shrimp fisheries (North Carolina through Texas). An estimated 1,062 vessels use this gear (1,047 vessels in the Gulf of Mexico and 15 vessels in the South Atlantic). Although some vessels are known to be owned by businesses with the same, or substantially the same, individual owners and, thus, would be considered affiliated, ownership data is incomplete. It is not currently feasible to accurately determine the number of individual businesses these 1,062 vessels represent. While it will result in an overestimate of the actual number of businesses directly regulated by this rule, for the purposes of this analysis, we assume

that each vessel is independently owned by a single business and, thus, the terms vessels and businesses are used interchangeably. Therefore, we expect this rule to directly regulate 1,062 businesses.

The average annual gross revenue (2014 dollars) over the period 2011–2014 for vessels 40 feet and greater in length that harvested shrimp using skimmer trawls was approximately $76,529 for vessels in the Gulf of Mexico (1,047 vessels) and $258,756 for vessels in the South Atlantic (15 vessels). The largest average annual gross revenue earned by a single business over this period was approximately $1.85 million. We have not identified any other small entities that might be directly affected by this regulatory action.

On December 29, 2015, we issued a final rule establishing a small business size standard of $11 million in annual gross receipts (revenue) for all businesses primarily engaged in the commercial fishing industry (NAICS code 11411) for RFA compliance purposes only (80 FR 81194, December 29, 2015). The $11 million standard became effective on July 1, 2016, and replaces the prior Small Business Administration standards of $20.5 million, $5.5 million, and $7.5 million for the finfish (NAICS 114111), shellfish (NAICS 114112), and other marine fishing (NAICS 114119) sectors of the U.S. commercial fishing industry in all our rules subject to the RFA after July 1, 2016 (Id. at 81194). In addition to this gross revenue standard, a business primarily involved in commercial fishing is classified as a small business if it is independently owned and operated, and is not dominant in its field of operations (including its affiliates). Based on the information above, all businesses directly regulated by this rule are determined to be small businesses for the purpose of this analysis.

This final rule is expected to directly regulate all commercial fishing entities operating vessels 40 feet and greater in length that use skimmer trawls in the southeastern U.S. shrimp fisheries, or an estimated 1,062 businesses. Data from 2011 through 2014 indicate that 9,711 vessels (8,401 in the Gulf of Mexico and 1,310 in the South Atlantic) participated in the southeastern U.S. shrimp fisheries during this time. Thus, this rule would directly regulate about 11 percent of the vessels in these fisheries, which is considered a substantial number based on existing guidance. As previously discussed, all of these affected entities have been determined, for the purpose of this analysis, to be small entities. Therefore, we determine that this rule would affect a substantial number of small entities.

This final rule would require all commercial fishing businesses that operate vessels 40 feet and greater in length using skimmer trawls in the southeastern U.S. shrimp fisheries (North Carolina through Texas) to use TEDs designed to exclude small sea turtles when shrimping. These TEDs successfully result in the reduced bycatch of small sea turtles, but they also result in shrimp loss and, thus, reduced shrimp harvest per tow. Although it may be theoretically possible to compensate for this reduction in harvest with additional effort (*i.e.,* more tows or trips), increasing effort will also increase operating costs. With the exceptions of 2013 and 2014, the differential between shrimp and fuel prices has generally been very small in the past several years and, therefore, vessels are already operating on small positive or negative economic margins. Increasing effort is therefore likely to be economically risky in the short term, particularly for vessels that only or primarily harvest after season openings because catch per unit of effort steadily declines over the course of a trip and a season and thus the additional revenue from each tow or trip steadily declines as well. Further, if additional effort was cost-effective or profitable, this effort would already be occurring and part of baseline fishing behavior. Therefore, we do not expect that individual vessels would or could compensate for lost shrimp and the associated gross revenues by increasing effort.

Vessels affected by this final rule would likely experience economic losses from two sources: Reduced shrimp revenue resulting from loss of shrimp catch caused by the use of TEDs and increased gear costs associated with the purchase, installation, maintenance, and replacement of newly required TEDs. Revenue loss from reduced shrimp harvest is expected to be recurring, barring changes in fishing practices, and the increased gear costs due to the purchase and installation of TEDs are expected to occur in the first year (*i.e.,* prior to the effective date of this rule). Under normal use and proper maintenance, a TED would last more than three years and likely much longer for many vessels. In addition, TEDs can often be repaired by the owner or operator if they have or can easily obtain the proper knowledge. TEDs have been required in otter trawls for many years and a majority of the vessels directly regulated by this regulatory action also used otter trawls between 2011 and 2014. Thus, many if not most vessel owners and captains are expected to be knowledgeable of how to maintain and use TEDs. Further, we plan to engage in significant outreach efforts to educate the owners and captains of affected skimmer vessels regarding how to use and properly maintain TEDs. Therefore, TED costs are not assumed to recur on an annual basis.

In this analysis, we assume the average shrimp loss to be 6.21 percent (estimated range of 3.07–10.61 percent), the estimated cost per TED is $325 for small vessels (vessels less than 60 feet) and $550 for large vessels (vessels 60 feet or longer), and vessels are assumed to purchase/carry enough TEDs for the nets towed plus one spare set. Therefore, the actual effects of this final rule on individual vessels will vary based on gear purchase decisions (*e.g.,* how many nets are used, how many spares are kept, and how many TEDs are purchased) and individual performance. Individual vessels may experience higher or lower shrimp loss than the average given their experience with TEDs. For example, fishers that have not traditionally had to use TEDs may initially experience shrimp loss greater than the average, which could persist until they become more familiar with the equipment, while shrimp loss for those who have experience with TEDs may be below the average.

Further, in this analysis, we expect neither the ex-vessel price per pound of shrimp nor the cost per TED to change in response to supply and demand conditions. Specifically, the estimated decrease in the harvest of domestic shrimp from catch loss due to the use of TEDs is not expected to result in an increase in the ex-vessel price of domestically-harvested shrimp, nor do we expect an increase in the average price (cost) of a TED. The maximum estimated number of TEDs necessary to outfit all of the vessels regulated by this regulatory action is 4,242. The assumed stability in shrimp ex-vessel prices is based on the fact that imported shrimp dominate the U.S. market and available evidence suggests the demand for shrimp is highly elastic. Whether the price of TEDs increases and the magnitude of that increase will be determined by the number of available producers (there are currently six), their capacity to meet demand (each can currently produce 20 TEDs per week), the timeframe for compliance, and the total number of TEDs needed. The total number of TEDs needed will be affected by vessel owners' purchase decisions and the number of vessels that can successfully remain in operation in the face of the higher operating costs and

reduced revenue. Though not expected, if the ex-vessel price of shrimp increases due to reduced supply, this analysis will overstate the adverse economic effects of lost shrimp revenue. Conversely, if the price of a TED increases, the adverse economic effects associated with TED costs will be understated.

Because the increased gear costs associated with purchasing TEDs would be incurred in the first year but only periodically thereafter, whereas shrimp loss would recur on each trip in every year, the following analysis focuses on first-year results (*i.e.,* results that include both TED purchase costs and shrimp revenue reduction). The adverse effects in subsequent years will be less than those in the first year. As previously stated, effects in subsequent years would be expected to vary with fishing adaptations (*e.g.,* fishers may become more skilled in how the nets with TEDs are fished, thereby reducing shrimp loss), as well as unpredictable and unknown TED replacement schedules. In this analysis, all of the monetary effects provided are in 2014 dollars.

Over all of the businesses expected to be affected (1,062 vessels), this final rule would be expected to result in a reduction in gross revenue of approximately $2.29 million, TED costs of approximately $1.38 million, and thus a total adverse effect of approximately $3.67 million in the first year, assuming no vessels cease operations as a result of this rule. The average adverse effects per vessel in the first year would be $2,159 lost gross revenue and $1,298 in TED costs, and, thus, the average total adverse effect per vessel would be $3,457. These effects are not expected to be uniform across Gulf of Mexico and South Atlantic vessels. The 1,047 vessels in the Gulf of Mexico are expected to experience average adverse effects of $2,184, $1,298, and $3,482 in the first year with respect to lost gross revenue, TED costs, and total adverse effects, respectively. In general, the comparable values for the 15 South Atlantic vessels are much less at $429, $1,300, and $1,729, respectively.

However, these values insufficiently capture the range of differences in the economic performance of vessels across the fisheries. To examine these differences, we placed vessels in a category based on their average annual gross (total) revenue from 2011–2014. These categories are based on vessel categories developed for or derived from the annual economic reports for Federally-permitted vessels in the Gulf of Mexico and the South Atlantic, and a 2014 economic report for non-Federally-permitted vessels in the Gulf of Mexico. Vessels were placed in the category that their average annual gross revenue most closely approximated. In the South Atlantic, the distribution of gross revenue between shrimp and non-shrimp species was also taken into account.

In the Gulf of Mexico, vessels were placed into one of six categories: Average Federally-permitted vessel (Federal Gulf of Mexico), Q5, Q4, Q3, Q2, and Q1. Specifically, in the Gulf of Mexico, the average annual gross revenue ranges for the Federal Gulf, Q5, Q4, Q3, Q2, and Q1 categories are as follows: >/=$255,000, <$255,000 and >/=$119,000, <$119,000 and >/=$52,000, <$52,000 and >/=$29,000, <$29,000 and >/=$17,000, and <$17,000. In the South Atlantic, vessels were placed into nine categories: Rock shrimp (RSLA), primary penaeid (SPA Primary), secondary penaeid (SPA Secondary), average Federally-permitted South Atlantic penaeid vessel (AS), Q5, Q4, Q3, Q2, and Q1. A vessel was placed in the RSLA category if 50 percent or more of its gross revenue came from shrimp and its average annual gross revenue was >/=$456,000. A vessel was placed in the AS category if 50 percent or more of its gross revenue came from shrimp and its average annual gross revenue was <$456,000 and >/=$216,000. A vessel was placed in the SPA Primary category if 50 percent or more of its gross revenue came from shrimp and its average annual gross revenue was <$216,000 and >/=$119,000. Finally, a vessel was placed in the SPA Secondary category if <50 percent of its gross revenue came from shrimp and its average annual gross revenue was >/= $119,000. The ranges are the same as in the Gulf of Mexico for the Q5, Q4, Q3, Q2, and Q1 categories.

These categories should not be presumed to imply that every vessel in a particular category has a particular permit associated with the category name, as that is not always the case. Among these vessel categories for vessels in both areas, vessels in the Q1, Q2, and Q3 categories are considered, for the purpose of this analysis, as part-time commercial shrimp vessels (*i.e.,* vessels that are only engaged in commercial fishing part-time) and vessels in each of the other categories are considered full-time vessels.

For Gulf of Mexico vessels, the number of vessels expected to be directly regulated by this final rule and their average annual gross revenue for 2011–2014 by category are as follows: 265 vessels and $6,661 (Q1), followed by 116 vessels and $23,060 (Q2), 169 vessels and $39,947 (Q3), 303 vessels and $80,411 (Q4), 139 vessels and $163,311 (Q5), and 55 vessels and $397,640 (Federal Gulf of Mexico). The expected average adverse effect (reduced shrimp revenue and TED cost) of this regulatory action in the first year for these vessels by category is $1,615, $2,175, $2,697, $4,677, $6,450, and $3,558 for vessels in each category, Q1–Q5 and Federal Gulf of Mexico, respectively.

Although the average adverse effects of this final rule could be compared to the average gross revenue to generate an estimate of the average relative (percent) effect of the rule by category, this ''average to average'' approach (average adverse effect/average gross revenue for each category) would provide a distorted perspective of the actual expected effects of this rule at the vessel level. For example, using this ''average to average'' approach for category Q1, the average estimated adverse effect of this rule would be approximately 24 percent ($1,615/$6,661), and thus the projected average adverse effect of this rule per vessel in the Q1 category would be 24 percent of average annual gross revenue). Although this outcome would not likely be considered insignificant, examination of the adverse effect by vessel (adverse effect/average gross revenue for that vessel), then averaged across all vessels, provides a much clearer picture of the expected economic burden of this regulatory action because it accounts for the heterogeneity of vessels within categories. Using this approach, the relative adverse effect of this rule as a percentage of average annual gross revenue increases to 85 percent for vessels in the Q1 category. This result demonstrates that most of these vessels generate minimal fishing revenue year-to-year, and the costs of the TEDs alone are likely to be financially unbearable even before factoring in the loss of shrimp revenue. Applying this approach (analysis at the vessel level, then averaging across all vessels) to all revenue categories for Gulf of Mexico vessels, the percent loss relative to gross revenue would be expected to be 85 percent (Q1), 9.5 percent (Q2), 6.9 percent (Q3), 5.9 percent (Q4), 4.2 percent (Q5), and 1.1 percent (Federal Gulf of Mexico). These results demonstrate that, although the expected effects in absolute monetary terms are greater for the vessels that generate the highest average annual gross revenues and are considered full-time vessels (*i.e.,* Q4, Q5 and Federal Gulf of Mexico vessels), the relative effect of this rule would be greater on part-time vessels with the lowest

average annual gross revenues (*i.e.,* Q1, Q2, and Q3 vessels).

The number of South Atlantic vessels expected to be directly regulated by this final rule and, where disclosable, their average annual gross revenue for 2011–2014 by category are as follows: 4 vessels and $5,832 (Q1) vessels, 5 vessels and $70,860 (Q4), and 3 vessels and $835,270 (RSLA). In addition, 1 vessel in the SPA Secondary category and 2 vessels in the Q2 category are expected to be affected. Because the expected number of businesses affected by this regulatory action in the SPA Secondary and Q2 categories is so small, neither baseline economic information nor expected economic effects directly derived from that baseline economic information can be reported for these entities due to confidentiality restrictions. The expected average adverse effect (reduced shrimp revenue and TED cost) of this regulatory action in the first year for these vessels is $1,378, $2,180, and $1,308 for vessels in the Q1, Q4 and RSLA categories, respectively. Using the same vessel-level analytical approach discussed above for Gulf of Mexico vessels, the percent loss relative to gross revenue expected for South Atlantic vessels by category is 77.5 percent (Q1), 7.9 percent (Q2), 3.4 percent (Q4), 0.2 percent (RSLA), and 0.1 percent (SPA Secondary). Using the same vessel-level analytical approach discussed above for Gulf of Mexico vessels, the percent loss relative to gross revenue expected for South Atlantic vessels by category would be 69.1 percent (Q1), 7.6 percent (Q2), 4.9 percent (Q3), 2.8 percent (Q4), and 0.2 percent (RSLA). Although the expected effects in absolute monetary terms for the South Atlantic vessels do not follow as markedly the same pattern as those for Gulf of Mexico vessels, full-time vessels in the South Atlantic would generally be expected to experience greater average adverse effects than part-time vessels. However, the range of the difference is only several hundred dollars for South Atlantic vessels and not thousands of dollars as expected in the Gulf of Mexico. Further, although the relative effects in general are not expected to be as great for South Atlantic vessels, the relative effects on the part-time vessels in the South Atlantic still exceed those of full-time vessels. Although the effects on some South Atlantic part-time vessels may be so great as to render continued operation as a commercial fishing vessel economically infeasible, as with some part-time vessels in the Gulf of Mexico, only 6 part-time vessels are affected in the South Atlantic.

The average lifespan of a TED is inversely related to how often it is used for harvesting shrimp (*i.e.,* the more it is used in a particular period of time, the shorter its lifespan will be). At some point over the 10-year time period considered in the analysis, there will be recurring TED costs for the Q2, Q3, Q4, and Q5 vessels, the frequency of which will vary with the average number of days they shrimp in each year level. Because the Q4 and Q5 vessels spend more days shrimping in a year on average, they will experience recurring TED costs more often than the Q2 and Q3 vessels. The Q1 vessels are not expected to experience recurring TED costs in this analysis because TEDs are expected to last about 15 years due to the relatively small number of days they spend shrimping on average in any given year.

In spite of the results presented above, the preceding analysis does not assume nor conclude that any specific individual or total number of vessels would be expected to stop operating in the southeastern U.S. shrimp fisheries because of this final rule. However, the vessels most likely to shut down because of these adverse effects are the part-time vessels (*i.e.,* Q1, Q2, and Q3 vessels). These vessels have the lowest average annual gross revenues per vessel, are thought to earn relatively high negative net revenues (losses) on average, and are, therefore, the least able to absorb revenue reductions and cost increases. On the other hand, at least some of these vessels continued to commercially harvest shrimp in 2013 and 2014 after experiencing relatively high losses in 2012. This suggests either available data incompletely captures the ''economics'' of these operations (*e.g.,* the value of shrimp retained for personal consumption or bartering purposes is not considered), or the decision to harvest shrimp is based on criteria other than, or in addition to, considerations of economic profit and loss, such as personal consumption of harvested shrimp and associated value and lifestyle bonus (*i.e.,* the value of the commercial fishing lifestyle).

Nonetheless, in theory, vessels and businesses in general are expected to shut down when they cannot cover their variable costs. However, data on variable costs is not available for all vessels affected by this final rule. Estimates of average variable costs for a relatively small sample of the affected vessels are available, as are estimates of net revenues, but those estimates are insufficient with respect to determining how many and which vessel owners may choose to stop operating. Thus, the most appropriate measure to use for projecting how many and which vessels may stop operating is the percentage loss in average annual gross revenue, estimates of which are available for all of the affected vessels.

There is no single ''hard and fast'' decision rule for determining what percentage loss in gross revenue will definitively cause a vessel or any other business to stop operating. However, given the characteristics of the part-time vessels as noted above, it is reasonable to assume that an adverse effect (*i.e.,* the combination of additional costs and revenue reductions) in the first year that represents more than 20 percent of their average annual gross revenue would be sufficient to cause them to shut down. Applying this assumption to the vessels affected by this rule results in the following findings.

The number of part-time skimmer trawl vessels 40 feet and greater in length projected to potentially shut down in the Gulf of Mexico is 178, or approximately 2 percent of the 8,401 shrimp vessels in the Gulf of Mexico, 17 percent of the 1,047 affected shrimp vessels in the Gulf of Mexico, and about 32 percent of the 550 part-time shrimp vessels affected in the Gulf of Mexico. The number of part-time vessels projected to shut down in the South Atlantic is only 2, or approximately 0.1 percent of the 1,310 shrimp vessels in the South Atlantic, 13 percent of the 15 affected vessels in the South Atlantic, and one-third of the 6 part-time shrimp vessels affected in the South Atlantic. As some uncertainty exists with respect to how business owners will respond, these estimates should be viewed with some caution.

In general, if vessels shut down, they will no longer be landing shrimp or other species, nor will they be generating gross revenues or net revenues associated with those landings (*i.e.,* their loss in landings and gross revenue is 100 percent). Further, the average percentage loss in annual gross revenue per vessel will in turn increase, particularly in the long term because shutting down causes a long-term reduction in landings and gross revenue for the vessels that shut down. In theory, the loss of net revenues may improve or worsen average economic performance within the affected group of vessels depending on whether the economic performance (as measured by net revenues) of the vessels that shut down is better or worse than the average affected vessel. Because the vessels shutting down are thought to experience relatively high losses, average net revenues for those that continue operating would be expected to improve. On the other hand, because

vessels that shut down will no longer require TEDs, the number of TEDs needed, the total costs of purchasing those TEDs, and the average cost of TEDs per affected vessel will decrease. The decrease in TED costs will help to mitigate the adverse effects across all vessels, but the losses in gross revenue would generally be expected to far outweigh the reductions in TED costs and thus the average adverse effect per affected vessel would be expected to increase. Further, the reductions in total TED costs would not reduce such costs for the vessels that continue operating as those would be expected to remain unchanged.

Seven alternatives, including no action, were considered for this final rule. The first alternative (no action) to the rule would not expand the required use of TEDs. The ''no action'' alternative would not achieve the objective of reducing the incidental bycatch and mortality of ESA-listed sea turtles, particularly small sea turtles, in the southeastern U.S. shrimp fisheries in order to aid in protection and recovery.

The second alternative to the final rule would have expanded the required use of TEDs to vessels 26 feet and greater in length using skimmer trawls, pusher-head trawls, and wing nets (butterfly trawls) to harvest shrimp in the southeastern U.S. This alternative was not selected as it would have been expected to affect more vessels (3,103) and increase the total expected TED costs and shrimp revenue loss compared to this rule. In addition, this alternative would have potentially caused an additional 680 part-time vessels to cease operations, and it would have taken almost 1.5 additional years to produce the number of TEDs necessary for all vessels to comply compared to this rule. This alternative was also not selected because, to date, we have no fishery observer data or TED testing information on any vessels using pusher-head trawls or wing nets in the southeastern U.S. shrimp fisheries. Concerns were expressed about applying data regarding the use of TEDs in skimmer trawl operations to pusher-head trawls and wing nets. New information indicated significant differences in the manner pusher-head trawls and wing nets operate compared to skimmer trawls, and therefore we determined additional gear testing is needed for those types.

The third alternative to the final rule would have expanded the required use of TEDs to vessels that use skimmer trawls, pusher-head trawls, and wing nets (butterfly trawls) in the southeastern U.S. shrimp fisheries (North Carolina through Texas), with the exception of vessels that use wing nets in Biscayne Bay in Miami-Dade County, Florida. This alternative was the preferred alternative in the proposed rule. This alternative was not selected because it would have been expected to affect significantly more vessels (5,847) and significantly increase the total expected TED costs and the shrimp revenue loss compared to this rule. This alternative was also not selected would have potentially caused an additional 2,630 part-time vessels to cease operations, and it would have taken almost 3.5 additional years to produce the number of TEDs necessary for all vessels to comply compared to this rule. In addition, to date, we have no fishery observer data on skimmer trawl vessels less than 26 feet in length or TED testing information on skimmer trawl vessels less than 25 feet in length in the southeastern U.S. shrimp fisheries. Thus, we do not have adequate information to determine the effectiveness and practicability of TEDs on skimmer trawl vessels less than 26 feet in length. Some of our concerns included the ability to adequately install TEDs in the nets of these vessels without significant modifications to vessel rigging. Other identified issues included the potential lack of deck space to accommodate TEDs. On very small vessels, such as skiffs 18 feet in length for example, there is limited space to sort catch and handle gear. These types of issues have complicated TED testing, as there is little space for observers, and would likely complicate enforcement and compliance checks at sea. Further, there were potential navigational concerns with TEDs installed on vessels less than 26 feet in length. For example, there were concerns the TED extension could interfere with the engine while maneuvering a small vessel. A net lengthened to accommodate a TED on a small vessel could potentially foul the engine and immobilize a vessel, presenting a potential safety issue. We are conducting additional testing before requiring TEDs on vessels less than 26 feet in length.

The fourth alternative to the final rule would have expanded the required use of TEDs to vessels 26 feet and greater in length using skimmer trawls. This alternative would have been expected to affect significantly more vessels (2,913) and lead to higher TED costs and greater shrimp revenue losses compared to this rule. This alternative would have also potentially caused an additional 623 part-time vessels to cease operations, and it would have taken almost 1.5 additional years to produce the number of TEDs necessary for all vessels to comply compared to this rule.

The fifth alternative to the final rule would have expanded the required use of TEDs to all vessels using skimmer trawls regardless of vessel length. Similar to the third alternative, this alternative would have been expected to affect significantly more vessels (5,432) and significantly increase the total expected TED costs and shrimp revenue loss compared to the rule. This alternative was also not selected would have potentially caused an additional 2,417 part-time vessels to cease operations, and it would have taken almost 3.5 additional years to produce the number of TEDs necessary for all vessels to comply compared to this rule. In addition, this alternative was also not selected for the reasons noted above with respect to why the TED requirement was not expanded to vessels less than 26 feet in length.

The sixth and seventh alternatives to the final rule would have expanded the required use of TEDs to all shrimp vessels regardless of trawl type but varying by fishing location (*i.e.,* state waters only or all waters). These alternatives were not selected for the same reasons the second, third, and fourth alternatives were not selected. These alternatives were also not selected because they would have been expected to affect significantly more vessels (9,711 for both alternatives) and result in significantly greater expected increases in TED costs and shrimp revenue loss, with a relatively minor increase in the expected protection of small sea turtles, compared to the rule. These alternatives were also not selected because they would have potentially caused an additional 3,972 part-time vessels to cease operations, and it would have taken more than 7 additional years to produce the number of TEDs necessary for all vessels to comply compared to this rule.

Based on the above information, the alternative chosen in this final rule has minimized the expected adverse effects on small entities compared to the other significant alternatives considered that would achieve the objectives of this rule and the ESA.

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as ''small entity compliance guides.'' The agency shall explain the actions a small entity is required to take to comply with a rule

or group of rules. As part of this rulemaking process, a small entity compliance guide was prepared. The compliance guide will be distributed to affected entities by sending copies of the guide to fishing industry and interest groups (*e.g.,* Louisiana Shrimp Association, Audubon Nature Institute—G.U.L.F., Vietnamese-American Fisher Folk and Families, and Coastal Communities Consulting, Inc., *etc.*) and to state fish and wildlife agencies in Louisiana, Mississippi, Alabama, Florida, and North Carolina. In addition, copies of this final rule and the compliance guide are available from the Regional Administrator (see **ADDRESSES**) and at the following website: *https://www.fisheries.noaa.gov/southeast/bycatch/turtle-excluder-device-regulations.*

As noted in the response to comment 8, we intend to offset this action as soon as practicable after publication to comply with Executive Order 13771.

List of Subjects in 50 CFR Part 223

Endangered and threatened species, Exports, Imports, Transportation.

Dated: December 16, 2019.

Samuel D. Rauch III,

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

For the reasons set out in the preamble, 50 CFR part 223 is amended as follows:

PART 223—THREATENED MARINE AND ANADROMOUS SPECIES

■ 1. The authority citation for part 223 continues to read as follows:

Authority: 16 U.S.C. 1531–1543; subpart B, § 223.201–202 also issued under 16 U.S.C. 1361 *et seq.;* 16 U.S.C. 5503(d) for § 223.206(d)(9).

■ 2. In § 223.206, revise paragraphs (d)(2)(ii)(A)(*3*) and (d)(3)(i) introductory text to read as follows:

§ 223.206 Exceptions to prohibitions relating to sea turtles.

* * * * *

(d) * * *

(2) * * *

(ii) * * *

(A) * * *

(*3*) Has only a pusher-head trawl or a wing net, or has a skimmer trawl on a vessel less than 40 ft (12.2 m) in length as indicated on the vessel's state vessel registration or U.S. Coast Guard vessel documentation.

* * * * *

(3) *Tow-time restrictions*—(i) *Duration of tows.* If tow-time restrictions are used pursuant to paragraph (d)(2)(ii), (d)(3)(ii), or (d)(3)(iii) of this section, a shrimp trawler must limit tow times. The tow time begins at the time the trawl door enters the water and ends at the time the trawl door is removed from the water. For a trawl that is not attached to a door, the tow time begins at the time the codend enters the water and ends at the time the codend is emptied of catch on deck. Tow times may not exceed:

* * * * *

■ 3. In § 223.207 revise paragraphs (a)(4), (a)(6), (a)(7)(ii)(B) and (C), and (d)(3)(ii) and (iii) and add paragraph (d)(3)(v) to read as follows:

§ 223.207 Approved TEDs.

* * * * *

(a) * * *

(4) *Space between bars.* The space between deflector bars and the deflector bars and the TED frame must not exceed 4 inches (10.2 cm), except for TEDs required to be installed in skimmer trawls, where the space between deflector bars and the deflector bars and the TED frame must not exceed 3 inches (7.6 cm).

* * * * *

(6*) Position of the escape opening.* The escape opening must be made by removing a rectangular section of webbing from the trawl, except for a TED with an escape opening size described at paragraph (a)(7)(ii)(A) of this section for which the escape opening may alternatively be made by making a horizontal cut along the same plane as the TED. A TED installed in a skimmer trawl rigged for fishing must have the escape opening oriented at the top of the net. For TEDs installed in all other trawls, the escape opening must be centered on and immediately forward of the frame at either the top or bottom of the net when the net is in the deployed position. The escape opening must be at the top of the net when the slope of the deflector bars from forward to aft is upward, and must be at the bottom when such slope is downward. The passage from the mouth of the trawl through the escape opening must be completely clear of any obstruction or modification, other than those specified in paragraph (d) of this section.

(7) * * *

(ii) * * *

(B) *The 71-inch opening.* The two forward cuts of the escape opening must not be less than 26 inches (66 cm) long from the points of the cut immediately forward of the TED frame. The resultant length of the leading edge of the escape opening cut must be no less than 71 inches (181 cm) with a resultant circumference of the opening being 142 inches (361 cm) (Figure 12 to this part). A webbing flap, as described in paragraph (d)(3)(ii) or (v) of this section, may be used with this escape hole, so long as this minimum opening size is achieved. Either this opening or the one described in paragraph (a)(7)(ii)(C) of this section must be used in all offshore waters and in all inshore waters in Georgia and South Carolina, but may also be used in other inshore waters.

(C) *Double cover opening.* The two forward cuts of the escape opening must not be less than 20 inches (51 cm) long from the points of the cut immediately forward of the TED frame. The resultant length of the leading edge of the escape opening cut must be no less than 56 inches (142 cm) (Figure 16 to this part illustrates the dimensions of these cuts). A webbing flap, as described in paragraph (d)(3)(iii) or (v) of this section, may be used with this escape hole. Either this opening or the one described in paragraph (a)(7)(ii)(B) of this section must be used in all offshore waters and in all inshore waters in Georgia and South Carolina, but may also be used in other inshore waters.

* * * * *

(d) * * *

(3) * * *

(ii) *71-inch TED flap.* The flap must be a 133-inch (338-cm) by 52-inch (132-cm) piece of webbing. The 133-inch (338-cm) edge of the flap is attached to the forward edge of the opening (71-inch (180-cm) edge). The flap may extend no more than 24 inches (61 cm) behind the posterior edge of the grid (Figure 12 to this part illustrates this flap).

(iii) *Double cover TED flap.* This flap must be composed of two equal size rectangular panels of webbing. Each panel must be no less than 58 inches (147.3 cm) wide and may overlap each other no more than 15 inches (38.1 cm). The panels may only be sewn together along the leading edge of the cut. The trailing edge of each panel must not extend more than 24 inches (61 cm) past the posterior edge of the grid (Figure 16 to this part). Each panel may be sewn down the entire length of the outside edge of each panel. This paragraph (d)(3) of this section notwithstanding, this flap may be installed on either the outside or inside of the TED extension. For interior installation, the flap may be sewn to the interior of the TED extension along the leading edge and sides to a point intersecting the TED frame; however, the flap must be sewn to the exterior of the TED extension from the point at which it intersects the TED frame to the trailing edge of the flap. Chafing webbing described in

paragraph (d)(4) of this section may not be used with this type of flap.

* * * * *

(v) *Small turtle TED flap.* If the angle of the deflector bars of a bent bar TED used by a skimmer trawl exceeds 45°, or if a double cover opening straight bar TED (at any allowable angle) is used by a skimmer trawl, the flap must consist of twine size not greater than number 15 (1.32-mm thick) on webbing flaps described in paragraph (d)(3)(i), (ii), (iii), or (iv) of this section.

* * * * *

[FR Doc. 2019–27398 Filed 12–19–19; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 191212–0112]

RIN 0648–BJ02

Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Cod Management in the Groundfish Fisheries of the Bering Sea and Aleutian Islands and the Gulf of Alaska

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

ACTION: Final rule.

SUMMARY: NMFS issues regulations to implement Amendment 120 to the Fishery Management Plan (FMP) for Groundfish of the Bering Sea and Aleutian Islands (BSAI) Management Area (BSAI FMP) and Amendment 108 to the FMP for Groundfish of the Gulf of Alaska (GOA) (GOA FMP). Amendment 120 and this final rule limit the number of catcher/processors (C/Ps) eligible to operate as motherships receiving and processing Pacific cod from catcher vessels (CVs) directed fishing in the BSAI non-Community Development Quota Program Pacific cod trawl fishery. Amendment 120, Amendment 108, and this final rule prohibit replaced Amendment 80 C/Ps from receiving and processing Pacific cod harvested and delivered by CVs directed fishing for Pacific cod in the BSAI and GOA. This final rule is intended to promote the goals and objectives of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), Amendments 120 and 108, the BSAI and GOA FMPs, and other applicable laws.

DATES: This rule is effective on January 20, 2020.

ADDRESSES: Electronic copies of Amendment 120 to the BSAI FMP, Amendment 108 to the GOA FMP, the Regulatory Impact Review (RIR; also referred to as the Analysis) and the National Environmental Policy Act (NEPA) Categorical Exclusion evaluation document may be obtained from *www.regulations.gov.* Electronic copies of Amendments 61, 80, 85, and 97 to the BSAI FMP, and the Environmental Assessments (EAs)/RIRs or Environmental Impact Statements prepared for those actions may be obtained from *https://www.fisheries.noaa.gov/alaska/sustainable-fisheries/sustainable-fisheries-alaska.*

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this rule may be submitted by mail to NMFS Alaska Region, P.O. Box 21668, Juneau, AK 99802–1668, Attn: Glenn Merrill; in person at NMFS Alaska Region, 709 West 9th Street, Room 401, Juneau, AK; by email to *OIRA_Submission@omb.eop.gov;* or by fax to 202–395–5806.

FOR FURTHER INFORMATION CONTACT: Bridget Mansfield, 907–586–7228.

SUPPLEMENTARY INFORMATION: This final rule implements Amendment 120 BSAI FMP and Amendment 108 to the GOA FMP, collectively referred to as Amendments 120/108. The Council submitted Amendments 120/108 for review by the Secretary of Commerce (Secretary), and a Notice of Availability of Amendments 120/108 was published in the **Federal Register** on August 21, 2019 with comments invited through October 21, 2019 (84 FR 43576). The Secretary approved Amendments 120/108 on November 19, 2019. The proposed rule to implement Amendments 120/108 published in the **Federal Register** on September 27, 2019 (84 FR 51092) with comments invited through October 28, 2019. NMFS received six comment letters containing nine individual comments from six unique individuals during the comment periods for Amendments 120/108 and the proposed rule. The six commenters consisted of one association representing shoreside processors, one individual representing five communities in one Alaskan Borough, and four companies representing C/Ps. A summary of these comments and the responses by NMFS are provided under the heading ''Comments and Responses'' below.

A detailed review of the provisions of Amendments 120/108, the proposed regulations to implement Amendments 120/108 (84 FR 51092, September 27, 2019), and the rationale for this action is provided in the preamble to the proposed rule and is briefly summarized in this final rule. This preamble uses specific terms (*e.g.,* Amendment 80 sector, directed fishing) that are described in regulation and in the preamble to the proposed rule. We refer the reader to the preamble to the proposed rule for additional detail.

Background

NMFS manages the BSAI Pacific cod fishery under a total allowable catch (TAC) limit with portions of the TAC allocated to the Western Alaska Community Development Quota (CDQ) Program, the Amendment 80 sector, and the BSAI trawl limited access sector, which, in part, includes the American Fisheries Act (AFA) and the BSAI trawl catcher vessel sectors. CVs directed fishing in the BSAI non-CDQ Pacific cod trawl CV fishery deliver to shoreside processors and motherships offshore. A ''mothership'' is defined as a vessel that receives and processes groundfish from other vessels (see definition at 50 CFR 679.2).

The BSAI Pacific cod trawl CV fishery has seen rapid increases in CV and mothership participation from 2016 through 2018 as compared to fishery participation patterns prior to 2016 (*i.e.,* from 2003 through 2015, as described in Section 2.7.1 of the Analysis). This increase in trawl CVs delivering Pacific cod to an increased number of C/Ps operating as motherships has resulted in a corresponding decrease in Pacific cod landings at BSAI shoreside processing facilities. Also since 2016, the BSAI Pacific cod TAC has been more fully harvested and the fishing season has grown shorter as the TAC has been reached earlier. Section 2.7.1 of the Analysis prepared for this action notes that the potential exists for up to 40 additional Amendment 80 C/Ps and AFA C/Ps to participate as motherships in the fishery, providing processing capacity for additional CVs, which would put greater fishing pressure on the fishery.

The Council determined, and NMFS agrees, that limiting access to the BSAI Pacific cod fishery by motherships receiving and processing Pacific cod from CVs directed fishing using trawl gear is needed, given the expectation of additional capacity entering the fishery. The Council adopted its preferred alternative for Amendments 120/108 at its April 2019 meeting.

This final rule balances the need to limit the number of C/Ps operating as motherships in the fishery with the need to provide continued access and benefits from the fishery for long-time participants with sustained activity, given the increasing number of participants in the fishery and shorter fishing seasons. This final rule promotes stability in the fishery by reducing the risk of a race for fish, stabilizing the length of the fishing season, and creating a safer, more predictable fishery. That stability will also minimize the potential for increased prohibited species catch (PSC) rates, particularly for halibut. Regulations at § 679.21(b)(4)(i)(B) require NMFS to close BSAI trawl limited access fisheries when halibut PSC limits are reached. Regulations at § 679.7(o)(7) prohibit Amendment 80 cooperatives from exceeding PSC halibut caps. These closures and caps could limit the ability of harvesters to fully harvest the TAC.

This final rule establishes the requirement that a C/P used to receive and process Pacific cod harvested and delivered by CVs directed fishing in the BSAI non-CDQ Pacific cod trawl CV fishery must be designated on a groundfish License Limitation Program (LLP) license with a BSAI Pacific cod trawl mothership endorsement. This final rule also establishes the eligibility criteria and issuance process for this new endorsement. C/Ps not designated on groundfish LLP licenses that receive the endorsement are prohibited from receiving and processing Pacific cod delivered by a CV directed fishing in the BSAI non-CDQ Pacific cod trawl CV fishery. This final rule does not preclude any vessel from delivering BSAI Pacific cod to a shoreside processor. This final rule also does not preclude a C/P without a BSAI Pacific cod trawl fishery mothership endorsement from receiving and processing incidental catch of Pacific cod that is caught by a CV while directed fishing for other species. This final rule does not preclude a vessel from participating as a C/P and processing its own catch in the BSAI non-CDQ Pacific cod fishery. Finally, true motherships (*i.e.,* vessels that only receive catch from other vessels and that do not operate as C/Ps), other at-sea processors, and shoreside processors are not restricted by this action.

Under this action, NMFS will issue a BSAI Pacific cod trawl mothership endorsement to a groundfish LLP license with Bering Sea or Aleutian Islands area and C/P operation endorsements if the groundfish LLP license is credited with receiving and processing at least one legal mothership trip target landing of Pacific cod in the BSAI non-CDQ Pacific cod trawl CV fishery in each year of the qualifying period (2015 through 2017). NMFS anticipates that a total of two groundfish LLP licenses will receive a BSAI Pacific cod trawl fishery mothership endorsement under this final rule, resulting in up to two vessels that have also operated as C/Ps being eligible to receive and process Pacific cod delivered by a CV directed fishing in the BSAI non-CDQ Pacific cod trawl CV fishery. Under this action, NMFS will also prohibit Amendment 80 sector C/Ps not designated on an Amendment 80 Quota Share (QS) permit and an Amendment 80 LLP license, or not designated on an Amendment 80 LLP/QS license, from receiving and processing Pacific cod harvested by vessels directed fishing for Pacific cod in the BSAI and GOA.

Overview of Measures Implemented by This Rule

This final rule limits access to the BSAI non-CDQ Pacific cod trawl CV fishery by motherships receiving and processing Pacific cod harvested and delivered by CVs directed fishing in that fishery to those C/Ps designated on a groundfish LLP license with a BSAI Pacific cod trawl mothership endorsement.

In order to implement Amendment 120, this final rule—

- Authorizes receiving and processing of BSAI Pacific cod harvested and delivered by CVs directed fishing in the BSAI non-CDQ Pacific cod trawl CV fishery by only those C/Ps designated on a groundfish LLP license with a BSAI Pacific cod trawl mothership endorsement.
- Includes the provisions that are necessary for a groundfish LLP license to qualify for and receive a BSAI Pacific cod trawl mothership endorsement.
- Prohibits a vessel endorsed to operate as a C/P from receiving and processing of BSAI Pacific cod harvested and delivered by CVs directed fishing in the BSAI non-CDQ Pacific cod trawl CV fishery without a copy of a valid LLP license with a BSAI Pacific cod trawl mothership endorsement.
- Lists those groundfish LLP licenses that NMFS has determined are eligible, will be credited with qualifying landings, and will receive a BSAI Pacific cod trawl mothership endorsement under this final rule.
- Establishes the process for notifying groundfish LLP license holders of eligibility for a BSAI Pacific cod trawl mothership endorsement.
- Establishes the process for the issuance of revised groundfish LLP licenses with a BSAI Pacific cod trawl mothership endorsement.
- Establishes an administrative adjudicative process to challenge NMFS's determinations on eligibility for a BSAI Pacific cod trawl mothership endorsement.
- Prohibits Amendment 80 sector C/Ps not designated on an Amendment 80 QS permit and an Amendment 80 LLP license, or not designated on an Amendment 80 LLP/QS license, from receiving and processing Pacific cod harvested by vessels directed fishing for Pacific cod in the BSAI.

In order to implement Amendment 108, this final rule—

- Prohibits Amendment 80 sector C/Ps not designated on an Amendment 80 QS permit and an Amendment 80 LLP license, or not designated on an Amendment 80 LLP/QS license, from receiving and processing Pacific cod harvested by vessels directed fishing for Pacific cod in the GOA.

Additional detail about the rationale for and effect of the regulatory changes in this rule is provided in the preamble to the proposed rule (84 FR 51092, September 27, 2019) and in the Analysis for this action.

Summary of Regulatory Changes

The following provides a brief summary of the regulatory changes made by this final rule.

Revisions to Permits at § 679.4

This final rule adds § 679.4(k)(15) to include the provisions that are necessary to qualify for and receive a BSAI Pacific cod trawl mothership endorsement. Section 679.4(k)(15) establishes a notification process for holders of groundfish LLP licenses eligible and ineligible for a BSAI Pacific cod trawl mothership endorsement. This section also establishes an administrative adjudicative process to challenge NMFS's determinations on eligibility for a BSAI Pacific cod trawl mothership endorsement.

Revisions to Prohibitions at § 679.7

This final rule adds § 679.7(i)(12) to prohibit the receiving and processing by a C/P operating as a mothership of Pacific cod harvested and delivered by a CV directed fishing in the BSAI non-CDQ Pacific cod trawl CV fishery unless that C/P has a legible copy on board of a valid groundfish LLP license with endorsements for (1) the Bering Sea or Aleutian Islands area, (2) C/P operation type, and (3) BSAI Pacific cod trawl mothership operation.

This final rule also adds § 679.7(o)(3)(v) to prohibit the use of an Amendment 80 C/P to receive and process Pacific cod harvested by vessels directed fishing for Pacific cod in the BSAI or GOA, if that C/P is not designated on an Amendment 80 QS permit and an Amendment 80 LLP license or on an Amendment 80 LLP/QS license.

Revisions to Tables to Part 679

This final rule adds Table 57 to part 679 to list those groundfish LLP licenses that NMFS has determined are eligible, will be credited with qualifying receipts of legal mothership trip targets, and will receive a BSAI Pacific cod trawl mothership endorsement under this final rule.

Comments and Responses

NMFS received six comment letters containing nine individual comments from six unique commenters during the comment periods for Amendments120/108 and the proposed rule. The six commenters consisted of one association representing shoreside processors, one individual representing five communities in one Alaskan Borough, and four companies representing C/Ps. Seven of the nine individual comments supported this action. One comment did not support the action. One comment from three separate commenters suggested a clarification to the proposed regulatory language to support the intent of the action as described in the preamble to the proposed rule.

In the following responses to these comments, reference to the phrase ''Amendment 120 or 108'', unless otherwise noted, means Amendment 120 or 108 and this final rule implementing Amendments 120/108.

Comment 1: NMFS received five comment letters that supported this action. Commenters noted that the action is consistent with the Council's purpose and need statement, which recognized that the negative impacts on historical participants arising from a management problem that has been building for several years warrants action. During the development of the Amendment 80 Program, the Council was silent on the ability of Amendment 80 C/Ps to act as motherships in limited access fisheries. However, there has been substantial growth in BSAI offshore Pacific cod deliveries by CVs to Amendment 80 C/Ps utilizing excess offshore processing capacity realized through the rationalized fishery. This has resulted in shifting processing effort away from historical, predominantly shoreside processors. The ability of motherships to operate close to the fishing grounds and provide quick turnaround for CVs, the decline in Pacific cod TAC, and the increased effort and catch per unit effort in the CV trawl fishery have led to an intensified race for fish, shorter fishing seasons, greater instability for historic participants and Alaska communities, and diminished ability to promote conservation. As the race for fish intensifies, Pacific cod flood the docks and are rushed through the factory to facilitate quick turnaround, and thus the race for fish negatively impacts vessel safety and fish quality, and global markets are flooded by large volumes of lower quality cod oversaturating the market.

The commenters state that the Council weighed all relevant information before recommending this action. The commenters state that this action addresses the need to limit the offshore processing capacity (specifically C/Ps acting as motherships) in the BSAI trawl CV Pacific cod fishery, while reducing the negative impacts on the two C/Ps with long-term participation as motherships by accommodating their continued participation. The commenters state that this action is an important step toward providing stability in the fishery and will provide conservation and management benefits to the fishery by slowing the pace of the fishery, ensuring the wise use of the resource, and improving safety-at-sea. Adoption of this rule will promote the goals and objectives of the Magnuson-Stevens Act.

Response: NMFS acknowledges the comment in support of Amendments 120/108. As noted in the Analysis (Section 2.8.1), this action has the potential to address impacts from C/Ps that have recently changed their fishing practices as a benefit of previously implemented rationalization programs. This action is intended to limit the offshore processing capacity in the BSAI non-CDQ Pacific cod trawl CV fishery in order to avoid further negative impacts on long-term participants in the fishery, including C/Ps operating as motherships, shoreside processors, and communities with local economies dependent on shoreside processing of Pacific cod. This action is also intended to allow more flexibility in fishing operations by ensuring predictable levels of competition. That flexibility may help reduce prohibited species catch in the fishery and improve vessel safety, by allowing vessels to implement fishing practices known to reduce PSC and improve vessel safety.

Comment 2: One commenter stated that many fishing communities across the state depend on tax revenue from raw fish delivered across the dock to shoreside plants. The recent escalation of C/Ps acting as motherships has resulted in a dramatic increase in the amount of deliveries to motherships offshore in recent BSAI Pacific cod seasons, at the expense of shore-based processing plants and communities who have historically processed a majority of the Pacific cod. This loss of shore-based processed cod is exacerbated by the recent lower Pacific cod TACs. The commenters state that this action will help our Pacific cod-dependent communities, and will have meaningful impacts for shoreside processors and coastal communities, that have relied heavily on volume fisheries like pollock and cod for decades. Though Alaska's shoreside processors rely on a diverse portfolio of species, high volume fisheries like pollock and Pacific cod are the foundation of the sector's economic success. Larger volumes of Pacific cod delivered shoreside allows for longer fishing seasons, a near year-round processing workforce, and increased economic activity. Significant investments have been made to expand markets, increase value, and increase capacity to serve the fishing fleets. Closing this regulatory loophole, which currently allows C/Ps to use the excess processing capacity realized through the benefits of their rationalization programs in order to act as motherships in the unrationalized trawl CV fishery, is critically important to Bering Sea shoreside processors historically dependent on Pacific cod and to the communities in which the shoreside processors operate. The increase in this mothership activity, starting in 2016 and increasing each year since, severely erodes shoreside Pacific cod landings, which have historically comprised almost the entire fishery, and erodes tax and other support service benefits from this fishery on which coastal Alaska communities depend.

Response: NMFS acknowledges this comment, and as noted in the response to Comment 1, the Analysis (Section 2.8.1) concluded that this action has the potential to prevent increased participation by C/Ps operating as motherships from reducing the benefits that the fishery provides to long-term, consistent participants in the BSAI non-CDQ Pacific cod trawl CV fishery, including shoreside processors and communities with local economies dependent on shoreside processing of Pacific cod.

Comment 3: This action is consistent with the Council's purpose and need statement and final action to reduce the excess processing capacity resulting

from rationalization under Amendment 80 and corresponding Amendment 80 vessel replacement. The proposed rule for this action noted that the final rule implementing Amendment 80 had anticipated that a future regulatory amendment may be needed, depending on whether the use of C/Ps as motherships would increase due to the Amendment 80 Program and result in adverse impacts on existing shoreside processors. This action addresses those issues directly by including a prohibition on using replaced Amendment 80 vessels as motherships to receive and process Pacific cod harvested by vessels directed fishing for Pacific cod in the BSAI or GOA. (Current regulations already prevent this for AFA CPs.)

Response: This action prohibits replaced Amendment 80 C/Ps from acting as a mothership in the BSAI or GOA fisheries. Section 2.8.1 of the Analysis notes that there is no indication to date that this has occurred, but implementing a prohibition in this action eliminates the opportunity for this to occur in the future. The intent of the vessel replacement provision in Amendment 80 was to allow older, less efficient vessels to be replaced by more efficient vessels. The intent of the regulations was not to provide new opportunities for the replaced vessel in fisheries that are already fully utilized.

Comment 4: This action is consistent with the Council's intent for how the qualification for a BSAI Pacific cod trawl mothership endorsement should be calculated and applied. This calculation includes using targeted Pacific cod landings because the action is intended to only regulate C/Ps that receive and process Pacific cod harvested by CVs engaged in directed fishing, and not regulate the receiving and processing of incidental catch of Pacific cod. In addition, this action uses weekly production reports to determine which C/Ps received deliveries of targeted Pacific cod during the qualifying period, similar to the Council's approach in other actions, and was a range of qualifying years that honors the control date previously set by the Council and that encompasses years directly before and after significant new entry. This action does not prevent any Amendment 80 C/Ps acting as motherships from retaining incidental catch of Pacific cod delivered by CVs in their target flatfish fisheries, as is currently the practice. This action will not place any additional limit on incidental catch, beyond the maximum retainable amounts already in place, which are applied at the trip level. In addition, Amendment 80 C/Ps have full access to their exclusive, rationalized C/P allocations of BSAI Pacific cod, yellowfin sole, flathead sole, rock sole, Atka mackerel, and Aleutian Islands Pacific ocean perch fisheries. Similarly, AFA C/Ps that target pollock fisheries remain unaffected. This action only limits the ability of Amendment 80 and AFA C/Ps to act as motherships that receive and process Pacific cod delivered by CVs directed fishing in the BSAI non-CDQ Pacific cod trawl CV fishery, unless they have documented mothership processing history in this fishery as required by the Council's preferred alternative.

Response: NMFS concurs that this action, as noted in the preamble to the proposed rule, limits Amendment 80 and AFA C/Ps' ability to operate as a mothership in the BSAI non-CDQ Pacific cod trawl CV fishery based on qualification for an endorsement to participate. This action also prohibits Amendment 80 vessels not designated on an Amendment 80 QS permit and an Amendment 80 LLP license or an Amendment 80 LLP/QS license from operating as a mothership by receiving and processing Pacific cod harvested by vessels directed fishing in the GOA and BSAI. It does not impose additional limits on incidental catch of Pacific cod in other fisheries beyond existing regulatory requirements. This action does not change Amendment 80 C/Ps' access to their allocations of BSAI Pacific cod, yellowfin sole, flathead sole, rock sole, Atka mackerel, and Aleutian Islands POP fisheries. This action does not affect AFA C/P pollock fisheries.

Comment 5: If the two C/Ps that have history prior to Amendment 80 and are allowed to continue offshore processing under this action choose to expand their capacity in the future, the Council could consider a sideboard in the future.

Response: As noted in Section 2.8.1 of the Analysis, the Council and NMFS considered setting harvesting limits (commonly known as sideboards) on the C/Ps eligible for a BSAI Pacific cod trawl mothership endorsement. The Council and NMFS did not include a sideboard limitation due to the consistent trends in delivery patterns to these two C/Ps, the relatively limited amount of catch processed by these vessels, and the challenges in effectively monitoring and managing a sideboard. (See Sections 2.7.3.2 and 2.10 of the Analysis for additional detail.) The Council and NMFS may consider sideboard limitations under a future action, if appropriate.

Comment 6: Three commenters requested that NMFS review its proposed regulatory language in both the permit section (50 CFR 679.4) and the prohibitions section (50 CFR 679.7) to ensure that it does not exclude processing operations, such as operations of true motherships, floating processors, or shoreside processors which were not intended to be restricted under this action. The commenters expressed concern that the regulatory language could be interpreted as unintentionally precluding true motherships, floating processors, or shoreside processors from receiving and processing Pacific cod harvested by CVs directed fishing in the BSAI non-CDQ Pacific cod trawl CV fishery.

Response: NMFS concurs that the proposed regulatory text might be interpreted to be overly broad and exclude some processors, such as floating processors and true motherships, which were never intended to be precluded from receiving and processing Pacific cod harvested by CVs directed fishing in the BSAI non-CDQ trawl CV fishery. The preamble to the proposed rule, and Section 2.4.2 of the Analysis clearly state that floating processors and true motherships are not intended to be precluded from receiving and processing Pacific cod in the BSAI under this rule. Therefore, the regulatory text has been revised in this final rule to clarify that floating processors and true motherships are not precluded from receiving and processing Pacific cod in the BSAI under this rule. This revision is discussed further in the Changes from the Proposed Rule section of this final rule.

Comment 7: We understand the rationale for NMFS and the Council curtailing the recent increase in offshore deliveries to entering Amendment 80 and AFA C/Ps. We also appreciate their decision to allow the fishing vessel (F/V) *Seafreeze Alaska* to continue to operate as a mothership in the fishery in recognition of its long-term participation and dependence on this fishery. We note that the preamble to the proposed rule identified a single Amendment 80 C/P, the F/V *Seafreeze Alaska,* as taking mothership deliveries prior to the final rule for Amendment 80 in 2008. The preamble suggests that the history of the F/V *Seafreeze Alaska* was one reason for the final rule allowing Amendment 80 C/Ps to operate as motherships. The proposed rule recognizes that history and dependence by allowing the F/V *Seafreeze Alaska* to continue to participate in the fishery. Our business depends on the ability of our CVs to continue to deliver Pacific cod offshore. The proposed rule limits the continued participation of some of our C/Ps in the Pacific cod fishery. We

understand the rationale for those limitations. We are thankful that the rule also recognizes the unique long-term dependence of the F/V *Seafreeze Alask*a on the offshore fishery, and we support implementation of a rule allowing that activity to continue.

Response: NMFS acknowledges this comment. However, NMFS also clarifies that the data analyzed for this action include data from 2003 forward. While there may have been other Amendment 80 C/Ps that received and processed Pacific cod delivered by CVs prior to 2003, NMFS determined the eligibility of the LLP license on which the F/V *Seafreeze Alaska* is designated based on criteria established by the Council, consistent with its intent to recognize sustained participation in the fishery.

Comment 8: Three commenters who support this proposed rule urged swift implementation prior to the upcoming 2020 BSAI Pacific cod trawl CV fishery A season in January. The commenters state that the purpose and need statement and the analysis identified that further delays to this action will undoubtedly lead to increased growth in offshore deliveries of Pacific cod. The commenters urged no further delays in action, since additional delays will result in a continued exponential shift away from historic Pacific cod processing efforts.

Response: NMFS appreciates the desire for timely implementation of this rulemaking.

Comment 9: We do not support the proposed rule for this action. Our company operates two Amendment 80 trawl C/Ps that took deliveries of BSAI non-CDQ trawl CV Pacific cod in two of the three years in the Council's selected qualifying period of 2015 through 2017. These C/Ps will not be eligible to mothership under these proposed regulations because they did not take qualifying deliveries in all three of the years in the qualifying period. The proposed rule states that the Council's rationale for not choosing the suboptions for one- or two-year participation requirements was that either option would have allowed participation in a manner that is not reflective of the historical harvest patterns in the fishery prior to the recent increase in Amendment 80 C/Ps acting as motherships. We disagree. Qualifying our vessels would be reflective of the historical harvest patterns in the fishery. Our history clearly shows participation of these two C/Ps as cod motherships prior to any privileges being received in the multi-species groundfish fishery through the Amendment 80 rationalization program. Our C/Ps have history operating as motherships for CVs delivering BSAI non-CDQ Pacific cod during the Amendment 80 qualifying years in addition to our recent participation in the fishery. However, these previous years of participation were not included in the Council's analysis, because that analysis included only data beginning with 2003. The Amendment 80 qualifying years of 1998 through 2004 are critical to understanding the historical modes of operation and harvest patterns of our fleet, including the dynamics of mothership activity pre- and post-rationalization. Without the inclusion of these years in the Analysis, the Council does not have a comprehensive understanding of the historical harvest patterns in the fishery and cannot justify the exclusion of these two vessels.

Response: NMFS disagrees. The Council expressed its intent, and Section 2.6.10 of the Analysis specifies, that qualification for a C/P to operate as a mothership should be based on the history of that vessel receiving deliveries of targeted non-CDQ BSAI Pacific cod harvested by CVs using trawl gear during each year in the three-year qualifying period (2015 through 2017). The qualifying period used in this final rule places emphasis on the years directly before, including, and after 2016, which was the year that five additional Amendment 80 C/Ps entered the fishery as motherships, more than doubling the number of participating C/Ps operating as motherships in the fishery. The increase in Amendment 80 C/Ps operating as motherships resulted in the Council expressing concern about the increased amount of BSAI non-CDQ Pacific cod delivered offshore in the fishery, and the corresponding decrease in the amount delivered to shoreside processors.

The Council considered including participation in the fishery prior to 2015, but determined that participation for the years prior to 2015 was stable and represented sustained effort. Further, the Council and NMFS considered the proposed action's consistency with the relatively stable conditions of the fishery under the Amendment 80 Program. The establishment of the Amendment 80 Program fundamentally changed the dynamics of the BSAI non-pollock trawl fisheries by establishing a framework under which exclusive rights to non-pollock target species allocations, including Pacific cod, were granted in part to improve stability in those fisheries. The post-Amendment 80 stability in the BSAI Pacific cod trawl fishery was maintained until 2016, when additional Amendment 80 C/Ps began receiving and processing Pacific cod. The Council's intent in recommending this action is to regain the stability in the fishery seen during the post-Amendment 80 and pre-2016 period, particularly in light of the dramatic decline in Pacific cod TACs. The preamble to the proposed rule provides additional details on the rationale for selecting the qualifying years.

Further, for reasons explained in Section 2.5.1 of the Analysis, NMFS is not able to reliably compare historical data prior to 2003 to the current catch accounting system that includes data from 2003 forward. NMFS believes that consideration of fishing patterns up to twelve years prior to the first year of the qualifying period (2015) is sufficient to establish sustained participation in the fishery. Catch history prior to 2003 is not likely to be representative of current fishing patterns or demonstrative of sustained participation in a fishery.

Changes From the Proposed Rule

In response to public comment, NMFS has modified the regulatory text at §§ 679.4(k)(15)(i), (k)(15)(ii)(B), and (k)(15)(iii)(B) and 679.7(i)(12) to clarify that true motherships and floating processors are not excluded from receiving and processing Pacific cod in the BSAI non-CDQ Pacific cod CV trawl directed fishery. Regulatory language in the proposed rule was ambiguous and these clarifying changes are intended to ensure that the language cannot be misinterpreted to exclude those entities from processing Pacific cod in the fishery.

At the proposed § 679.4(k)(15)(i) the sentence that indicates that a vessel must be designated on a groundfish LLP license with a BSAI Pacific cod trawl mothership endorsement in order to receive and process Pacific cod delivered by CVs directed fishing using trawl in the BSAI non-CDQ Pacific cod fishery as specified in § 679.20(a)(7)(ii)(A) is revised to indicate that a C/P must be designated on a groundfish LLP license with a BSAI mothership Pacific cod trawl mothership endorsement in order to receive and process Pacific cod delivered by a CV directed fishing using trawl gear in that fishery.

At the proposed § 679.4(k)(15)(ii)(B) the sentence that indicates that a groundfish LLP license that had a vessel designated on it that received and processed at least one legal mothership trip target of Pacific cod delivered by a CV directed fishing using trawl gear in the BSAI non-CDQ Pacific cod fishery as specified in § 679.20(a)(7)(ii)(A) in each of the three years of the qualifying period of 2015 through 2017 is eligible

to receive a BSAI Pacific cod trawl mothership endorsement has been revised to indicate that a groundfish LLP license that had a C/P designated on it that received and processed at least one legal mothership trip target of Pacific cod delivered by a CV directed fishing using trawl gear in the BSAI non-CDQ Pacific cod fishery as specified in § 679.20(a)(7)(ii)(A) in each of the three years of the qualifying period of 2015 through 2017 is eligible to receive a BSAI Pacific cod trawl mothership endorsement.

At the proposed § 679.4(k)(15)(iii)(B) the sentence that indicates that NMFS will credit a groundfish LLP license with a legal mothership trip target of Pacific cod if that groundfish LLP license was the only one on which the vessel that received and processed legal mothership trip targets was designated from 2015 through 2017 has been revised to replace the word ''vessel'' with the term ''catcher/processor''.

At the proposed § 679.7(i)(12) in the Prohibitions section, the sentence that stipulates that it is prohibited to receive and process Pacific cod harvested and delivered by a CV directed fishing using trawl gear in the BSAI non-CDQ Pacific cod fishery without a legible copy on board of a valid groundfish LLP license with the appropriate endorsements, including a BSAI Pacific cod trawl mothership endorsement, has been revised to stipulate that it is prohibited to use a C/P to receive and process Pacific cod harvested and delivered by a CV directed fishing using trawl gear in that fishery without a legible copy on board of a valid groundfish LLP license with the appropriate endorsements.

In addition, the name of the fishery has been edited for consistency at §§ 679.4(k)(15)(i), (k)(15)(ii)(B), and (k)(15)(v)(B) and 679.7(i)(12).

Classification

The Administrator, Alaska Region, NMFS, determined that BSAI FMP Amendment 120 and GOA FMP Amendment 108 are necessary for the conservation and management of the BSAI and GOA Pacific cod fisheries and that they are consistent with the Magnuson-Stevens Act and other applicable laws.

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

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

Small Entity Compliance Guide

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a final regulatory flexibility analysis, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as ''small entity compliance guides.'' The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. The preambles to the proposed rule and this final rule include a detailed description of the actions necessary to comply with this rule, and as part of this rulemaking process NMFS included on its website a summary of compliance requirements that serves as the small entity compliance guide: *https://www.fisheries.noaa.gov/action/amendment-120-fmp-groundfish-bering-sea-and-aleutian-islands-and-amendment-108-fmp*. This action does not require any additional compliance from small entities that is not described in the preambles to the proposed rule and this final rule. Copies of the proposed rule and this final rule are available from the NMFS website at *http://alaskafisheries.noaa.gov*.

Final Regulatory Flexibility Analysis (FRFA)

This FRFA incorporates the initial regulatory flexibility analysis (IRFA), a summary of the significant issues raised by the public comments in response to the IRFA, NMFS' responses to those comments, and a summary of the analyses completed to support this action.

Section 604 of the Regulatory Flexibility Act (RFA) requires that, when an agency promulgates a final rule under section 553 of Title 5 of the U.S. Code, after being required by that section or any other law to publish a general notice of proposed rulemaking, the agency shall prepare a FRFA. Section 604 describes the required contents of a FRFA: (1) A statement of the need for and objectives of the rule; (2) a statement of the significant issues raised by the public comments in response to the IRFA, a statement of the assessment of the agency of such issues, and a statement of any changes made to the proposed rule as a result of such comments; (3) the response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA) in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments; (4) a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available; (5) a description of the projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and (6) a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in this final rule, and why each of the other significant alternatives considered by the agency was rejected.

A description of this final rule and the need for and objectives of this rule are contained in the preamble to this final rule and the preamble to the proposed rule (84 FR 51092, September 27, 2019), and are not repeated here.

Public and Chief Counsel for Advocacy Comments on the IRFA

NMFS published the proposed rule on September 27, 2019 (84 FR 51092). An IRFA was prepared and summarized in the Classification section of the preamble to the proposed rule. The comment period for the proposed rule closed on October 28, 2019. The comment period for the notice of availability for Amendments 120/108 closed on October 21, 2019. NMFS received six letters of public comment on the proposed rule and Amendments 120/108. The Chief Counsel for Advocacy of the SBA did not file any comments on the proposed rule. NMFS received no public comments specifically on the IRFA.

Number and Description of Small Entities Regulated by This Final Action

This final rule directly regulates the owners and operators of certain Amendment 80 and AFA C/Ps operating as motherships when receiving Pacific cod in the BSAI non-CDQ Pacific cod trawl CV directed fishery. This final rule also directly regulates the owners of current Amendment 80 C/Ps and Amendment 80 C/Ps that have been replaced under BSAI Amendment 97 (77 FR 59852, October 1, 2012) and that are not designated on an Amendment 80 QS permit and an Amendment 80 LLP license, or are not designated on an Amendment 80 LLP/QS license, by prohibiting replaced Amendment 80 vessels from operating as a mothership in the BSAI or GOA Pacific cod fisheries. Based on the best available and most recent complete data from 2003 through 2018, 40 groundfish LLP

license holders will be directly regulated by this action.

For RFA purposes only, NMFS has established a small business size standard for businesses, including their affiliates, whose primary industry is commercial fishing (see 50 CFR 200.2). A business primarily engaged in commercial fishing (NAICS code 11411) is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual receipts not in excess of $11 million for all its affiliated operations worldwide.

The RFA requires consideration of affiliations between entities for the purpose of assessing whether an entity is classified as small. The AFA pollock and Amendment 80 cooperatives are types of affiliation between entities. All of the AFA and Amendment 80 cooperatives have gross annual revenues that are substantially greater than $11 million. Therefore, NMFS considers members in these cooperatives affiliated large (*i.e.,* they are not small) entities for RFA purposes.

Of the 40 groundfish LLP license holders directly regulated by this action, 21 were members of an AFA cooperative and 19 were members of an Amendment 80 cooperative in 2018. All of the groundfish LLP licenses with designated C/Ps that received and processed Pacific cod delivered by a CV directed fishing in the BSAI non-CDQ Pacific cod trawl CV fishery from 2003 through 2018 were affiliated with either an AFA or an Amendment 80 cooperative in 2018. NMFS therefore considers these LLP license holders to be affiliated large (*i.e.,* they are not small) entities for RFA purposes.

Recordkeeping, Reporting, and Other Compliance Requirements.

Therefore, this final rule does not directly regulate any small entities.

This final rule does not add additional reporting or recordkeeping requirements for the vessels that choose to submit an appeal. An appeal process exists for LLP license endorsement issuance. No small entity is subject to reporting requirements that are in addition to or different from the requirements that already apply to all directly regulated entities. No unique professional skills are needed for the LLP license or vessel owners or operators to comply with the reporting and recordkeeping requirements associated with this final rule. This final rule does not implement or increase any fees that NMFS collects from directly regulated entities. The Analysis identifies no operational costs of the endorsement (see **ADDRESSES**).

Description of Significant Alternatives Considered to the Final Action That Minimize Adverse Impacts on Small Entities

Under this final rule, C/Ps acting as motherships that receive and process Pacific cod harvested by CVs directed fishing in the BSAI non-CDQ Pacific cod trawl CV fishery will be limited to two vessels, and all remaining AFA and Amendment 80 C/Ps will not be permitted to operate as a mothership in this fishery even if retired from and/or replaced in either the AFA or Amendment 80 Programs. All of the directly regulated entities have been determined to be large entities via ownership, cooperative, or contractual affiliations. Thus there are no adverse impacts on directly regulated small entities.

Collection-of-Information Requirements

This final rule contains a collection-of-information requirement subject to review and approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA). This requirement has been submitted to OMB for approval under a new control number.

The public reporting burden for the collection-of-information requirement in this final rule is estimated to average 4 hours per response to submit an appeal, which includes the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Send comments on these or any other aspects of the collection of information to NMFS Alaska Region (see **ADDRESSES**) by email to *OIRA_Submission@omb.eop.gov,* or by fax to (202) 395–5806.

Notwithstanding any other provision of law, no person is required to respond to, and no person shall be subject to penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number. All currently approved NOAA collections of information may be viewed at *https://www.reginfo.gov/public/do/PRASearch#.*

List of Subjects 50 CFR Part 679

Alaska, Fisheries, Reporting and recordkeeping requirements.

Dated: December 13, 2019.

Samuel D. Rauch III,

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

For the reasons set out in the preamble, NMFS amends 50 CFR part 679 as follows:

Title 50—Wildlife and Fisheries

PART 679—FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

■ 1. The authority citation for part 679 continues to read as follows:

Authority: 16 U.S.C. 773 *et seq.;* 1801 *et seq.;* 3631 *et seq.;* Pub. L. 108–447; Pub. L. 111–281.

■ 2. In § 679.4, add paragraph (k)(15) to read as follows:

§ 679.4 Permits.

* * * * *

(k) * * *

(15) *BSAI Pacific cod trawl mothership endorsement*—(i) *General.* In addition to other requirements of this part, a catcher/processor must be designated on a groundfish LLP license that has a BSAI Pacific cod trawl mothership endorsement in order to receive and process Pacific cod harvested and delivered by a catcher vessel directed fishing in the BSAI non-CDQ Pacific cod trawl catcher vessel fishery as specified in § 679.20(a)(7)(ii)(A). A catcher/processor designated on a groundfish LLP license with Bering Sea or Aleutian Islands area, catcher/processor operation, and BSAI Pacific cod trawl mothership endorsements may operate as a mothership, as defined at § 679.2, to receive and process Pacific cod harvested by a catcher vessel directed fishing in the BSAI non-CDQ Pacific cod trawl catcher vessel fishery as specified in § 679.20(a)(7)(ii)(A).

(ii) *Eligibility requirements for a BSAI Pacific cod trawl mothership endorsement.* A groundfish LLP license is eligible to receive a BSAI Pacific cod trawl mothership endorsement if the groundfish LLP license:

(A) Has Bering Sea or Aleutian Islands area and catcher/processor operation endorsements;

(B) Had a catcher/processor designated on it that received and processed at least one legal mothership trip target of Pacific cod delivered from a catcher vessel directed fishing in the BSAI non-CDQ Pacific cod trawl catcher vessel fishery as specified in § 679.20(a)(7)(ii)(A) in each of the three years of the qualifying period of 2015 through 2017, inclusive, where a

mothership trip target is, in the aggregate, the groundfish species that is delivered by a catcher vessel to a given catcher/processor acting as a mothership in an amount greater than the retained amount of any other groundfish species delivered by the same catcher vessel to the same catcher/processor for a given week; and

(C) Is credited by NMFS with receiving a legal mothership trip target specified in paragraph (k)(15)(ii)(B) of this section.

(iii) *Explanations for BSAI Pacific cod trawl mothership endorsement.* (A) NMFS will determine whether a groundfish LLP license is eligible to receive a BSAI Pacific cod trawl mothership endorsement under paragraph (k)(15)(ii) of this section based only on information contained in the official record described in paragraph (k)(15)(iv) of this section.

(B) NMFS will credit a groundfish LLP license with receipt of a legal mothership trip target specified in paragraph (k)(15)(ii)(B) of this section if that groundfish LLP license was the only groundfish LLP license on which the catcher/processor that received and processed legal mothership trip targets was designated from 2015 through 2017.

(C) Mothership trip targets will be determined based on round weight equivalents.

(iv) *Official record of participation in the BSAI non-CDQ Pacific cod trawl catcher vessel fishery.* (A) The official record will contain all information used by the Regional Administrator that is necessary to administer the requirements described in paragraph (k)(15) of this section.

(B) The official record is presumed to be correct. A groundfish LLP license holder has the burden to prove otherwise.

(C) Only legal landings as defined in § 679.2 and documented on NMFS production reports will be used to determine legal mothership trip targets under paragraph (k)(15)(ii)(B) of this section.

(v) *Process for issuing BSAI Pacific cod trawl mothership endorsements.* (A) NMFS will issue to the holder of each groundfish LLP license with Bering Sea or Aleutian Islands area and catcher/processor operation endorsements, and specified in Column A of Table 57 of this part, a notice of eligibility to receive a BSAI Pacific cod trawl mothership endorsement and a revised groundfish LLP license with a BSAI Pacific cod trawl mothership endorsement.

(B) NMFS will issue to the holder of a groundfish LLP license with Bering Sea or Aleutian Islands area and catcher/processor operation endorsements, and that is not listed in Table 57 of this part, a notice informing that holder that the groundfish LLP license is not eligible to be credited with at least one legal mothership trip target of Pacific cod in the BSAI non-CDQ Pacific cod trawl catcher vessel fishery for each year during the qualifying period or receive a BSAI Pacific cod trawl mothership endorsement based on the official record, using the address on record at the time the notice is sent. The notice specified in this paragraph (k)(15)(v)(B) will inform the holder of the groundfish LLP license of the timing and process through which the holder can provide additional information or evidence to amend or challenge the information in the official record of this section, as specified in paragraphs (k)(15)(v)(C) and (D) of this section.

(C) The Regional Administrator will specify by notice a 30-day evidentiary period during which an applicant may provide additional information or evidence to amend or challenge the information in the official record. A person will be limited to one 30-day evidentiary period. Additional information or evidence received after the 30-day evidentiary period specified in the letter has expired will not be considered for purposes of the initial administrative determination (IAD).

(D) The Regional Administrator will prepare and send an IAD to the applicant following the expiration of the 30-day evidentiary period, if the Regional Administrator determines that the information or evidence provided by the person fails to support the person's claims and is insufficient to rebut the presumption that the official record is correct, or if the additional information, evidence, or revised application is not provided within the time period specified in the letter that notifies the applicant of his or her 30-day evidentiary period. The IAD will indicate the deficiencies with the information or evidence submitted. The IAD will also indicate which claims cannot be approved based on the available information or evidence. A person who receives an IAD may appeal pursuant to 15 CFR part 906. NMFS will issue a non-transferable interim license that is effective until final agency action on the IAD to an applicant who avails himself or herself of the opportunity to appeal an IAD and who has a credible claim to eligibility for a BSAI Pacific cod trawl mothership endorsement.

* * * * *

■ 3. In § 679.7, add paragraphs (i)(12) and (o)(3)(v) to read as follows:

§ 679.7 Prohibitions.

* * * * *

(i) * * *

(12) *Prohibitions specific to directed fishing in the BSAI non-CDQ Pacific cod trawl catcher vessel fishery as specified at § 679.20(a)(7)(ii)(A).* Use a catcher/processor to receive and process Pacific cod harvested and delivered by a catcher vessel directed fishing in the BSAI non-CDQ Pacific cod trawl catcher vessel fishery without a legible copy on board of a valid groundfish LLP license with Bering Sea or Aleutian Islands area, catcher/processor operation, and BSAI Pacific cod trawl mothership endorsements.

* * * * *

(o) * * *

(3) * * *

(v) Use an Amendment 80 catcher/processor, as defined at § 679.2, to receive and process Pacific cod harvested by vessels directed fishing for Pacific cod in the BSAI or GOA, if that catcher/processor is not designated on:

(A) An Amendment 80 QS permit and an Amendment 80 LLP license; or

(B) An Amendment 80 LLP/QS license.

* * * * *

■ 4. Add Table 57 to part 679 to read as follows:

TABLE 57 TO PART 679—GROUNDFISH LLP LICENSES WITH BERING SEA OR ALEUTIAN ISLANDS AREA AND CATCHER/PROCESSOR OPERATION ENDORSEMENTS ELIGIBLE FOR A BSAI PACIFIC COD TRAWL MOTHERSHIP ENDORSEMENT

[X indicates that Column A applies]

Column A	Column B
The Holder of Groundfish License Number . . .	Is eligible under 50 CFR 679.4(k)(15)(ii) to be assigned a BSAI Pacific Cod Trawl Mothership Endorsement.
LLG 5009	X
LLG 4692	X

[FR Doc. 2019–27244 Filed 12–19–19; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 84, No. 245
Friday, December 20, 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 THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 43

[Docket No. OCC–2019–0012]

FEDERAL RESERVE SYSTEM

12 CFR Part 244

[Docket No. OP–1688]

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 373

RIN 3064–ZA07

FEDERAL HOUSING FINANCE AGENCY

12 CFR Part 1234

[Notice No. 2019–N–7]

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 246

[Release No. 34–87714]

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 267

[FR–6172–N–01]

Credit Risk Retention-Notice of Commencement of Review

AGENCY: Office of the Comptroller of the Currency, Treasury (OCC); Board of Governors of the Federal Reserve System (Board); Federal Deposit Insurance Corporation (FDIC); U.S. Securities and Exchange Commission (Commission); Federal Housing Finance Agency (FHFA); and Department of Housing and Urban Development (HUD).

ACTION: Notice of commencement of review.

SUMMARY: The OCC, Board, FDIC, Commission, FHFA, and HUD (the agencies) are providing notice of the commencement of the review of the definition of qualified residential mortgage; the community-focused residential mortgage exemption; and the exemption for qualifying three-to-four unit residential mortgage loans, in each case as currently set forth in the Credit Risk Retention Regulations (as defined below) as adopted by the agencies.

DATES: Comments on the review must be received by February 3, 2020.

ADDRESSES: Interested parties are encouraged to submit written comments jointly to all of the agencies and use the title ''QRM review'' to facilitate the organization and distribution of comments among the agencies.

Office of the Comptroller of the Currency: Commenters are encouraged to submit comments through the Federal eRulemaking Portal or email, if possible. Please use the title ''Credit Risk Retention-Notice of Commencement of Review'' to facilitate the organization and distribution of the comments. You may submit comments by any of the following methods:

- *Federal eRulemaking Portal—Regulations.gov Classic or Regulations.gov Beta*

Regulations.gov Classic: Go to *https://www.regulations.gov/.* Enter ''Docket ID OCC–2019–0012'' in the Search Box and click ''Search.'' Click on ''Comment Now'' to submit public comments. For help with submitting effective comments please click on ''View Commenter's Checklist.'' Click on the ''Help'' tab on the *Regulations.gov* home page to get information on using *Regulations.gov*, including instructions for submitting public comments.

Regulations.gov Beta: Go to *https://beta.regulations.gov/* or click ''Visit New *Regulations.gov* Site'' from the *Regulations.gov* classic homepage. Enter ''Docket ID OCC–2019–0012'' in the Search Box and click ''Search.'' Public comments can be submitted via the ''Comment'' box below the displayed document information or click on the document title and click the ''Comment'' box on the top-left side of the screen. For help with submitting effective comments please click on ''Commenter's Checklist.'' For assistance with the *Regulations.gov* Beta site please call (877)-378–5457 (toll free) or (703) 454–9859 Monday–Friday, 9 a.m.–5 p.m. ET or email to *regulations@erulemakinghelpdesk.com.*

- *Email: regs.comments@occ.treas.gov.*
- *Mail:* Chief Counsel's Office, Attention: Comment Processing, Office of the Comptroller of the Currency, 400 7th Street SW, Suite 3E–218, Washington, DC 20219.
- *Hand Delivery/Courier:* 400 7th Street SW, Suite 3E–218, Washington, DC 20219.
- *Fax:* (571) 465–4326.

Instructions: You must include ''OCC'' as the agency name and ''Docket ID OCC–2019–0012'' in your comment. In general, the OCC will enter all comments received into the docket and publish the comments on the *Regulations.gov* website without change, including any business or personal information provided such as name and address information, email addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this notice by any of the following methods:

- *Viewing Comments Electronically—Regulations.gov Classic or Regulations.gov Beta*

Regulations.gov Classic: Go to *https://www.regulations.gov/.* Enter ''Docket ID OCC–2019—0012'' in the Search box and click ''Search.'' Click on ''Open Docket Folder'' on the right side of the screen. Comments and supporting materials can be viewed and filtered by clicking on ''View all documents and comments in this docket'' and then using the filtering tools on the left side of the screen. Click on the ''Help'' tab on the *Regulations.gov* home page to get information on using *Regulations.gov*. The docket may be viewed after the close of the comment period in the same manner as during the comment period.

Regulations.gov Beta: Go to *https://beta.regulations.gov/* or click ''Visit New *Regulations.gov* Site'' from the *Regulations.gov* classic homepage. Enter ''Docket ID OCC–2019–0012'' in the Search Box and click ''Search.'' Click on the ''Comments'' tab. Comments can be viewed and filtered by clicking on the

''Sort By'' drop-down on the right side of the screen or the ''Refine Results'' options on the left side of the screen. Supporting Materials can be viewed by clicking on the ''Documents'' tab and filtered by clicking on the ''Sort By'' drop-down on the right side of the screen or the ''Refine Results'' options on the left side of the screen.'' For assistance with the *Regulations.gov* Beta site please call (877)-378–5457 (toll free) or (703) 454–9859 Monday–Friday, 9 a.m.–5 p.m. ET or email to *regulations@erulemakinghelpdesk.com.*

The docket may be viewed after the close of the comment period in the same manner as during the comment period.

• *Viewing Comments Personally:* You may personally inspect comments at the OCC, 400 7th Street SW, Washington, DC 20219. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 649–6700 or, for persons who are deaf or hearing impaired, TTY, (202) 649–5597. Upon arrival, visitors will be required to present valid government-issued photo identification and submit to security screening in order to inspect comments.

Board of Governors of the Federal Reserve System:

You may submit comments, identified by Docket No. OP–1688, by any of the following methods:

• *Agency website: http://www.federalreserve.gov.* Follow the instructions for submitting comments at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.*

• *Email: regs.comments@federalreserve.gov.* Include the docket number in the subject line of the message.

• *Fax:* (202) 452–3819 or (202) 452–3102.

• *Mail:* Address to Ann E. Misback, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551.

All public comments will be made available on the Board's website at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, unless modified for technical reasons or to remove sensitive personal identifying information at the commenter's request. Accordingly, comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper form in Room 146, 1709 New York Avenue NW, Washington, DC 20006, between 9:00 a.m. and 5:00 p.m. on weekdays.

Federal Deposit Insurance Corporation: You may submit comments, identified by RIN 3064–ZA07, by any of the following methods:

• *Agency Website: http://www.FDIC.gov/regulations/laws/federal.* Follow instructions for submitting comments on the agency website.

• *Email: Comments@FDIC.gov.* Include RIN 3064–ZA07 in the subject line of the message.

• *Mail:* Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.

• *Hand Delivery/Courier:* Guard station at the rear of the 550 17th Street building (located on F Street) on business days between 7:00 a.m. and 5:00 p.m.

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All comments will be posted without change to *http://www.fdic.gov/regulations/laws/federal/,* including any personal information provided. Paper copies of public comments may be ordered from the Public Information Center by telephone at (877) 275–3342 or (703) 562–2200.

Securities and Exchange Commission: Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's internet comment form (*http://www.sec.gov/rules/proposed.shtml*); or

• Send an email to *rule-comments@sec.gov.* Please include File Number S7–14–11 on the subject line.

Paper Comments

• Send paper comments to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number S7–14–11. This file number should be included on the subject line if email is used. To help us 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/proposed.shtml*). Comments are also 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. All comments received will be posted without change. Persons submitting comments are cautioned that the Commission does not redact or edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

Federal Housing Finance Agency: You may submit your written comments on the notice, identified by notice number 2019–N–7, by any of the following methods:

• *Agency Website: www.fhfa.gov/open-for-comment-or-input.*

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. If you submit your comments to the Federal eRulemaking Portal, please also send it by email to FHFA at *RegComments@fhfa.gov* to ensure timely receipt by the agency. Please include ''QRM Review Input/Notice No. 2019–N–7'' in the subject line of the message.

• *U.S. Mail, United Parcel Service, Federal Express, or Other Mail Service:* The mailing address for comments is: Alfred M. Pollard, General Counsel, Attention: QRM Review Input/Notice No. 2019–N–7, Federal Housing Finance Agency, Constitution Center, (OGC) Eighth Floor, 400 7th Street SW, Washington, DC 20219.

• *Hand Delivery/Courier:* The hand delivery address is: Alfred M. Pollard, General Counsel, Attention: QRM Review Input/Notice No. 2019–N–7, Federal Housing Finance Agency, Constitution Center, (OGC) Eighth Floor, 400 7th Street SW, Washington, DC 20219. Deliver the package at the Seventh Street entrance Guard Desk, First Floor, on business days between 9:00 a.m. and 5:00 p.m.

All comments received by the deadline will be posted for public inspection without change, including any personal information you provide, such as your name, address, email address, and telephone number, on the FHFA website at *http://www.fhfa.gov.* In addition, copies of all comments received will be available for examination by the public through the electronic comments docket for this Notice also located on the FHFA website.

Department of Housing and Urban Development: Interested persons are invited to submit comments regarding this rule to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW, Room 10276, Washington, DC 20410–0500. Communications must refer to the docket number and title. There are two methods for submitting public comments.

• *Submission of Comments by Mail.* Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW, Room 10276, Washington, DC 20410–0500.

• *Electronic Submission of Comments.* Interested persons may submit comments electronically through the Federal eRulemaking Portal at *www.regulations.gov.* HUD strongly encourages persons providing comments to submit comments electronically. Electronic submission of comments allows the submitter maximum time to prepare and submit comments, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the *www.regulations.gov* website can be viewed by other submitters and interested members of the public. Submitters should follow the instructions provided on that site to submit comments electronically.

• *Note:* To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the rule.

• *No Facsimile Comments.* Facsimile (FAX) comments are not acceptable.

• *Public Inspection of Public Comments.* All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an appointment to review the public comments must be scheduled in advance by calling the Regulations Division at 202–708–3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Relay Service at 800–877–8339. Copies of all comments submitted are available for inspection and downloading at *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT:

OCC: Daniel Borman, Senior Attorney, (202) 649–6929 or, for persons who are deaf or hearing impaired, TTY, (202) 649–5597, Chief Counsel's Office; Ajay Palvia, (202) 649–5505, Senior Financial Economist, Office of the Comptroller of the Currency, 400 7th Street SW, Washington, DC 20219.

Board: Flora H. Ahn, Special Counsel, (202) 452–2317, David W. Alexander, Counsel, (202) 452–287, or Matthew D. Suntag, Senior Counsel, (202) 452–3694, Legal Division; Donald N. Gabbai, Lead Financial Institutions Policy Analyst, Division of Supervision and Regulation, (202) 452–3358; Karen Pence, Assistant Director, Division of Research & Statistics, (202) 452–2342; Nikita Pastor, Senior Counsel, Division of Consumer & Community Affairs (202) 452–3692; Board of Governors of the Federal Reserve System, 20th and C Streets NW, Washington, DC 20551.

FDIC: Rae-Ann Miller, Associate Director, (202) 898–3898; Kathleen M. Russo, Counsel, (703) 562–2071, *krusso@fdic.gov;* or Phillip E. Sloan, Counsel, (703) 562–6137, *psloan@fdic.gov,* Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.

Commission: Arthur Sandel, Special Counsel; Kayla Roberts, Special Counsel; Katherine Hsu, Chief, (202) 551–3850, in the Office of Structured Finance, Division of Corporation Finance; or Chandler Lutz, Economist, (202) 551–6600, in the Office of Risk Analysis, Division of Economic and Risk Analysis, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

FHFA: Ron Sugarman, Principal Policy Analyst, Office of Policy Analysis and Research, (202) 649–3208, *Ron.Sugarman@fhfa.gov,* or Peggy K. Balsawer, Associate General Counsel, Office of General Counsel, (202) 649–3060, *Peggy.Balsawer@fhfa.gov,* Federal Housing Finance Agency, Constitution Center, 400 7th Street SW, Washington, DC 20219. The telephone number for the Telecommunications Device for the Deaf is (800) 877–8339.

HUD: Keith Becker, Deputy Assistant Secretary for Risk Management & Regulatory Affairs, U.S. Department of Housing & Urban Development, 451 7th Street SW, Washington, DC 20410; telephone number 202–402–3722 (this is not a toll-free number). Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay at 800–877–8339.

SUPPLEMENTARY INFORMATION: The credit risk retention regulations, codified at 12 CFR part 43; 12 CFR part 244; 12 CFR part 373; 17 CFR part 246; 12 CFR part 1234; and 24 CFR part 267 (the Credit Risk Retention Regulations), require the OCC, Board, FDIC and Commission, in consultation with the FHFA and HUD, to commence a review of the following provisions of the Credit Risk Retention Regulations no later than December 24, 2019: (1) The definition of qualified residential mortgage (QRM) in section _.13 of the Credit Risk Retention Regulations; (2) the community-focused residential mortgage exemption in section _.19(f) of the Credit Risk Retention Regulations; and (3) the exemption for qualifying three-to-four unit residential mortgage loans in section _.19(g) of the Credit Risk Retention Regulations. Notice of the commencement of this review is hereby given.

In the Supplementary Information to the Credit Risk Retention Regulations the agencies noted that they were committing in the final rule to review the QRM definition at regular intervals to consider, among other things, changes in the mortgage and securitization market conditions and practices, and that this review might include, for example, the structures of securitizations, the relationship between, and roles undertaken by, the various transaction parties, implications for investor protection and financial stability arising from the relationship between government-sponsored enterprise (GSE) markets and private label markets, and trends in mortgage products in various markets and structures, as well as how the QRM definition is affecting residential mortgage underwriting and securitization of residential mortgage loans under evolving market conditions.[1] The Supplementary Information also stated that the agencies would want the opportunity to consider the results of future reviews of, and any changes made to, the qualified mortgage definition by the Consumer Financial Protection Bureau, any additional regulatory changes affecting securitization that are adopted by the agencies, as well as any changes to the structure and framework of the GSEs and those markets.[2] The simultaneous review of the community-focused lending exemption and the exemption for qualifying three-to-four unit residential mortgage loans will similarly allow the agencies to evaluate the advantages and disadvantages of these exemptions as their respective markets evolve over time.

The agencies welcome public comments relating to the review of these provisions of the Credit Risk Retention Regulations, including the matters listed above that might be considered as part of the review.

Joseph M. Otting,

Comptroller of the Currency.

By Order of the Board of Governors of the Federal Reserve System.

Ann E. Misback,

Secretary of the Board.

Federal Deposit Insurance Corporation.

Dated at Washington, DC, on December 10, 2019.

Robert E. Feldman,

Executive Secretary.

Dated: December 10, 2019.

[1] *See* 79 FR 77601, 77689 (December 24, 2014).

[2] *See* 79 FR 77601, 77689 (December 24, 2014).

By the Securities and Exchange Commission.

Vanessa A. Countryman,

Secretary.

Dated: November 21, 2019.

Mark A. Calabria,

Director, Federal Housing Finance Agency.

Dated: November 21, 2019.

By the Department of Housing and Urban Development.

John L. Garvin,

General Deputy Assistant Secretary for Housing.

[FR Doc. 2019–27490 Filed 12–19–19; 8:45 am]

BILLING CODE 4810–33–P; 6210–01–P; 3064–01–P; 8070–01–P; 8011–01–P; 4210–67–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2019–1056; Product Identifier 2018–SW–047–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Helicopters (Previously Eurocopter France)

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to supersede Airworthiness Directive (AD) 2009–25–09 for Eurocopter France (now Airbus Helicopters) Model SA 330 F, G, and J helicopters. AD 2009–25–09 currently requires re-adjusting the torque of the main gearbox (MGB) flexible coupling bolts. Since the FAA issued AD 2009–25–09, Airbus Helicopters has modified the MGB overhaul and repair procedures, which corrects the unsafe condition. Additionally, the FAA-validation for Model SA330F and G helicopters has been cancelled. This proposed AD would retain the requirements of AD 2009–25–09 but would revise the applicability by excluding Model SA330F and G helicopters and exclude MGBs that have been subject to the modified procedures. The actions of this proposed AD are intended to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by February 18, 2020.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Docket:* Go to *https://www.regulations.gov.* Follow the online instructions for sending your comments electronically.
- *Fax:* 202–493–2251.
- *Mail:* Send comments to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590–0001.
- *Hand Delivery:* Deliver to the ''Mail'' address between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Examining the AD Docket

You may examine the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2019–1056; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the European Aviation Safety Agency (EASA) AD, the economic evaluation, any comments received and other information. The street address for Docket Operations is listed above. Comments will be available in the AD docket shortly after receipt.

For service information identified in this proposed rule, contact Airbus Helicopters, 2701 N Forum Drive, Grand Prairie, TX 75052; telephone (972) 641–0000 or (800) 232–0323; fax (972) 641–3775; or at *https://www.airbus.com/helicopters/services/technical-support.html.* You may view service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy, Room 6N–321, Fort Worth, TX 76177.

FOR FURTHER INFORMATION CONTACT: Jignesh Patel, Aerospace Engineer, Safety Management Section, Rotorcraft Standards Branch, FAA, 10101 Hillwood Pkwy, Fort Worth, TX 76177; telephone (817) 222–5110; email *jignesh.patel@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to participate in this rulemaking by submitting written comments, data, or views. The FAA also invites comments relating to the economic, environmental, energy, or federalism impacts that might result from adopting the proposals in this document. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should send only one copy of written comments, or if comments are filed electronically, commenters should submit only one time.

The FAA will file in the docket all comments received, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking. Before acting on this proposal, the FAA will consider all comments received on or before the closing date for comments. The FAA will consider comments filed after the comment period has closed if it is possible to do so without incurring expense or delay. The FAA may change this proposal in light of the comments received.

Discussion

The FAA issued AD 2009–25–09, Amendment 39–16128 (74 FR 66045, December 14, 2009) (''AD 2009–25–09'') for Eurocopter France (now Airbus Helicopters) Model SA 330 F, G, and J helicopters. AD 2009–25–09 requires re-adjusting the tightening torque load of the MGB input flexible coupling-to-flange attachment bolts. AD 2009–25–09 was prompted by EASA AD No. 2008–0049–E, dated March 3, 2008 and corrected March 7, 2008 (EASA AD 2008–0049–E), issued by EASA, which is the Technical Agent for the Member States of the European Union, to correct an unsafe condition on Model SA 330 F, G, and J helicopters. The actions of AD 2009–25–29 were intended to prevent progressive fatigue failure of the coupling discs, caused by excessive fretting on the faces and in the bolt holes of the coupling discs, which could result in loss of the MGB input, loss of the drive transmission, and subsequent loss of control of the helicopter.

Actions Since AD 2009–25–09 Was Issued

Since the FAA issued AD 2009–25–09, EASA has issued AD No. 2008–0049R1, dated December 18, 2015 (EASA AD 2008–0049R1). EASA advises that since EASA AD 2008–0049–E was issued, Airbus Helicopters has improved its procedures for assembling the flexible coupling-to-flanges during MGB overhaul and maintenance of individual flexible couplings. EASA further states that the improved maintenance procedures ensure the correct torqueing of the attachment bolts of the flexible couplings. Because of these improved procedures, EASA AD 2008–0049R1 states that installing a coupling-to-flange assembly that has been subject to improved maintenance procedures after April 1, 2015, is an acceptable method to comply with the requirements of that AD. The FAA agrees with EASA's determination and therefore proposes to change AD 2009–25–09 accordingly.

Additionally, at the request of Airbus Helicopters, Model SA330F and G helicopters have been removed from the

FAA Type Certificate Data Sheet (TCDS). According to Airbus Helicopters, none of these aircraft models are in existence. EASA, the state of design, has also removed these models from its TCDS. As a result, the FAA is removing these models from the applicability.

FAA's Determination

These helicopters have been approved by EASA and are approved for operation in the United States. Pursuant to the FAA's bilateral agreement with the European Union, EASA has notified the FAA of the unsafe condition described in its AD. The FAA is proposing this AD after evaluating all known relevant information and determining that an unsafe condition is likely to exist or develop on other helicopters of the same type design.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Eurocopter Emergency Alert Service Bulletin No. 05.95, Revision 0, dated March 3, 2008, and Airbus Helicopters Emergency Alert Service Bulletin No. 05.95, Revision 1, dated October 22, 2015. This service information describes procedures for readjusting or checking the tightening torque load of the hardware attaching the flexible coupling to the sliding coupling flange and the bolts attaching the flexible coupling to the fixed coupling flange. Revision 1 of this service information excludes from its applicability certain flexible coupling assemblies that have undergone the improved procedures.

This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Proposed AD Requirements

This proposed AD would retain the attachment hardware torque verification and re-adjustment requirements of AD 2009–25–09, and would revise the applicability paragraph by excluding Model SA330F and G helicopters and by excluding input flexible coupling flange assemblies that have been installed in an MGB that has been overhauled after April 1, 2015.

Costs of Compliance

The FAA estimates that this proposed AD affects 16 helicopters of U.S. Registry. Labor costs are estimated at $85 per work-hour. Based on these numbers, the FAA estimates that operators may incur the following costs in order to comply with this AD.

Re-adjusting the tightening torque on the flexible coupling-to-flange attachment bolts would take about 8 work-hours for an estimated cost of $680 per helicopter and $10,880 to the U.S. fleet. For MGB input flexible coupling flange assemblies with more than 75 hours time-in-service, inspecting the tightening torque load on the flexible coupling-to-flange attachment bolts would take about 10 work-hours for an estimated cost of $850 per helicopter and $13,600 to the U.S. fleet.

If required, replacing a damaged flexible coupling would take about 1 work-hour in addition to those required for disassembling and inspecting the flexible coupling flange assembly and required parts would cost about $2,046 for an estimated cost of $2,131 per helicopter.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. Subtitle VII: Aviation Programs, describes in more detail the scope of the Agency's authority.

The FAA is issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701: General requirements. Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

The FAA determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed, I certify this proposed regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866,

2. Will not affect intrastate aviation in Alaska, and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA prepared an economic evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing Airworthiness Directive (AD) 2009–25–09, Amendment 39–16128 (74 FR 66045, December 14, 2009), and adding the following new AD:

Airbus Helicopters (Previously Eurocopter France): Docket No. FAA–2019–1056; Directorate Identifier 2018–SW–047–AD.

(a) Comments Due Date

The FAA must receive comments by February 18, 2020.

(b) Affected ADs

This AD replaces AD 2009–25–09, Amendment 39–16128 (74 FR 66045, December 14, 2009).

(c) Applicability

This AD applies to Airbus Helicopters (previously Eurocopter France) Model SA330J helicopters, certificated in any category, with a main gearbox (MGB) input flexible coupling flange assembly part number 330A–32937401 installed that has been modified per MOD 0752416 and MOD 0752419, excluding:

(1) Assemblies that have been subject to a maintenance scheduled inspection per Working Card 65.32.601 since new or since a complete overhaul of the MGB; and

(2) Assemblies installed on an MGB that has undergone complete overhaul after April 1, 2015, and that have not been replaced since the complete overhaul of the MGB.

(d) Unsafe Condition

This AD defines the unsafe condition as progressive fatigue failure of the coupling discs, caused by excessive fretting on the faces and in the bolt holes of the coupling discs. This condition, if not corrected, could result in loss of the MGB input, loss of the drive transmission, and subsequent loss of control of the helicopter.

(e) Actions and Compliance

You are responsible for performing each action required by this AD within the specified compliance time unless it has already been accomplished prior to that time.

(1) For MGB input flexible coupling flange assemblies with less than 50 hours time-in-service (TIS) since new or since a complete overhaul of the MGB, re-adjust the tightening torque load of the 6 nuts on the flexible coupling-to-flange attachment bolts. Accomplish this re-adjustment between 50 hours TIS and 75 hours TIS since new or since a complete overhaul of the MGB in accordance with paragraph 2.B.2.a. of Eurocopter Emergency Alert Service Bulletin No. 05.95, Revision 0, dated March 3, 2008 (EASB 05.95) or Airbus Helicopters Emergency Alert Service Bulletin No. 05.95, Revision 1, dated October 22, 2015 (EASB 05.95 Rev 1).

(2) For MGB input flexible coupling flange assemblies with 50 hours TIS and 75 or less hours TIS since new or since a complete overhaul of the MGB, either:

(i) Upon or before reaching 75 hours TIS since new or since a complete overhaul of the MGB, re-adjust the tightening torque load of the 6 nuts on the flexible coupling-to-flange attachment bolts in accordance with paragraph 2.B.2.a. of EASB 05.95 or EASB 05.95 Rev 1; or

(ii) Upon or before reaching 125 hours TIS since new or since a complete overhaul of the MGB, inspect the tightening torque load of the 6 nuts on the flexible coupling-to-flange attachment bolts in accordance with paragraph 2.B.2.b. of EASB 05.95 or EASB 05.95 Rev 1, except you are not required to contact the manufacturer.

(3) For MGB input flexible coupling flange assemblies that have more than 75 hours TIS since new or since a complete overhaul of the MGB, within the next 50 hours TIS, inspect the tightening torque load of the 6 nuts on the flexible coupling-to-flange attachment bolts, in accordance with paragraph 2.B.2.b. of EASB 05.95 or EASB 05.95 Rev 1, except you are not required to contact the manufacturer.

(4) Prior to installing an MGB that contains an input flexible coupling flange assembly that has been modified per MOD 0752416 and MOD 0752419, you must comply with the provisions of this AD.

(f) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Safety Management Section, FAA, may approve AMOCs for this AD. Send your proposal to: Jignesh Patel, Aerospace Engineer, Safety Management Section, Rotorcraft Standards Branch, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone (817) 222–5110; email *9-ASW-FTW-AMOC-Requests@faa.gov.*

(2) For operations conducted under a 14 CFR part 119 operating certificate or under 14 CFR part 91, subpart K, the FAA suggests that you notify your principal inspector, or lacking a principal inspector, the manager of the local flight standards district office or certificate holding district office before operating any aircraft complying with this AD through an AMOC.

(g) Additional Information

The subject of this AD is addressed in European Aviation Safety Agency (EASA) AD No. 2008–0049R1, dated December 18, 2015. You may view the EASA AD on the internet at *https://www.regulations.gov* in the AD Docket.

(h) Subject

Joint Aircraft Service Component (JASC) Code: 6310, Engine/Transmission Coupling.

Issued in Fort Worth, Texas, on December 11, 2019.

Gaetano A. Sciortino,

Acting Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2019–27430 Filed 12–19–19; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2019–0988; Product Identifier 2019–NM–175–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Canada Limited Partnership (Type Certificate Previously Held by C Series Aircraft Limited Partnership (CSALP); Bombardier, Inc.) Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain Airbus Canada Limited Partnership Model BD–500–1A11 airplanes. This proposed AD was prompted by reports that, under certain combinations of airplane configuration and flight conditions, higher than anticipated temperatures could lead to an engine fire warning nuisance message. This proposed AD would require installation of Integrated Air Systems Controller (IASC) software version 5.0. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by February 3, 2020.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this NPRM, contact Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–5000; fax 514–855–7401; email *thd.crj@aero.bombardier.com;* Internet *http://www.bombardier.com.* You may view this service information at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

Examining the AD Docket

You may examine the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0988; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, the regulatory evaluation, any comments received, and other information. The street address for Docket Operations is listed above. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Thomas Niczky, Aerospace Engineer, Avionics and Electrical Systems Section, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7347; fax 516–794–5531; email *9-avs-nyaco-cos@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2019–0988; Product Identifier 2019–NM–175–AD'' at the beginning of your comments. The FAA specifically invites comments on the overall regulatory, economic, environmental, and energy aspects of this NPRM. The FAA will consider all comments received by the closing date and may amend this NPRM because of those comments.

The FAA will post all comments, without change, to *https://www.regulations.gov,* including any personal information you provide. The FAA will also post a report summarizing each substantive verbal contact the agency receives about this NPRM.

Discussion

Transport Canada Civil Aviation (TCCA), which is the aviation authority for Canada, has issued Canadian AD CF–2019–31, dated September 6, 2019 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for certain Airbus Canada Limited Partnership Model BD–500–1A11 airplanes. You may examine the MCAI in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0988.

This proposed AD was prompted by reports that, under certain combinations of airplane configuration and flight conditions, higher than anticipated temperatures could lead to an engine fire warning nuisance message. The FAA is proposing this AD to address this potential nuisance message, which could lead to an unnecessary shutdown of the engine by the flightcrew, and consequent reduced controllability of the airplane. See the MCAI for additional background information.

Related Service Information Under 1 CFR Part 51

Bombardier has issued Service Bulletin BD500–219001, Issue 002, dated September 11, 2018. This service information describes procedures for installation of IASC software version 5.0. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

FAA's Determination

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to the FAA's bilateral agreement with the State of Design Authority, the FAA has been notified of the unsafe condition described in the MCAI and service information referenced above. The FAA is proposing this AD because the FAA evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop on other products of the same type design.

Proposed Requirements of This NPRM

This proposed AD would require accomplishing the actions specified in the service information described previously.

Costs of Compliance

The FAA estimates that this proposed AD affects 8 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
2 work-hours × $85 per hour = $170	$0	$170	$1,360

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. Subtitle VII: Aviation Programs, describes in more detail the scope of the Agency's authority.

The FAA is issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701: ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

This proposed AD is issued in accordance with authority delegated by the Executive Director, Aircraft Certification Service, as authorized by FAA Order 8000.51C. In accordance with that order, issuance of ADs is normally a function of the Compliance and Airworthiness Division, but during this transition period, the Executive Director has delegated the authority to issue ADs applicable to transport category airplanes and associated appliances to the Director of the System Oversight Division.

Regulatory Findings

The FAA determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

(1) Is not a ''significant regulatory action'' under Executive Order 12866,

(2) Will not affect intrastate aviation in Alaska, and

(3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Airbus Canada Limited Partnership (Type Certificate Previously Held by C Series Aircraft Limited Partnership (CSALP); Bombardier, Inc.): Docket No. FAA–2019–0988; Product Identifier 2019–NM–175–AD.

(a) Comments Due Date

The FAA must receive comments by February 3, 2020.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Airbus Canada Limited Partnership (Type Certificate Previously Held by C Series Aircraft Limited Partnership (CSALP); Bombardier, Inc.) Model BD–500–1A11 airplanes, certificated in any category, serial numbers 55018, 55019, 55022, 55024, 55026, 55028, 55031, and 55035.

(d) Subject

Air Transport Association (ATA) of America Code 30, Ice and rain protection.

(e) Reason

This AD was prompted by reports that, under certain combinations of airplane configuration and flight conditions, higher than anticipated temperatures could lead to an engine fire warning nuisance message. The FAA is issuing this AD to address this condition, which could lead to an unnecessary shutdown of the engine by the flightcrew, which could lead to reduced controllability of the airplane.

(f) Compliance

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

(g) Software Update

Within 850 flight hours or 6 months, whichever occurs first after the effective date of this AD: Install Integrated Air Systems Controller (IASC) software version 5.0, in accordance with the Accomplishment Instructions of Bombardier Service Bulletin BD500–219001, Issue 002, dated September 11, 2018.

(h) Credit for Previous Actions

This paragraph provides credit for actions required by paragraph (g) of this AD, if those actions were performed before the effective date of this AD using Bombardier Service Bulletin BD500–219001, Issue 001, dated August 3, 2018.

(i) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, New York ACO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the certification office, send it to ATTN: Program Manager, Continuing Operational Safety, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7300; fax 516–794–5531. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain instructions from a manufacturer, the instructions must be accomplished using a method approved by the Manager, New York ACO Branch, FAA; or Transport Canada Civil Aviation (TCCA); or Airbus Canada Limited Partnership's TCCA Design Approval Organization (DAO). If approved by the DAO, the approval must include the DAO-authorized signature.

(j) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) Canadian AD CF–2019–31, dated September 6, 2019, for related information. This MCAI may be found in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0988.

(2) For more information about this AD, contact Thomas Niczky, Aerospace Engineer, Avionics and Electrical Systems Section, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7347; fax 516–794–5531; email *9-avs-nyaco-cos@faa.gov.*

(3) For service information identified in this AD, contact Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–5000; fax 514–855–7401; email *thd.crj@aero.bombardier.com;* internet *http://www.bombardier.com.* You may view this service information at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

Issued in Des Moines, Washington, on December 12, 2019.

Michael Kaszycki,

Acting Director, System Oversight Division, Aircraft Certification Service.

[FR Doc. 2019–27466 Filed 12–19–19; 8:45 am]

BILLING CODE 4910–13–P

SOCIAL SECURITY ADMINISTRATION

20 CFR Parts 402, 404, 408, 411, 416, and 422

[Docket No. SSA–2017–0073]

RIN 0960–AI25

Hearings Held by Administrative Appeals Judges of the Appeals Council

AGENCY: Social Security Administration.

ACTION: Notice of proposed rule making.

SUMMARY: We propose to revise our rules to clarify when and how administrative appeals judges (AAJ) on our Appeals Council may hold hearings and issue decisions. The Appeals Council already has the authority to hold hearings and issue decisions under our existing statute and regulations, but we have not exercised this authority or explained the circumstances under which it would be appropriate for the Appeals Council to assume responsibility for holding a hearing and issuing a decision. The proposed clarifications will ensure the Appeals Council is not limited in the type of claims for which it may hold hearings. We expect that these proposed rules will increase our adjudicative capacity when needed, allowing us to adjust more quickly to fluctuating short-term workloads, such as when an influx of cases reaches the hearings level. Our ability to utilize our limited resources more effectively will help us quickly optimize our hearings capacity, which in turn will allow us to continue to issue accurate, timely, high-quality decisions.

DATES: To ensure that your comments are considered, we must receive them no later than February 18, 2020.

You may submit comments by any one of three methods—internet, fax, or mail. Do not submit the same comments multiple times or by more than one method. Regardless of which method you choose, please state that your comments refer to Docket No. SSA–2017–0073 so that we may associate your comments with the correct rule.

Caution: You should be careful to include in your comments only information that you wish to make publicly available. We strongly urge you not to include in your comments any personal information, such as Social Security numbers or medical information.

1. *Internet:* We strongly recommend that you submit your comments via the internet. Please visit the Federal eRulemaking portal at *http://www.regulations.gov.* Use the *Search* function to find docket number SSA–2017–0073. The system will issue a tracking number to confirm your submission. You will not be able to view your comment immediately because we must post each comment manually. It may take up to a week for your comments to be viewable.

2. *Fax:* Fax comments to (410) 966–2830.

3. *Mail:* Mail your comments to the Office of Regulations and Reports Clearance, Social Security Administration, 3100 West High Rise Building, 6401 Security Boulevard, Baltimore, Maryland 21235–6401.

Comments are available for public viewing on the Federal eRulemaking portal at *http://www.regulations.gov* or in person, during regular business hours, by arranging with the contact person identified in **FOR FURTHER INFORMATION CONTACT**.

FOR FURTHER INFORMATION CONTACT: Nancy Chung, Office of Appellate Operations, Social Security Administration, 5107 Leesburg Pike, Falls Church, VA 22041, (703) 605–7100. 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

As of November 2019, pending applicants have waited from a low of about 8.5 months to a high of about 20

months for a hearing.[1] At the end of November 2019, we had approximately 541,000 applicants for benefits who are waiting for a hearing before an administrative law judge (ALJ).[2] The vast majority of these claimants are seeking disability benefits under title II of the Social Security Act (Act) or Supplemental Security Income (SSI) payments based on disability under title XVI of the Act.[3]

The proposed changes in these rules will increase our adjudicative capacity, when needed, allowing us to adjust to fluctuating short-term workloads, such as when an influx of cases reaches the hearings level. This will also provide us with appropriate flexibility, particularly when budgets may not support additional hiring or unanticipated shifts in disability application rates occur. Utilizing resources we already have will help us quickly optimize our hearings capacity to issue decisions in a timely manner and avoid the likelihood of growing hearings backlogs in the future.

At the end of fiscal year (FY) 2010, we had approximately 705,000 cases pending at the hearing level of our administrative review process.[4] By the end of FY 2016, that number had grown to more than 1.1 million cases, peaking in FY 2017 at 38 percent above the number of hearing requests pending at the end of FY 2010.[5] As of November 2019, the number of pending hearing-level cases was approximately 541,000. As part of our efforts to effectively utilize our resources to decrease the number of pending hearing requests, while maintaining and reducing the average wait for hearings, we propose to clarify when AAJs from our Appeals Council may hold hearings and issue decisions, or dismissals where appropriate, using the same rules that apply to ALJs.

The Appeals Council has authority under our current regulations to remove a request for hearing that is pending before an ALJ, and thereby assume responsibility for the case and conduct the hearing.[6] We have not exercised this authority, however, nor explained the circumstances under which it would be appropriate for the Appeals Council to assume responsibility for holding a hearing and issuing a decision. Each AAJ possesses the same skills and experience as the skills and experience of our ALJs. We will not implement these proposed changes in a way that could undermine the independence and integrity of our existing administrative review process. As discussed below, we take seriously our responsibility to ensure that claimants receive accurate decisions from impartial decision-makers, arrived at through a fair process that provides each claimant with the full measure of due process protections. Since the beginning of the Social Security administrative review process in 1940, we have held an unwavering commitment to a full and fair hearings process. These proposed rules would not alter the fundamental fairness of our longstanding hearings process. Under these proposed rules, our AAJs will continue to possess the same responsibility and independence they have always had to make fair and accurate decisions, free from agency interference.[7]

What is the Appeals Council and its current role in the appeals process? What is the current role of ALJs in the process?

In most cases, we evaluate disability claims using an administrative process that consists of four levels: (1) Initial determination; (2) reconsideration; (3) hearing before an ALJ; and (4) Appeals Council review.[8] At the first and second steps of the administrative process, Federal and State decision-makers issue initial and reconsidered determinations.

At the third step, we operate an administrative hearings system. The Office of Hearings Operations (OHO) administers our administrative hearings program and directs a nationwide field organization of ALJs, who conduct impartial de novo hearings and issue decisions on appealed determinations involving claims under titles II, VIII, and XVI of the Act. Our hearings process guarantees parties the opportunity to present evidence, written statements, and oral arguments, before a fair and impartial decisionmaker; the right to appoint someone to represent them; and the right to a decision that gives findings of fact and the reasons for the decision based on the preponderance of the evidence offered at the hearing or otherwise included in the record.

At the fourth step of the administrative review process, the Appeals Council reviews hearing decisions and dismissals of hearing requests issued under titles II, VIII, and XVI of the Act.[9] When an individual requests review of a hearing decision or dismissal of a hearing request, the Appeals Council may deny or dismiss the request for review, or it may grant the request and either issue a decision or remand the case for further administrative proceedings.[10] The Appeals Council may decide on its own motion to review a case and issue a decision or remand.[11] As members of the Appeals Council, AAJs impartially consider all claims presented to them with a high degree of expertise.

If the Appeals Council does not review a hearing decision, the hearing decision becomes the final decision of the Commissioner and is binding unless a party files an action in Federal district court or the decision is revised.[12] If the Appeals Council reviews a case and issues a decision, its decision is the final decision of the Commissioner and is binding unless a party files an action in Federal district court or the decision is revised.[13] Any party who is dissatisfied with the Commissioner's final decision may request judicial review of the decision.[14] The Appeals Council also processes cases remanded to the agency by the Federal courts.[15]

[1] See Average Wait Time Until Hearing Held Report (By Month), available at: *https://www.ssa.gov/appeals/DataSets/archive/archive_data_reports.html,* where further data may be extrapolated. You may also extrapolate current average processing time for a hearing decision here: *https://www.ssa.gov/appeals/DataSets/02_HO_Workload_Data.html.*

[2] We are making the national Hearing Office Workload, from November 30, 2018, available as supporting documentation, at *https://www.regulations.gov,* under ''supporting and related material'' for this docket, SSA–2017–0073. You may also review national Hearing Office Workload information here: *https://www.ssa.gov/appeals/DataSets/02_HO_Workload_Data.html.*

[3] See page six of the recent letter from Acting Commissioner of Social Security Berryhill to Senate Appropriations Chairman Shelby, *https://www.ssa.gov/budget/FY19Files/2019OP.pdf.*

[4] *Annual Statistical Supplement to the Social Security Bulletin, 2012,* Table 2.F9, at page 2.75 (2013), available at: *https://www.ssa.gov/policy/docs/statcomps/supplement/2012/supplement12.pdf.* The *Annual Statistical Supplement to the Social Security Bulletin* is prepared in SSA's Office of Retirement and Disability Policy, Office of Research, Evaluation, and Statistics (ORES).

[5] *Annual Statistical Supplement to the Social Security Bulletin, 2017,* Table 2.F9, at page 2.80 (2018), available at: *https://www.ssa.gov/policy/docs/statcomps/supplement/index.html.*

[6] 20 CFR 404.956 and 416.1456.

[7] Our ALJs have protections that provide them with qualified decisional independence, which ensures that they conduct impartial hearings. They must decide cases based on the facts in each case and in accordance with agency policy set out in regulations, rulings, and other policy statements. Further, because of their qualified decisional independence, ALJs make their decisions free from agency pressure or pressure by a party to decide a particular case, or a particular percentage of cases, in a particular way. Consistent with our longstanding policy and practice, our AAJs will continue to follow these same principles.

[8] 20 CFR 404.900 and 416.1400.

[9] The Appeals Council is part of our Office of Analytics, Review, and Oversight.

[10] 20 CFR 404.967 and 416.1467.

[11] 20 CFR 404.969 and 416.1469.

[12] 20 CFR 404.981 and 416.1481.

[13] *Id.*

[14] 20 CFR 404.981 and 416.1481.

[15] 20 CFR 404.983 and 416.1483.

The History of the Appeals Council's Hearing Authority

Our proposal for AAJs to conduct hearings and issue decisions under the same rules that apply to ALJs is supported by our existing regulations,[16] which have authorized this option since the beginning of our hearings and appeals process in 1940.[17] Our existing regulations state that when a request for hearing is pending before an ALJ, the Appeals Council can assume responsibility for holding the hearing by requesting jurisdiction of the case. If the Appeals Council holds a hearing, it must follow the same rules that apply to hearings before ALJs.[18]

Our current regulations are based on the original blueprint for our hearing and review process [19] and our original regulations governing the administrative review process. The original administrative review regulations provided that, ''The hearing provided for in this section shall be, except as herein provided, conducted by a referee designated by the Chairman of the Appeals Council.'' [20] The regulations also provided, however, that ''[t]he Chairman may designate a member of the Appeals Council to conduct a hearing.'' [21] The Social Security Board, an early term for the Social Security organization, envisioned that the members of the Appeals Council ''should exercise [this] authority from time to time as a means of keeping in touch with the problems connected with conducting hearings and developing the records.'' [22]

In January 2016, we recommended that AAJs hold hearings in certain cases as part of our adjudication augmentation strategy.[23] That proposal to use AAJs to hold hearings and issue decisions in certain categories of cases attracted significant public and congressional interest.[24] We ultimately decided against implementing the adjudication augmentation strategy and decided instead to pursue clarifying changes to our regulations, which also gives us an opportunity to receive additional input from interested stakeholders.

Why are we proposing having AAJs hold hearings and issue decisions?

As of November 2019, pending applicants have waited from a low of about 8.5 months to a high of about 20 months for a hearing. It is incumbent upon us to develop solutions to provide more timely service to claimants, while at the same time ensuring that our hearings process remains fair and impartial. Using AAJs to serve the public in the manner we propose allows us more flexibility to use our resources to meet the needs of the public we serve and ensures that our hearings process remains fair and impartial, while providing high quality decisions to our claimants.

How will AAJ hearings and decisions compare to those by ALJs?

We propose to clarify that an AAJ from our Appeals Council may hold a hearing and issue a decision on any case pending at the hearings level under titles II, VIII, or XVI of the Act. Just as ALJs have the authority to hold hearings on a variety of disability and non-disability claims, we would not limit the kinds of claims that AAJs could hear. AAJs would be required to follow the same rules as ALJs, and the hearings they hold would apply the same due process protections as hearings held by our ALJs. The rules that govern ALJ hearings that AAJs would be required to follow include, but are not limited to, those governing the submission of evidence, the representation of claimants, and the use of video teleconferencing. Claimants would be entitled to request Appeals Council review of any decision with which they are dissatisfied and to seek judicial review of our final decision. In addition, when the Appeals Council removes a case from the hearings level and schedules a hearing, it would mail a notice of hearing at least 75 days before the date of the hearing, just as hearing offices do under our current rules.[25] Further, as mentioned above, parties would have the ability to request Appeals Council review of decisions or dismissals issued by AAJs.

To ensure impartiality, we propose to preclude an AAJ who conducted a hearing or issued the decision in a case, or dismissed a hearing request, from participating in any action associated with a request for Appeals Council review in that case. If the Appeals Council denies a request for review of a decision, parties would have the ability to seek judicial review in Federal district court pursuant to section 205(g) of the Act. We expect that these revisions will provide us with much-needed flexibility to respond to and mitigate the impact of surges in hearing requests.

Clarifying Regulatory Language

Federal Court Remands

We propose to clarify when a case has been remanded by Federal Court, the Appeals Council has authority to hold a hearing. In §§ 404.983 and 416.1483, we propose to clarify that if the Appeals Council assumes responsibility for issuing a decision on a claim(s) that has been remanded by Federal court, it may hold a hearing if a hearing is necessary to complete adjudication of the claim(s). If the Appeals Council holds a hearing, it will follow the same procedures for holding hearings as ALJs, as set forth in §§ 404.929 through 404.961 and §§ 416.1429 through 416.1461. However, there may be differences in judicial review as provided in § 422.210. When the Appeals Council assumes responsibility for issuing a decision on a claim(s) that has been remanded by Federal court and no hearing is necessary, we propose that it will follow the notice and decision procedures in §§ 404.973, 404.979, 416.1473 and 416.1479, which are the procedures the Appeals Council uses when granting review.

We also propose to specify that if the Appeals Council intends to remand a case following a Federal court remand, the procedures in §§ 404.977 and 416.1477 will apply. Additionally, 20 CFR 404.984 and 416.1484 state that when a Federal court remands a case for further consideration, and an ALJ issues a new decision upon remand, the Appeals Council may assume jurisdiction of the case based on written exceptions to the ALJ's decision. The current regulations do not specify the standard the Appeals Council will use when determining whether to assume jurisdiction. We propose to specify that, in such cases, the Appeals Council may assume jurisdiction using the standards in §§ 404.970 and 416.1470, which are

[16] 20 CFR 404.956 and 416.1456.

[17] 5 FR 4169, 4172 (October 22,1940).

[18] 20 CFR 404.956 and 416.1456.

[19] See *Basic Provisions Adopted by the Social Security Board for the Hearing and Review of Old-Age and Survivors Insurance Claims* (January 1940). The *Basic Provisions* are reprinted as an appendix in S. Doc. No. 77–10, Administrative Procedure in Government Agencies: Monograph of the Attorney General's Committee on Administrative Procedure (Part 3, Social Security Board), at 33–59 (1940).

[20] 20 CFR 403.709(d) (1940 Supp.)

[21] *Id.*

[22] *Basic Provisions,* at 39.

[23] The adjudication augmentation strategy was part of our 2016 Plan for Compassionate and Responsive Service (CARES) (available at: *https://www.ssa.gov/appeals/documents/cares_plan_2016.pdf*). Under the strategy, we would have expanded (on a temporary basis) the number of cases in which AAJs on the Appeals Council could hold hearings under the authority of the regulations. *Id.* at 11.

[24] *See* Examining Due Process in Administrative Hearings: Hearing Before the Subcommittee on Regulatory Affairs and Federal Management of the Committee on Homeland Security and Governmental Affairs, United States Senate, 114th Cong. 89, 96 (2016) (*https://www.gpo.gov/fdsys/pkg/CHRG-114shrg21182/pdf/CHRG-114shrg21182.pdf*).

[25] 20 CFR 404.938(a) and 416.1438(a).

the standards the Appeals Council follows when determining whether to grant review of an ALJ decision.

We also propose adding language to clarify that in some circumstances following a Federal court remand, the Appeals Council may dismiss the proceedings before it. Specifically, we propose that in cases remanded under sentence four of section 205(g) of the Act only, the Appeals Council may dismiss the proceedings for any reason that an ALJ can dismiss a request for hearing.[26] A request for hearing can be dismissed for reasons such as an untimely filed request for review, if neither the claimant nor designated representative appear at the hearing, if res judicata applies, or when the person requesting the hearing has no right to it.[27] The most common reason the Appeals Council dismisses a request for hearing after a court remand is that the claimant is deceased, and there is no substitute party.

Appeals Council Review Generally

In §§ 404.970 and 416.1470, we propose to add paragraph (d) to clarify when the Appeals Council will review a case. Under these proposed rules, the Appeals Council will generally grant review of a hearing decision or dismissal only when it finds there is a reasonable probability that an error present in the ruling or hearing decision changes the outcome of the decision or benefits are owed to any party. This limitation will allow the Appeals Council to focus agency resources on correcting significant errors that may change the outcome of a case and avoid further administrative proceedings that serve only to correct harmless errors in an otherwise appropriate decision or dismissal.

In §§ 404.976 and 416.1476, we propose to clarify the procedures the Appeals Council follows on its review of hearing decisions or dismissals. We propose to clarify that the Appeals Council will evaluate all additional evidence it receives, but it will only mark the evidence as an exhibit and make part of the official record additional evidence that it determines meets the requirements of §§ 404.970(a)(5) and 416.1470(a)(5). Consistent with the Appeals Council's current business process, when the Appeals Council finds that additional evidence does not meet these requirements, it will still include a copy of the evidence in the transcript if the claimant seeks judicial review in Federal court. These proposed revisions apply only to the Appeals Council level of review, and would not affect how an AAJ considers additional evidence when he or she is acting in the same capacity as an ALJ.

Additionally, we propose to remove and reserve §§ 404.966 and 416.1466, testing elimination of the request for Appeals Council review. On September 23, 1997, we amended our rules to establish authority to test elimination of the request for Appeals Council review. Given our experience over the last 21 years, we no longer intend to test the elimination of the request for Appeals Council review.[28] Therefore, we propose to remove and reserve §§ 404.966 and 416.1466.

Sections 404.955 and 416.1455 state that an ALJ decision is binding, except in certain circumstances. Missing from the list of circumstances, however, is the Appeals Council's authority to review the decision on its own motion, which is set forth in §§ 404.969 and 416.1469. We propose to add this exception to the list of circumstances in §§ 404.955 and 416.1455.

Sections 404.973 and 416.1473 state that when the Appeals Council decides to review a case, it shall mail a notice to all parties at their last known addresses stating the reasons for the review and the issues to be considered. Consistent with our longstanding practice, we propose to clarify in §§ 404.973 and 416.1473 that if the Appeals Council decides to review a decision or dismissal and plans to either issue a fully favorable decision or remand the case, the Appeals Council may send the notice of review to all parties with the decision or remand order.

In our Ticket to Work regulation, we changed the words, ''administrative law judge'' to read as ''judge,'' in § 411.175. This change conforms to the broader clarification, outlined in this rulemaking, that an AAJ may provide the same adjudication as an ALJ. We wish to make clear; the underlying substantive Ticket to Work policy is not changing with this terminology adjustment.

Organizational Changes

We propose to update cited organizational component names since the current listed organization components are obsolete. We propose to replace references to the Office of Hearings and Appeals and the Office of Disability Adjudication and Review with references to OHO, the Office of Analytics, Review, and Oversight, or the Commissioner of Social Security, as appropriate.

We also propose deleting language referring to workloads neither OHO nor the Appeals Council currently handles (*e.g.,* Medicare appeals as described in 20 CFR 422.205 are currently heard by the Medicare Appeals Council of the Department of Health and Human Services).

Regulatory Procedures

Clarity of These Rules

Executive Order 12866, as supplemented by Executive Order 13563, requires each agency to write all rules in plain language. In addition to your substantive comments on this NPRM, we invite your comments on how to make rules easier to understand.

For example:

- Would more, but shorter, sections be better?
- Are the requirements in the rule clearly stated?
- Have we organized the material to suit your needs?
- Could we improve clarity by adding tables, lists, or diagrams?
- What else could we do to make the rule easier to understand?
- Does the rule contain technical language or jargon that is not clear?
- Would a different format make the rule easier to understand, *e.g.* grouping and order of sections, use of headings, paragraphing?

Executive Order 12866 as Supplemented by Executive Order 13563

We consulted with the Office of Management and Budget (OMB) and determined that these proposed rules meet the requirements for a significant regulatory action under Executive Order 12866 as supplemented by Executive Order 13563. Thus, OMB reviewed these proposed rules.

Executive Order 13771

These proposed rules are not subject to the requirements of Executive Order 13771 because they are administrative in nature and result in no more than de minimis costs.

Regulatory Flexibility Act

We certify that these proposed rules will not have a significant economic impact on a substantial number of small entities because they affect individuals only. Accordingly, a regulatory flexibility analysis as provided in the Regulatory Flexibility Act, as amended, is not required.

[26] HALLEX I–3–2–51 and I–3–4–20.

[27] 20 CFR 404.947 and 416.1457.

[28] See 71 FR 16424, Administrative Review Process for Adjudicating Initial Disability Claims (March 31, 2006) and 76 FR 24802, Eliminating the Decision Review Board (May 3, 2011).

Paperwork Reduction Act

SSA already has existing OMB PRA-approved information collection tools relating to this proposed rule: The Request for Review of ALJ Decision or Dismissal (Form HA–520, OMB No. 0960–0277); the Waiver of Your Right to Personal Appearance Before an Administrative Law Judge (Form HA–4608, OMB No. 0960–0284); the Request to Withdraw a Hearing Request (Form HA–85, OMB No. 0960–0710); the Acknowledgement of Receipt of Notice of Hearing (Form HA–504, OMB No. 0960–0671); the Request to Show Case for Failure to Appear (Form HA–L90, OMB No. 0960–0794); and the Request for Hearing by Administrative Law Judge (Form HA–501, OMB No. 0960–0269). Because this proposed rule, once finalized, will allow for both Administrative Appeals Judges and Administrative Law Judges to hold hearings and issue decisions, we will update these forms to reflect the new language stating that ''Judges'' will review the cases, hold hearings, and issue decisions. Currently, these forms use the narrow, specific designation, ''Administrative Law Judges.'' Once the rule is published in final, we will obtain OMB approval for this revision through non-substantive change requests for these information collections, which does not require public notice and comment under the PRA. Thus, these final rules do 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 402

Administrative practice and procedure, Freedom of information.

20 CFR Part 404

Administrative practice and procedure, Blind, Disability benefits, Public assistance programs, Reporting and recordkeeping requirements, Social security.

20 CFR Part 408

Administrative practice and procedure, Reporting and recordkeeping requirements, Social security, Supplemental Security Income (SSI), Veterans.

20 CFR Part 411

Administrative practice and procedure, Blind, Disability benefits, Public assistance programs, Reporting and recordkeeping requirements, Vocational rehabilitation.

20 CFR Part 416

Administrative practice and procedure, Reporting and recordkeeping requirements, Supplemental Security Income (SSI).

20 CFR Part 422

Administrative practice and procedure, Reporting and recordkeeping requirements, Social security.

Andrew Saul,

Commissioner of Social Security.

For the reasons set out in the preamble, we propose to amend 20 CFR chapter III, parts 402, 404, 408, 411, 416 and 422, as set forth below:

PART 402—AVAILABILITY OF INFORMATION AND RECORDS TO THE PUBLIC

■ 1. The authority citation for part 402 is revised to read as follows:

Authority: Secs. 205, 702(a)(5), and 1106 of the Social Security Act (42 U.S.C. 405, 902(a)(5), and 1306); 5 U.S.C. 552 and 552a; 8 U.S.C. 1360; 18 U.S.C. 1905; 26 U.S.C. 6103; 30 U.S.C. 923b; 31 U.S.C. 9701; E.O. 12600, 52 FR 23781, 3 CFR, 1987 Comp., p. 235.

■ 2. Revise § 402.60 to read as follows:

§ 402.60 Materials in the hearing offices of the Office of Hearings Operations.

(a) *Materials available for inspection.* The following materials are available for inspection in the hearing offices of the Office of Hearings Operations:

(1) Regulations of the Social Security Administration (see § 402.55(a)(2)).

(2) Title 5, United States Code.

(3) Compilation of the Social Security Laws.

(4) Social Security Rulings.

(5) Social Security Handbook.

(6) Social Security Acquiescence Rulings.

(b) *The Hearings, Appeals, and Litigation Law (HALLEX) manual.* The HALLEX manual is available for inspection and copying in the hearing offices of the Office of Hearings Operations (fees may be applicable per §§ 402.155 through 402.185).

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

Subpart A—Introduction, General Provisions and Definitions

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

Authority: Secs. 203, 205(a), 216(j), and 702(a)(5) of the Social Security Act (42 U.S.C. 403, 405(a), 416(j), and 902(a)(5)) and 48 U.S.C. 1801.

■ 4. Amend § 404.2 by revising paragraph (b) to read as follows:

§ 404.2 General definitions and use of terms.

* * * * *

(b) *Commissioner; Appeals Council; Administrative Law Judge; Administrative Appeals Judge defined*—

(1) *Commissioner* means the Commissioner of Social Security.

(2) *Appeals Council* means the Appeals Council of the Office of Analytics, Review, and Oversight in the Social Security Administration or such member or members thereof as may be designated by the Chair of the Appeals Council.

(3) *Administrative Law Judge* means an Administrative Law Judge in the Office of Hearings Operations in the Social Security Administration.

(4) *Administrative Appeals Judge* means an Administrative Appeals Judge serving as a member of the Appeals Council.

* * * * *

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

■ 5. 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).

■ 6. 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. Subject to § 404.956, the Commissioner, or his or her delegate, will appoint an administrative law judge to conduct the hearing. If circumstances warrant, the Commissioner, or his or her delegate, may assign your case to another administrative law judge. At the hearing, you may appear in person, by video teleconferencing, or, under certain extraordinary circumstances, 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, in person, by video teleconferencing, or by telephone, 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.

■ 7. Amend § 404.955 by, revising the section heading, redesignating paragraphs (c) through (f) as paragraphs (d) through (g), and adding new paragraph (c) to read as follows:

§ 404.955 The effect of a hearing decision.

* * * * *

(c) The Appeals Council decides on its own motion to review the decision under the procedures in § 404.969;

* * * * *

■ 8. Revise § 404.956 to read as follows:

§ 404.956 Removal of a hearing request(s) to the Appeals Council.

(a) *Removal.* The Appeals Council may assume responsibility for a hearing request(s) pending at the hearing level of the administrative review process.

(b) *Notice.* We will mail a notice to all parties at their last known address telling them that the Appeals Council has assumed responsibility for the case(s).

(c) *Procedures applied.* If the Appeals Council assumes responsibility for a hearing request(s), it shall conduct all proceedings in accordance with the rules set forth in §§ 404.929 through 404.961, as applicable.

(d) *Appeals Council review.* If the Appeals Council assumes responsibility for your hearing request under this section and you or any other party is dissatisfied with the hearing decision or with the dismissal of a hearing request, you may request that the Appeals Council review that action following the procedures in §§ 404.967 through 404.982. The Appeals Council may also decide on its own motion to review the action that was taken in your case under § 404.969. The administrative appeals judge who conducted a hearing, issued a hearing decision in your case, or dismissed your hearing request will not participate in any action associated with your request for Appeals Council review of that case.

(e) *Ancillary provisions.* For the purposes of the procedures authorized by this section, the regulations of part 404 shall apply to authorize a member of the Appeals Council to exercise the functions performed by an administrative law judge under subpart J of part 404.

§ 404.966 [REMOVED AND RESERVED]

■ 9. Section 404.966 is removed and reserved.

■ 10. Amend § 404.970 by revising paragraph (a) and adding paragraph (d) to read as follows:

§ 404.970 Cases the Appeals Council will review.

(a) Subject to paragraph (d) of this section, the Appeals Council will review a case at a party's request or on its own motion if—

(1) There appears to be an abuse of discretion by the administrative law judge or administrative appeals judge who heard the case;

(2) There is an error of law;

(3) The action, findings or conclusions in the hearing decision or dismissal order are not supported by substantial evidence;

(4) There is a broad policy or procedural issue that may affect the general public interest; or

(5) Subject to paragraph (b) of this section, the Appeals Council receives additional evidence that is new, material, and relates to the period on or before the date of the hearing decision, and there is a reasonable probability that the additional evidence would change the outcome of the decision.

* * * * *

(d) The Appeals Council will not review a case based on an error or abuse of discretion in the admission or exclusion of evidence or based on an error, defect, or omission in any ruling or decision unless the Appeals Council finds there is a reasonable probability that the error, abuse of discretion, defect, or omission, either alone or when considered with other aspects of the case, changed the outcome of the case or the amount of benefits owed to any party.

■ 11. Revise § 404.973 to read as follows:

§ 404.973 Notice of Appeals Council review.

When the Appeals Council decides to review a case, it shall mail a notice to all parties at their last known address stating the reasons for the review and the issues to be considered. However, when the Appeals Council plans to issue a decision that is fully favorable to all parties or plans to remand the case for further proceedings, it may send the notice of Appeals Council review to all parties with the decision or remand order.

■ 12. Amend § 404.976 by, revising the section heading and paragraph (b), and adding paragraph (c);

The revisions and addition read as follows:

§ 404.976 Procedures before the Appeals Council.

* * * * *

(b) *Evidence the Appeals Council will exhibit.* The Appeals Council will evaluate all additional evidence it receives, but will only mark as an exhibit and make part of the official record additional evidence that it determines meets the requirements of § 404.970(a)(5) and (b).

(c) *Oral argument.* You may request to appear before the Appeals Council to present oral argument in support of your request for review. 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. The Appeals Council will determine whether your appearance, or the appearance of any other person relevant to the proceeding, will be in person, by video teleconferencing, or by telephone.

■ 13. Revise § 404.983 to read as follows:

§ 404.983 Case remanded by a Federal court.

(a) *General rule.* When a Federal court remands a case to the Commissioner for further consideration, the Appeals Council, acting on behalf of the Commissioner, may make a decision following the provisions in paragraph (b) of this section, dismiss the proceedings, except as provided in paragraph (c) of this section, or remand the case to an administrative law judge following the provisions in paragraph (d) of this section with instructions to take action and issue a decision or return the case to the Appeals Council with a recommended decision. Any issues relating to the claim(s) may be considered by the Appeals Council or administrative law judge whether or not they were raised in the administrative proceedings leading to the final decision in the case.

(b) *Appeals Council decision.* If the Appeals Council assumes responsibility under paragraph (a) of this section for issuing a decision, it will follow the procedures explained in §§ 404.973 and 404.979. If the Appeals Council assumes responsibility for issuing a decision and a hearing is necessary to complete adjudication of the claim(s), the Appeals Council will hold a hearing using the procedures set forth in §§ 404.929

through 404.961, except as provided in § 422.210 of this chapter.

(c) *Appeals Council dismissal.* After a Federal court remands a case to the Commissioner for further consideration, the Appeals Council may dismiss the proceedings before it for any reason that an administrative law judge may dismiss a request for hearing under § 404.957. The Appeals Council will not dismiss the proceedings in a claim where we are otherwise required by law or a judicial order to file the Commissioner's additional and modified findings of fact and decision with a court.

(d) *Appeals Council remand.* If the Appeals Council remands a case under paragraph (a) of this section, it will follow the procedures explained in § 404.977.

■ 14. Amend § 404.984 by revising paragraph (a) to read as follows:

§ 404.984 Appeals Council review of administrative law judge decision in a case remanded by a Federal court.

(a) *General.* In accordance with § 404.983, when a case is remanded by a Federal court for further consideration and the Appeals Council remands the case to an administrative law judge, the decision of the administrative law judge will become the final decision of the Commissioner after remand on your case unless the Appeals Council assumes jurisdiction of the case. The Appeals Council may assume jurisdiction, using the standard set forth in § 404.970, based on written exceptions to the decision of the administrative law judge which you file with the Appeals Council or based on its authority pursuant to paragraph (c) of this section. If the Appeals Council assumes jurisdiction of your case, any issues relating to your claim may be considered by the Appeals Council whether or not they were raised in the administrative proceedings leading to the final decision in your case or subsequently considered by the administrative law judge in the administrative proceedings following the court's remand order. The Appeals Council will either make a new, independent decision based on the preponderance of the evidence in the record that will be the final decision of the Commissioner after remand, dismiss a claim(s), or remand the case to an administrative law judge for further proceedings, including a new decision.

* * * * *

■ 15. Amend § 404.999c by revising paragraph (d)(3)(i)(C) to read as follows:

§ 404.999c What travel expenses are reimbursable.

* * * * *

(d) * * *

(3) * * *

(i) * * *

(C) The designated geographic service area of the Office of Hearings Operations hearing office having responsibility for providing the hearing.

* * * * *

PART 408—SPECIAL BENEFITS FOR CERTAIN WORLD WAR II VETERANS

Subpart A—Introduction, General Provision and Definitions

■ 17. The authority citation for subpart A of part 408 continues to read as follows:

Authority: Secs. 702(a)(5) and 801–813 of the Social Security Act (42 U.S.C. 902(a)(5) and 1001–1013).

■ 18. Amend § 408.110 by revising paragraph (b) to read as follows:

§ 408.110 General definitions and use of terms.

* * * * *

(b) *Commissioner; Appeals Council; Administrative Law Judge defined*—(1) *Commissioner* means the Commissioner of Social Security.

(2) *Appeals Council* means the Appeals Council of the Office of Analytics, Review, and Oversight in the Social Security Administration or such member or members thereof as may be designated by the Chair of the Appeals Council.

(3) *Administrative Law Judge* means an Administrative Law Judge in the Office of Hearings Operations in the Social Security Administration.

* * * * *

PART 411—THE TICKET TO WORK AND SELF-SUFFICIENCY PROGRAM

■ 19. The authority citation for part 411 continues to read as follows:

Authority: Secs. 702(a)(5) and 1148 of the Social Security Act (42 U.S.C. 902(a)(5) and 1320b–19); sec. 101(b)–(e), Public Law 106–170, 113 Stat. 1860, 1873 (42 U.S.C. 1320b–19 note).

Subpart C—Suspension of Continuing Disability Reviews for Beneficiaries Who Are Using a Ticket

■ 20. Amend § 411.175 by revising paragraph (a) to read as follows:

§ 411.175 What if a continuing disability review is begun before my ticket is in use?

(a) If we begin a continuing disability review before the date on which your ticket is in use, you may still assign the ticket and receive services from an employment network or a State vocational rehabilitation agency acting as an employment network under the Ticket to Work program, or you may still receive services from a State vocational rehabilitation agency that elects the vocational rehabilitation cost reimbursement option. However, we will complete the continuing disability review. If in this review we determine that you are no longer disabled, in most cases you will no longer be eligible to receive benefit payments. However, if your ticket was in use before we determined that you are no longer disabled, in certain circumstances you may continue to receive benefit payments (see §§ 404.316(c), 404.337(c), 404.352(d), and 416.1338 of this chapter). If you appeal the decision that you are no longer disabled, you may also choose to have your benefits continued pending reconsideration or a hearing before a judge on the cessation determination (see §§ 404.1597a and 416.996 of this chapter).

* * * * *

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

Subpart A—Introduction, General Provisions and Definitions

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

Authority: Secs. 702(a)(5) and 1601–1635 of the Social Security Act (42 U.S.C. 902(a)(5) and 1381–1383d); sec. 212, Pub. L. 93–66, 87 Stat. 155 (42 U.S.C. 1382 note); sec. 502(a), Pub. L. 94–241, 90 Stat. 268 (48 U.S.C. 1681 note).

■ 22. Amend § 416.120 by revising paragraph (b) to read as follows:

§ 416.120 General definitions and use of terms.

* * * * *

(b) *Commissioner; Appeals Council; Administrative Law Judge; Administrative Appeals Judge defined*—(1) *Commissioner* means the Commissioner of Social Security.

(2) *Appeals Council* means the Appeals Council of the Office of Analytics, Review, and Oversight in the Social Security Administration or such member or members thereof as may be designated by the Chair of the Appeals Council.

(3) *Administrative Law Judge* means an Administrative Law Judge in the Office of Hearings Operations in the Social Security Administration.

(4) *Administrative Appeals Judge* means an Administrative Appeals Judge

serving as a member of the Appeals Council.

* * * * *

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

■ 23. 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).

■ 24. 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. Subject to § 416.1456, the Commissioner, or his or her delegate, will appoint an administrative law judge to conduct the hearing. If circumstances warrant, the Commissioner, or his or her delegate, may assign your case to another administrative law judge. At the hearing, you may appear in person, by video teleconferencing, or, under certain extraordinary circumstances, 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, in person, by video teleconferencing, or by telephone, 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.

■ 25. Amend § 416.1455 by, revising the section heading, redesignating paragraphs (c) through (f) as paragraphs (d) through (g), and adding new paragraph (c) to read as follows:

§ 416.1455 The effect of a hearing decision.

* * * * *

(c) The Appeals Council decides on its own motion to review the decision under the procedures in § 416.1469;

* * * * *

■ 26. Revise § 416.1456 to read as follows:

§ 416.1456 Removal of a hearing request(s) to the Appeals Council.

(a) *Removal.* The Appeals Council may assume responsibility for a hearing request(s) pending at the hearing level of the administrative review process.

(b) *Notice.* We will mail a notice to all parties at their last known address telling them that the Appeals Council has assumed responsibility for the case(s).

(c) *Procedures applied.* If the Appeals Council assumes responsibility for a hearing request(s), it shall conduct all proceedings in accordance with the rules set forth in §§ 416.1429 through 416.1461, as applicable.

(d) *Appeals Council review.* If the Appeals Council assumes responsibility for your hearing request under this section and you or any other party is dissatisfied with the hearing decision or with the dismissal of a hearing request, you may request that the Appeals Council review that action following the procedures in §§ 416.1467 through 416.1482. The Appeals Council may also decide on its own motion to review the action that was taken in your case under § 416.1469. The administrative appeals judge who conducted a hearing, issued a hearing decision in your case, or dismissed your hearing request will not participate in any action associated with your request for Appeals Council review of that case.

(e) *Ancillary provisions.* For the purposes of the procedures authorized by this section, the regulations of part 416 shall apply to authorize a member of the Appeals Council to exercise the functions performed by an administrative law judge under subpart N of part 416.

§ 416.1466 [REMOVED AND RESERVED]

■ 27. Section 416.1466 is removed and reserved.

■ 28. Amend § 416.1470 by revising paragraph (a) and adding paragraph (d) to read as follows:

§ 416.1470 Cases the Appeals Council will review.

(a) Subject to paragraph (d) of this section, the Appeals Council will review a case at a party's request or on its own motion if—

(1) There appears to be an abuse of discretion by the administrative law judge or administrative appeals judge who heard the case;

(2) There is an error of law;

(3) The action, findings or conclusions in the hearing decision or dismissal order are not supported by substantial evidence;

(4) There is a broad policy or procedural issue that may affect the general public interest; or

(5) Subject to paragraph (b) of this section, the Appeals Council receives additional evidence that is new, material, and relates to the period on or before the date of the hearing decision, and there is a reasonable probability that the additional evidence would change the outcome of the decision.

* * * * *

(d) The Appeals Council will not review a case based on an error or abuse of discretion in the admission or exclusion of evidence or based on an error, defect, or omission in any ruling or decision unless the Appeals Council finds there is a reasonable probability that the error, abuse of discretion, defect, or omission, either alone or when considered with other aspects of the case, changed the outcome of the case or the amount of benefits owed to any party.

■ 29. Revise § 416.1473 to read as follows:

§ 416.1473 Notice of Appeals Council review.

When the Appeals Council decides to review a case, it shall mail a notice to all parties at their last known address stating the reasons for the review and the issues to be considered. However, when the Appeals Council plans to issue a decision that is fully favorable to all parties or plans to remand the case for further proceedings, it may send the notice of Appeals Council review to all parties with the decision or remand order.

■ 30. Amend § 416.1476 by, revising the section heading and paragraph (b), and adding paragraph (c).

The revisions and addition read as follows:

§ 416.1476 Procedures before the Appeals Council.

* * * * *

(b) *Evidence the Appeals Council will exhibit.* The Appeals Council will evaluate all additional evidence it receives, but will only mark as an exhibit and make part of the official record additional evidence that it determines meets the requirements of § 416.1470(a)(5) and (b).

(c) *Oral argument.* You may request to appear before the Appeals Council to present oral argument in support of your request for review. 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. The Appeals Council will

determine whether your appearance, or the appearance of any other person relevant to the proceeding, will be in person, by video teleconferencing, or by telephone.

■ 31. Revise § 416.1483 to read as follows:

§ 416.1483 Case remanded by a Federal court.

(a) *General rule.* When a Federal court remands a case to the Commissioner for further consideration, the Appeals Council, acting on behalf of the Commissioner, may make a decision following the provisions in paragraph (b) of this section, dismiss the proceedings, except as provided in paragraph (c) of this section, or remand the case to an administrative law judge following the provisions in paragraph (d) of this section with instructions to take action and issue a decision or return the case to the Appeals Council with a recommended decision. Any issues relating to the claim(s) may be considered by the Appeals Council or administrative law judge whether or not they were raised in the administrative proceedings leading to the final decision in the case.

(b) *Appeals Council decision.* If the Appeals Council assumes responsibility under paragraph (a) of this section for issuing a decision, it will follow the procedures explained in §§ 416.1473 and 416.1479. If the Appeals Council assumes responsibility for issuing a decision and a hearing is necessary to complete adjudication of the claim(s), the Appeals Council will hold a hearing using the procedures set forth in §§ 416.1429 through 416.1461, except as provided in § 422.210 of this chapter.

(c) *Appeals Council dismissal.* After a Federal court remands a case to the Commissioner for further consideration, the Appeals Council may dismiss the proceedings before it for any reason that an administrative law judge may dismiss a request for hearing under § 416.1457. The Appeals Council will not dismiss the proceedings in a claim where we are otherwise required by law or a judicial order to file the Commissioner's additional and modified findings of fact and decision with a court.

(d) *Appeals Council remand.* If the Appeals Council remands a case under paragraph (a) of this section, it will follow the procedures explained in § 416.1477.

■ 32. Amend § 416.1484 by revising paragraph (a) to read as follows:

§ 416.1484 Appeals Council review of administrative law judge decision in a case remanded by a Federal court.

(a) *General.* In accordance with § 416.1483, when a case is remanded by a Federal court for further consideration and the Appeals Council remands the case to an administrative law judge, the decision of the administrative law judge will become the final decision of the Commissioner after remand on your case unless the Appeals Council assumes jurisdiction of the case. The Appeals Council may assume jurisdiction, using the standard set forth in § 416.1470, based on written exceptions to the decision of the administrative law judge which you file with the Appeals Council or based on its authority pursuant to paragraph (c) of this section. If the Appeals Council assumes jurisdiction of your case, any issues relating to your claim may be considered by the Appeals Council whether or not they were raised in the administrative proceedings leading to the final decision in your case or subsequently considered by the administrative law judge in the administrative proceedings following the court's remand order. The Appeals Council will either make a new, independent decision based on the preponderance of the evidence in the record that will be the final decision of the Commissioner after remand, dismiss a claim(s), or remand the case to an administrative law judge for further proceedings, including a new decision.

* * * * *

■ 33. Amend § 416.1498 by revising paragraph (d)(3)(i)(C) to read as follows:

§ 416.1498 What travel expenses are reimbursable.

* * * * *

(d) * * *

(3) * * *

(i) * * *

(C) The designated geographic service area of the Office of Hearings Operations hearing office having responsibility for providing the hearing.

* * * * *

PART 422—ORGANIZATION AND PROCEDURES

■ 34. Revise the heading for Subpart C to read as follows:

Subpart C—Hearings, Appeals Council Review, and Judicial Review Procedures

■ 35. The authority citation for subpart C of part 422 continues to read as follows:

Authority: Secs. 205, 221, and 702(a)(5) of the Social Security Act (42 U.S.C. 405, 421, and 902(a)(5)); 30 U.S.C. 923(b).

■ 36. Amend § 422.201 by revising the introductory text to read as follows

§ 422.201 Material included in this subpart.

This subpart describes in general the procedures relating to hearings, review by the Appeals Council of the hearing decision or dismissal, and court review in cases decided under the procedures in parts 404, 408, 410, and 416 of this chapter. It also describes the procedures for requesting a hearing or Appeals Council review, and for instituting a civil action for court review of cases decided under these parts. For detailed provisions relating to hearings, review by the Appeals Council, and court review, see the following references as appropriate to the matter involved:

* * * * *

■ 37. Amend § 422.203 by revising paragraphs (b) and (c) to read as follows:

§ 422.203 Hearings.

* * * * *

(b) *Request for hearing.* (1) A request for a hearing under paragraph (a) of this section may be made using the form(s) we designate for this purpose, or by any other writing requesting a hearing. The request shall be filed either electronically in the manner we prescribe or at an office of the Social Security Administration, usually a district office or a branch office, or at the Veterans' Administration Regional Office in the Philippines (except in title XVI cases), or at a hearing office of the Office of Hearings Operations, or with the Appeals Council. A qualified railroad retirement beneficiary may choose to file a request for a hearing under part A of title XVIII with the Railroad Retirement Board.

(2) Unless an extension of time has been granted for good cause shown, a request for hearing must be filed within 60 days after the receipt of the notice of the reconsidered or revised determination, or after an initial determination described in 42 CFR 498.3(b) and (c) (see §§ 404.933, 410.631, and 416.1433 of this chapter and 42 CFR 405.722, 498.40, and 417.260.)

(c) *Hearing decision or other action.* Generally, the administrative law judge, or an administrative appeals judge under § 404.956 or 416.1456 of this chapter, will either decide the case after hearing (unless hearing is waived) or, if appropriate, dismiss the request for hearing. With respect to a hearing on a determination under paragraph (a)(1) of this section, the administrative law judge may certify the case with a

recommended decision to the Appeals Council for decision. The administrative law judge, or an attorney advisor under § 404.942 or 416.1442 of this chapter, or an administrative appeals judge under § 404.956 or 416.1456 of this chapter, must base the hearing decision on the preponderance of the evidence offered at the hearing or otherwise included in the record.

■ 38. Revise § 422.205 to read as follows:

§ 422.205 Proceedings before the Appeals Council.

(a) *Appeals Council hearing decisions.* Appeals Council decisions and dismissals issued on hearing requests removed under §§ 404.956 and 416.1456 of this chapter and decisions and dismissals described in §§ 422.203(c) require one Appeals Council member signature. Requests for review of hearing decisions issued by the Appeals Council may be filed pursuant to §§ 404.968 and 416.1468 of this chapter and paragraph (b) of this section.

(b) *Appeals Council review.* Any party to a hearing decision or dismissal may request a review of such action by the Appeals Council. This request may be made on Form HA–520, Request for Review of Hearing Decision/Order, or by any other writing specifically requesting review. Form HA–520 may be obtained from any Social Security district office or branch office, or at any other office where a request for a hearing may be filed. (For time and place of filing, see §§ 404.968 and 416.1468 of this chapter.)

(c) *Review of a hearing decision, dismissal, or denial.* The denial of a request for review of a hearing decision concerning a determination under § 422.203(a)(1) shall be by such appeals officer or appeals officers or by such member or members of the Appeals Council as may be designated in the manner prescribed by the Chair or Deputy Chair. The denial of a request for review of a hearing dismissal, the dismissal of a request for review, the denial of a request for review of a hearing decision whenever such hearing decision after such denial would not be subject to judicial review as explained in § 422.210(a), or the refusal of a request to reopen a hearing or Appeals Council decision concerning a determination under § 422.203(a)(1) shall be by such member or members of the Appeals Council as may be designated in the manner prescribed by the Chair or Deputy Chair.

(d) *Appeals Council review panel.* Whenever the Appeals Council reviews a hearing decision under §§ 404.967, 404.969, 416.1467, or 416.1469 of this chapter and the claimant does not appear personally or through representation before the Appeals Council to present oral argument, such review will be conducted by a panel of not less than two members of the Appeals Council designated in the manner prescribed by the Chair or Deputy Chair of the Appeals Council. In the event of disagreement between a panel composed of only two members, the Chair or Deputy Chair, or his or her delegate, who must be a member of the Appeals Council, shall participate as a third member of the panel. When the claimant appears in person or through representation before the Appeals Council in the location designated by the Appeals Council, the review will be conducted by a panel of not less than three members of the Appeals Council designated in the manner prescribed by the Chair or Deputy Chair. Concurrence of a majority of a panel shall constitute the decision of the Appeals Council unless the case is considered as provided under paragraph (e) of this section.

(e) *Appeals Council meetings.* On call of the Chair, the Appeals Council may meet en banc or a representative body of Appeals Council members may be convened to consider any case arising under paragraph (c) or (d) of this section. Such representative body shall be comprised of a panel of not less than five members designated by the Chair as deemed appropriate for the matter to be considered. The Chair or Deputy Chair shall preside, or in his or her absence, the Chair shall designate a member of the Appeals Council to preside. A majority vote of the designated panel, or of the members present and voting, shall constitute the decision of the Appeals Council.

(f) *Temporary assignments of ALJs.* The Chair may designate an administrative law judge to serve as a member of the Appeals Council for temporary assignments. An administrative law judge shall not be designated to serve as a member on any panel where such panel is conducting review on a case in which such individual has been previously involved.

■ 39. Amend § 422.210 by revising paragraph (a) and adding paragraph (e) to read as follows:

§ 422.210 Judicial review.

(a) *General.* A claimant may obtain judicial review of a decision by an administrative law judge or administrative appeals judge if the Appeals Council has denied the claimant's request for review, or of a decision by the Appeals Council when that is the final decision of the Commissioner. A claimant may also obtain judicial review of a reconsidered determination, or of a decision of an administrative law judge or an administrative appeals judge, where, under the expedited appeals procedure, further administrative review is waived by agreement under § 404.926 or 416.1426 of this chapter or as appropriate. There are no amount-in-controversy limitations on these rights of appeal.

* * * * *

(e) *Appeals Council review panel after Federal court remand.* When the Appeals Council holds a hearing under § 404.983 or 416.1483 of this chapter, such hearing will be conducted and a decision will be issued by a panel of not less than two members of the Appeals Council designated in the manner prescribed by the Chair or Deputy Chair of the Appeals Council. When the Appeals Council issues a decision under §§ 404.983 and 416.1483 of this chapter without holding a hearing, a decision will be issued by a panel of not less than two members of the Council designated in the same manner prescribed by the Chair or Deputy Chair of the Council. In the event of disagreement between a panel composed of only two members, the Chair or Deputy Chair, or his or her delegate, who must be a member of the Council, shall participate as a third member of the panel.

[FR Doc. 2019–27019 Filed 12–19–19; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–102508–16]

RIN 1545–BN28

Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations; Hearing

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Proposed rule; notice of hearing.

SUMMARY: This document provides a notice of public hearing on proposed regulations that would update information reporting regulations under section 6033 that are generally applicable to organizations exempt from tax under section 501(a) to reflect statutory amendments and certain grants of reporting relief announced through subregulatory guidance that

have been made since the current regulations were adopted, particularly with respect to tax-exempt organizations required to file an annual Form 990 or 990–EZ information return.

DATES: The public hearing is being held on Friday, February 7, 2020, at 10:00 a.m. The IRS must receive speakers' outlines of the topics to be discussed at the public hearing by Friday, January 17, 2020. If no outlines are received by January 17, 2020, the public hearing will be cancelled.

ADDRESSES: The public hearing is being held in the IRS Auditorium, Internal Revenue Service Building, 1111 Constitution Avenue NW, Washington, DC 20224. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present a valid photo identification to enter the building.

Send Submissions to CC:PA:LPD:PR (REG–102508–16), Room 5205, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday to CC:PA:LPD:PR (REG–102508–16), Couriers Desk, Internal Revenue Service, 1111 Constitution Avenue NW, Washington, DC 20224 or sent electronically via the Federal eRulemaking Portal at *www.regulations.gov* (IRS REG–102508–16).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Office of the Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes) at (202) 317–3150; concerning submissions of comments, the hearing and/or to be placed on the building access list to attend the hearing, Regina Johnson at (202) 317–6901 (not toll-free numbers) or *fdms.database@irscounsel.treas.gov.*

SUPPLEMENTARY INFORMATION: The subject of the public hearing is the notice of proposed rulemaking (REG–102508–16) that was published in the **Federal Register** on Tuesday, September 10, 2019 (84 FR 47447).

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing that submitted written comments by December 9, 2019, must submit an outline of the topics to be addressed and the amount of time to be devoted to each topic by Friday, January 17, 2020.

A period of 10 minutes is allotted to each person for presenting oral comments. After the deadline for receiving outlines has passed, the IRS will prepare an agenda containing the schedule of speakers. Copies of the agenda will be made available, free of charge, at the hearing or by contacting the Publications and Regulations Branch at (202) 317–6901 (not a toll-free number).

Because of access restrictions, the IRS will not admit visitors beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** section of this document.

Crystal Pemberton,

Senior Federal Register Liaison, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).

[FR Doc. 2019–27440 Filed 12–19–19; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2019–0687]

RIN 1625–AA09

Drawbridge Operation Regulation; Illinois Waterway, Pearl, IL

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard is proposing to modify operations for the Kansas City Southern Railroad Drawbridge across the Illinois Waterway at Mile 43.2 near Pearl, Illinois by designating it as a remotely operated drawbridge. This proposed action is intended to maintain navigational safety while increasing operational efficiency of the Kansas City Southern Railroad Drawbridge. We invite your comments on this proposed rulemaking.

DATES: Comments and related material must reach the Coast Guard on or before February 18, 2020.

ADDRESSES: You may submit comments identified by docket number USCG–2019–0687 using Federal e-Rulemaking Portal at *http://www.regulations.gov.*

See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rule, call or email Mr. Eric Washburn, Bridge Administrator, Western Rivers, (314) 269–2378, email *Eric.Washburn@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
OMB Office of Management and Budget
NPRM Notice of Proposed Rulemaking (Advance, Supplemental)
§ Section
U.S.C. United States Code

II. Background, Purpose and Legal Basis

On March 09, 2019, Kansas City Southern requested approval to operate the Kansas City Southern Railroad Drawbridge remotely. A subsequent Coast Guard Remote Operations Case Report found no objections to the change from local waterway users, and recommended the change be forwarded for District Commander approval in accordance with 33 CFR 117.42.

The purpose of this rulemaking is to improve safety and operations for river and rail traffic as well as the workers who conduct the operations and improve the bridge operating efficiency.

III. Discussion of Proposed Rule

The Coast Guard is proposing to establish remote operating procedures for the Kansas City Southern Railroad Drawbridge across the Illinois Waterway at Mile 43.2 near Pearl, Illinois in 33 CFR 117.393. The draw span is currently maintained in the fully open position and train operators close the draw span to allow trains to pass. This proposed rule would establish a method of remote operation and communication between vessels and bridge closure personnel that would improve the flow of marine traffic, and enhance safety by leveraging remote sensing units to prevent unexpected closures.

IV. Regulatory Analyses

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

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. Executive Order 13771 directs agencies to control regulatory costs through a budgeting process. This NPRM has not

been designated a ''significant regulatory action,'' under Executive Order 12866. Accordingly, the NPRM has not been reviewed by the Office of Management and Budget (OMB) and pursuant to OMB guidance it is exempt from the requirements of Executive Order 13771.

This regulatory action determination is based on the location and effect of the rule. The proposed change to bridge operations will shift the bridge control point from an on-scene operator to a remotely located operator, but result in no change or increase in requirements for vessels seeking to navigate past the bridge.

B. Impact on Small Entities

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

While some owners or operators of vessels intending to transit the bridge may be small entities, for the reasons stated in section IV.A above this proposed rule would not have a significant economic impact on any vessel owner or operator.

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

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

C. Collection of Information

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

D. Federalism and Indian Tribal Government

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

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

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01, U.S. Coast Guard Environmental Planning Policy COMDTINST 5090.1 (series) and U.S. Coast Guard Environmental Planning Implementation Procedures (series) which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f). We 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 promulgates the operating regulations or procedures for drawbridges. Normally this action is categorically excluded from further review, under paragraph L49, of Chapter 3, Table 3–1 of the U.S. Coast Guard Environmental Planning Implementation 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 *http://www.regulations.gov.* If your material cannot be submitted using *http://www.regulations.gov,* contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

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

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

List of Subjects in 33 CFR Part 117

Bridges.

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

PART 117—DRAWBRIDGE OPERATION REGULATIONS

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

Authority: 33 U.S.C. 499; 33 CFR 1.05–1; DHS Delegation No. 0170.1.

§ 117.393 Illinois Waterway.

■ 2. Amend § 117.393 by adding paragraph (e) to read as follows:

* * * * *

(e) The draw span of the Kansas City Southern Railroad Drawbridge, mile 43.2, at Pearl, Illinois, is operated by remote operator located in Kansas City, Missouri as follows:

(1) The draw is normally maintained in the fully open position, displaying green center span navigation lights to indicate the draw span is fully open.

(2) When rail traffic approaches the bridge, the remote operator located in Kansas City, Missouri, will scan the river for vessel traffic via video cameras mounted near and under the bridge. Once the remote operator has visually verified no vessel traffic is present, they will announce on VHF–FM Channel 16 the draw span will be lowering for rail traffic.

(3) If a vessel is approaching the bridge, the draw will remain open. The vessel shall contact the train operator on VHF–FM channel 16 or 14 and the remote operator shall keep the draw in the fully open position until the vessel has cleared the bridge.

(4) If no vessels are observed, the remote operator initiates a five minute warning period on VHF–FM radio channel 16 before closing the bridge. The remote operator will broadcast the following message: ''The Kansas City Southern Railroad Bridge at Mile 43.2, Illinois River, will close to navigation in five minutes.'' The announcement is repeated every minute counting down the time remaining until closure.

(5) At the end of the five minute warning period, and no vessels are approaching the bridge, the remote operator shall sound the siren for 30 seconds, activate the alternate flashing red light on top of the draw, then lower and lock the draw in place. Red lights continue to flash to indicate the draw is closed to navigation.

(6) During the lowering process a boat detection system will monitor immediately upstream, downstream, and under the bridge, if a vessel enters the detection area, the lowering will cease and the remote operator will be immediately notified that an obstruction is present.

(7) After rail traffic has cleared the bridge, the remote operator will raise the draw span back to the fully open to navigation position, lock the draw span in place, stop the red flashing lights, and ensure the draw lights are changed from red to green.

(8) Once fully reopened, an automated verbal announcement will be made via VHF–FM Channel 16 indicating the bridge is again open to vessel traffic. Mariners may contact the remote operator via radiotelephone on VHF–FM Channel 14, or by standard telephone calling 1 (800) 892–6295.

Dated: December 10, 2019.

John P. Nadeau,

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

[FR Doc. 2019–27176 Filed 12–19–19; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51 and 52

[EPA–HQ–OAR–2019–0435; FRL–10002–77–OAR]

RIN 2060–AU46

Error Corrections to New Source Review Regulations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The U.S. Environmental Protection Agency (EPA) proposes to revise several New Source Review (NSR) regulations by making the following types of corrections: Correct typographical and grammatical errors, remove court vacated rule language, remove or update outdated or incorrect cross references, conform certain provisions to changes contained in the 1990 Clean Air Act (CAA or Act) Amendments, and remove certain outdated exemptions (grandfathering/transitional).

DATES:

Comments. Comments must be received on or before January 21, 2020.

Public Hearing: If anyone contacts us requesting to speak at a public hearing by January 6, 2020, we will hold a public hearing. Additional information about the hearing will be published in a subsequent **Federal Register** notice.

ADDRESSES: *Comments.* Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2019–0435, at *http://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov.* The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*e.g.,* on the Web, Cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.* Certain other material, such as copyrighted material, will not be placed on the internet but may be viewed, with prior arrangement, at the EPA Docket Center. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Air and Radiation Docket and Information Center, EPA/DC, EPA William Jefferson Clinton West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744 and the telephone number for the Air and Radiation Docket and Information Center is (202) 566–1742. For additional information about the EPA's public docket, visit the EPA Docket Center homepage at: *http://www.epa.gov/epahome/dockets.htm.*

FOR FURTHER INFORMATION CONTACT: For general questions about this document, please contact Mr. Ben Garwood, New Source Review Group, Air Quality Policy Division, Office of Air Quality Planning and Standards (C504–03), Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number (919) 541–1358; fax number (919) 541–4028; email address: *garwood.ben@epa.gov.* To request a public hearing, contact Ms. Pamela Long, U.S. EPA, Office of Air Quality Planning and Standards, Air Quality Policy Division (C504–01),

Research Triangle Park, NC 27711; telephone number (919) 541–0641; email address: *long.pam@epa.gov.*

SUPPLEMENTARY INFORMATION: The corrections generally address inadvertent errors and do not alter the substantive requirements of the NSR regulations. Other proposed changes simply reflect statutory changes enacted by Congress which have already been applied in practice or changes that have been necessitated by court decisions. Thus, the EPA considers the proposed rule to be administrative in nature. The EPA's intent is to provide clarity in the affected NSR regulations. The NSR regulations affected by this action contain requirements for the preconstruction review of new major stationary sources and major modifications. All of these regulations have undergone revisions and restructuring by the EPA during their long history, resulting from statutory and policy changes, as well as numerous court decisions, as explained in greater detail later. While we view these revisions as not altering substantive requirements under these regulations, we are seeking public comment on this proposed rule.

Organization of This Document. The information presented in this preamble is organized as follows:

I. General Information
- A. What entities are potentially affected by this action?
- B. What should I consider as I prepare my comments for the EPA?
- C. How can I find information about a possible hearing?
- D. Where can I get a copy of this document and other related information?

II. Overview of Action
- A. What regulations are being revised in this proposed corrections rule?
- B. What types of corrections are being proposed?

III. Environmental Justice Considerations

IV. Statutory and Executive Order Reviews
- A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review
- B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs
- C. Paperwork Reduction Act (PRA)
- D. Regulatory Flexibility Act (RFA)
- E. Unfunded Mandates Reform Act (UMRA)
- F. Executive Order 13132: Federalism
- G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
- H. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks
- I. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use
- J. National Technology Transfer and Advancement Act (NTTA)
- K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

I. General Information

A. What entities are potentially affected by this action?

Entities potentially affected directly by this action include sources in all industry categories. Entities potentially affected by this action also include federal, state, and local air pollution control agencies (air agencies) responsible for permitting sources pursuant to the NSR program.

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

When submitting comments, remember to:

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

C. How can I find information about a possible hearing?

To request a public hearing or information pertaining to a public hearing regarding this document, contact Mrs. Pam Long, OAQPS, U.S. EPA, at (919) 541–0641 or *long.pam@epa.gov* on or before January 6, 2020. Additional information about the hearing, if one is requested, will be published in a subsequent **Federal Register** document.

D. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this **Federal Register** document will be posted at *https://www.epa.gov/nsr* and on the tribal NSR page at *https://www.epa.gov/tribal-air/tribal-minor-new-source-review.*

II. Overview of Action

A. What regulations are being revised in this proposed corrections rule?

The regulations affected by this action are referred to as the major NSR regulations because they contain preconstruction review requirements for the construction of new major stationary sources and major modifications of existing major sources. The EPA has promulgated these regulations pursuant to requirements contained in the CAA as part of a larger set of air quality planning and air pollution control technology provisions designed to enable states to attain and maintain the NAAQS. Accordingly, the Act sets forth requirements for two types of major NSR programs: (1) Preconstruction review requirements for the construction of major stationary sources [1] locating in areas meeting the NAAQS (attainment areas),[2] and (2) preconstruction review requirements for the construction of major stationary sources locating in areas that are not meeting the NAAQS (nonattainment areas). Part C of title I of the Act contains the major NSR requirements for major sources locating in attainment areas, which are referred to as the PSD permit requirements. The EPA's PSD regulations which we are proposing to revise in this action are codified at 40 CFR 51.166 and 52.21. Part D of title I of the Act contains the major NSR requirements referred to as the nonattainment NSR (NNSR) permit requirements. The EPA's NNSR regulations which we are proposing to revise in this action are codified at 40 CFR 51.165 and part 51 Appendix S.

Three of the four sets of NSR regulations affected by this action are codified in part 51 of Title 40 of the CFR. Part 51 contains requirements for the preparation, adoption, and submittal of implementation plans. States apply these requirements to develop plans,

[1] The major NSR programs apply to the construction of new major stationary sources as well as the expansion or major modification of existing major stationary sources.

[2] These regulations also cover areas which are designated as unclassifiable for any NAAQS. In this preamble when we refer to attainment areas we intend to include these areas as well.

which must be submitted to the EPA for approval, to attain and maintain the NAAQS. The fourth set of regulations—the EPA's federal PSD permit program—is reflected in section 52.21 of Title 40 of the CFR. Section 52.21 provides a permit program designed to fill the gap for states that do not have an approved state PSD program. While the EPA has the primary responsibility for reviewing and issuing permits to major stationary sources based on the part 52 PSD program, federal authority for its implementation has, in many cases, been delegated by EPA Regional offices to states. In addition, some states with EPA-approved NSR programs may have incorporated by reference all or a portion of the permit requirements contained in section 52.21 into state law.

There may be state NSR programs, whether adopted pursuant to the part 51 NSR regulations or through an incorporation by reference of section 52.21, that have errors similar to those contained in the NSR regulations that the EPA is proposing to correct. There may also be state NSR programs that have adopted regulations that corrected the types of typographical errors and outdated references that are now being proposed for correction. For plans approved under 40 CFR 51.166, the EPA is proposing that the amendments proposed in this rule will not be subject to the deadline by which a state is typically required to revise its implementation plan in response to amendments to the federal regulations. *See* 40 CFR 51.166(a)(6). Similarly, because the EPA does not view these proposed changes as affecting the stringency of the requirements under 40 CFR 51.165, plans already approved under the current version of that section will continue to be at least as stringent as the revised regulation if these changes are finalized and states will not need to submit revisions to already approved plans. *See* 40 CFR 51.165(a)(1), (a)(2)(ii), and (a)(6) (allowing deviations only when at least as stringent). For states that incorporated by reference all or portions of the current or older versions of the part 51 or 52 regulations, the EPA does believe that an update to the incorporation by reference is necessary in response to these revisions. However, the EPA is not proposing to establish a deadline for such state revisions. The EPA is recommending that states make these types of changes when other types of required revisions are submitted to the EPA for approval.

B. What types of corrections are being proposed?

The EPA is proposing to revise the affected NSR regulations to correct various typographical and grammatical errors, as well as to correct certain other errors as explained in greater detail in the following paragraphs. In this proposed rule, we are only providing revised rule language without identifying changes. In order to facilitate easier review and provide a better understanding of all the corrections being proposed, the EPA has placed in the docket for this rulemaking a table containing each revised paragraph in a redline/strikeout form and a brief explanation of the specific correction(s) being made within each paragraph.

1. *Typographical errors.* The EPA is proposing revisions to correct misspelled words. *See, e.g.,* proposed §§ 51.165(a)(1)(viii) and 51.166(j)(4).

2. *Grammatical and punctuation errors.* In numerous instances, the EPA is proposing to correct inappropriate words or punctuation, such as capitalizations, commas and hyphens. *See, e.g.,* proposed § 51.165(a)(2)(iii), part 51 Appendix S II.A.4.(iii), and § 52.21(b)(23)(ii).

3. *Regulatory references.* The EPA is proposing to correct the way in which reference is made in one regulation to requirements contained in another regulation. *See e.g.,* §§ 51.165(a)(1)(v)(C)(5)(i) and 51.166(b)(2)(iii)(*e*)(*1*).

4. *Court vacaturs.* Some of the changes being proposed involve the removal of text that the EPA intended to remove subsequent to a court ruling for vacatur, but did not, under prior actions. These changes include the following:

a. In 2003, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) stayed indefinitely the effective date of the NSR provision known as the Equipment Replacement Provision (ERP), which amended the Routine Maintenance, Repair, and Replacement Exclusion from the NSR requirements in a 2003 final rule.[3] The ERP allowed sources to avoid NSR when replacing equipment under certain circumstances. The stay of the affected paragraphs was subsequently noted in the CFR under the three affected NSR regulations, § 51.165, 51.166, 52.21.[4] Later, in a 2006 decision, the court vacated the ERP, concluding that the provision was ''contrary to the plain language of section 111(a)(4) of the Act.'' *New York* v. *EPA,* 443 F.3d 880 (D.C. Cir. 2006) (''*New York II*''). Despite the vacatur, the affected provisions and the notes pertaining to the original stay of the ERP have to this day remained in the three aforementioned NSR regulations. The EPA is now proposing to remove the vacated ERP provisions, consistent with *New York II,* as well as the notes describing the indefinite stay of the various affected provisions. *See* proposed §§ 51.165(a)(8)(v)(C)(*1*), 51.165(h), 51.166(b)(2)(iii)(*a*), 51.166(y), 52.21(b)(2)(iii)(*a*), and 52.21(cc).

However, two components of the 2003 ERP rule, the criteria for *basic design parameters* (contained at §§ 51.165(h), 51.166(y), and 52.21(cc)), and the definition of *process units* (contained at §§ 51.165(a)(1)(xliii)(A) and (D), 51.166(b)(53)(i) and (iv), and 52.21(b)(55)(i) and (iv)), are used in conjunction with the definition of ''replacement unit,'' which was not part of the *New York II* decision. The definition of ''replacement unit'' currently cross references or refers to these terms within the ERP. *See* §§ 51.165(a)(1)(xxi), 51.166(b)(32), and 52.21(b)(33). Since we are vacating all of the ERP in response to the *New York II* decision, the EPA is proposing to add back criteria to determine *basic design parameters* and portions of the definition of *process unit* not affected by the vacatur into the definition of ''replacement unit'' in each of the three affected NSR regulations. *See* proposed new §§ 51.165(a)(1)(xxi)(E)–(F), 51.166(b)(32)(v)–(vi), and 52.21(b)(33)(v)–(vi).[5] In addition, this necessitates revising the cross reference to the *basic design parameters* provision to cite its new location. *See* proposed §§ 51.165(a)(1)(xxi)(C), 51.166(b)(32)(iii), and 52.21(b)(33)(iii).

Finally, the EPA notes that the ERP and the definition of ''replacement unit'' were not added to the NSR regulations at 40 CFR part 51 Appendix S when the EPA amended the other NSR regulations in 2003. To fix the omission of the replacement unit provision, the EPA is now proposing to add the definition of *replacement unit,* including the criteria for *basic design parameters* and the definition of *process unit,* to Appendix S. *See* proposed new paragraph II.A.37. In addition, a provision explaining that a replacement unit is considered to be

[3] 69 FR 61248, October 23, 2003.

[4] For example, in 40 CFR 52.21, the following note was added: ''NOTE TO PARAGRAPH (cc): By court order on December 24, 2003, this paragraph (cc) is stayed indefinitely. The stayed provisions will become effective immediately if the court terminates the stay. At that time, EPA will publish a document in the **Federal Register** advising the public of the termination of the stay.''

[5] There is a provision of the description of *process unit* that was only relevant to the ERP and is therefore not being included with the definition of replacement unit.

an existing emissions unit is proposed to be added to the definition of ''emissions unit.'' *See* proposed paragraph II.A.7.(ii). Together, these proposed changes will result in the Appendix S provisions concerning replacement units being consistent with the other NSR regulations.

b. In 2007,[6] the EPA removed certain provisions pertaining to Clean Units (CU) and Pollution Control Projects (PCP), which were vacated by the D.C. Circuit in a June 24, 2005, decision. *New York* v. *EPA,* 413 F.3d 3 (D.C. Cir. 2005) (''*New York I*''). The EPA explained that, although the court's opinion addressed the CU and PCP provisions in § 52.21, but not the corresponding provisions in §§ 51.165 and 51.166, ''the plain language of the Court's opinion clearly applies to the parallel constructions in those latter provisions . . . .'' 72 FR 32526, 32527, June 13, 2007. Accordingly, the EPA's 2007 action was intended to remove the relevant provisions from all three NSR regulations, but the EPA only specified its removal from § 51.165. The EPA is proposing to remove all of the CU/PCP provisions that were to be vacated in accordance with *New York I. See* proposed §§ 51.166(b)(3)(iii)(*c*) and 52.21(b)(3)(iii)(*b*).

c. In some cases, the EPA did not remove a specific reference in the regulations to a vacated PCP provision. The EPA is proposing to remove such references from the NSR regulations. *See* proposed §§ 51.165(a)(2)(ii)(A), 51.166(a)(7), 51.166(a)(7)(iv)(a), and 52.21(a)(2)(iv)(*a*).

d. In 2015,[7] the EPA amended the PSD regulations at §§ 51.166 and 52.21 to remove portions of those regulations concerning greenhouse gases (GHG) that were initially promulgated in 2010 but identified as vacated by the D.C. Circuit on April 10, 2015.[8] While the EPA removed certain GHG provisions, it overlooked references to these provisions elsewhere in those regulations. The EPA is proposing to delete the references to the already vacated GHG provisions. *See* proposed §§ 51.166(b)(48)(i), 51.166(b)(48)(ii), 51.166(b)(48)(iii), 52.21(b)(49)(i), 52.21(b)(49)(ii), and 52.21(b)(49(iii).

5. *Outdated and incorrect references.*

a. In 1980, the EPA made significant revisions to the PSD regulations under parts 51 and 52.[9] One revision deleted existing paragraph (k) and redesignated paragraphs (l) through (s) as (k) through (r). The EPA is proposing to correct incorrect references affected by the 1980 redesignation of paragraphs (l) through (s). *See* proposed §§ 51.166(p)(3), 51.166(p)(5)(i), 51.166(p)(5)(iii), 51.166(p)(7), 52.21(n)(1), 52.21(p)(6), 52.21(p)(7), 52.21(p)(8), and 52.21(u)(2)(ii).

b. Also in 1980, in the same rulemaking just described, the EPA added a provision under the source obligation requirements at § 51.166(r) applicable to stationary sources that could allow a relaxation of a prior enforceable limitation that allowed the source to be regulated as a ''minor'' rather than a major stationary source. The provision requires that such sources would become subject to the permit requirements for a major stationary source, as if they were a new source. The provision references the permit requirements contained under paragraphs (j) through (s) under § 51.166. However, paragraph(s) contains discretionary provisions concerning the application of innovative control technology. In light of the non-mandatory nature of those provisions, they should not have been included in the reference to required permit elements. Accordingly, the EPA is proposing to correct the source obligation requirement at § 51.166(r)(2) by removing the reference to paragraph (s) and replacing it with a reference to paragraph (r). *See* proposed § 51.166(r)(2).

b. The NNSR regulations at § 51.165 and part 51 Appendix S contain an outdated reference to a list of compounds that the EPA has determined make a negligible contribution to tropospheric ozone formation. The original list was contained in guidance that the EPA issued in 1977. We are proposing to revise both sets of NNSR regulations to provide an updated reference to the list, which is now included as part of the regulatory definition of ''volatile organic compounds'' codified at 40 CFR 51.100(s). *See* proposed § 51.165(s)(1) and section IV.C 4 at part 51 Appendix S.

c. In 1986, the NSR regulations codified at 40 CFR 51.18 were included in a restructuring rule that placed them under new subpart I of part 51.[10] Section 51.18 is an old reference to the NSR regulations applicable to minor sources, major sources locating in areas that do not meet the NAAQS (§ 51.18(j)), and major sources locating in areas that meet the NAAQS but significantly impact an area that is not meeting the NAAQS (§ 51.18(k)). Subpart I now contains the preconstruction review requirements for minor NSR (§§ 51.160–164) as well as major NNSR (§ 51.165).[11] The EPA is proposing to update the reference to old § 51.18 (as it specifically applied to major stationary sources) by replacing it with a reference to § 51.165, which includes NSR requirements for major stationary sources in nonattainment areas. *See* proposed section V.A (second paragraph) of part 51 Appendix S.

d. On December 31, 2002, at 67 FR 80186, the EPA amended its NSR regulations to add, among other things, provisions for Plantwide Applicability Limits (PAL). In each of the NSR regulations, new provisions were added to require major stationary sources with PAL permits to monitor affected emissions units in accordance with monitoring requirements set forth elsewhere in the regulations. The PSD regulations at 40 CFR 51.166 incorrectly provided a reference to the paragraph containing the recordkeeping requirements under paragraph (w)(13) instead of the intended monitoring requirements for PALs at paragraph (w)(12). The other NSR regulations provided the correct cross reference to the monitoring requirements. The EPA is proposing to correctly reference the monitoring requirements for PALs in 40 CFR 51.166. *See* proposed § 51.166(w)(7)(vii).

e. On December 21, 2007, at 72 FR 72616, the EPA amended the NSR regulations by, among other things, adding new paragraphs to explain when a stationary source will have a ''reasonable possibility'' of causing a significant emissions increase. In § 51.166(r)(6)(vi)(*b*), reference is incorrectly made to ''paragraph (a)(6)(vi)(*a*)'' and ''paragraphs (a)(6)(ii) through (v).'' Both references mistakenly reference paragraph (a), which is where similar references are made in the ''reasonable possibility'' provision contained in § 51.165(a)(6)(vi)(B). The EPA is proposing to correct the references in § 51.166 by referencing the applicable subparagraphs under paragraph (r). *See* proposed § 51.166(r)(6)(vi)(*b*).

5. *Clean Air Act Amendments.* Some of the proposed corrections result from new statutory requirements introduced in the 1990 CAA Amendments, which the EPA did not address in subsequent rulemakings involving the affected NSR regulations. Specifically:

[6] 72 FR 32526, June 13, 2007.

[7] 80 FR 50199, August 19, 2015.

[8] Amended Judgment by the D.C. Circuit, *Coalition for Responsible Regulation* v. *EPA,* Nos. 09–1322, 10–073, 10–1092 and 10–1167 (D.C. Cir. April 10, 2015) (Amended Judgment).

[9] 48 FR 52676, August 7, 1980.

[10] 51 FR 40656, November 7, 1986.

[11] Subpart I of part 51 also contains the PSD regulations at § 51.166, which were previously codified at § 51.24.

a. *Major source threshold for municipal incinerators.* The 1990 CAA Amendments amended the definition of ''major emitting facility'' at section 169(1) by striking out the words ''two hundred and'' as those words appeared in the phrase ''municipal incinerators capable of charging more than two hundred and fifty tons of refuse per day.'' This amendment had the effect of lowering (from 250 tons of refuse per day to 50 tons of refuse per day) the charging capacity threshold for a municipal incinerator, thereby providing that such a source would qualify as a major emitting facility if it also has the potential to emit at least 100 tons per year of any regulated NSR pollutant. In this action, the EPA is proposing to revise all four sets of major NSR regulations to reflect this change with regards to the statutory definition of ''major emitting facility'' for municipal incinerators. *See* proposed §§ 51.165 (a)(1)(iv)(C)(*8*), 51.165 (a)(4)(viii), 51.166 (b)(1)(i)(*a*), 51.166 (b)(1)(iii)(*h*), 51.166 (i)(1)(ii)(*h*); part 51 Appendix S II.A.4.(iii)(*h*); part 51 Appendix S II.F(8); and §§ 52.21 (b)(1)(i)(*a*), 52.21 (b)(1)(iii)(*h*), and 52.21 (i)(1)(vii)(*h*).

b. *Standards under section 112 of the Act.* The NSR regulations in several places make reference to emissions standards established pursuant to 40 CFR part 61. *See e.g.,* § 51.166(b)(12). Part 61 contains national emission standards for hazardous pollutants (NESHAP), which conform to the statutory requirements at section 112 of the Act. The 1990 CAA Amendments revised the statutory NESHAP provisions under section 112, causing the EPA to promulgate additional NESHAP, which are included in part 63. Accordingly, to ensure that the requirements associated with section 112 standards are adequately addressed in the NSR regulations, each regulatory reference to part 61 should also include a reference to part 63. The EPA is proposing to make the necessary updates in the affected NSR regulations. *See* proposed §§ 51.165(a)(1)(xi)(A), 51.165(a)(1)(xiv), 51.165(a)(1)(xl), 51.166(b)(12), 51.166(b)(16)(i), 51.166(b)(17), 51.166(j)(1); part 51 Appendix S II.A.11.(i), part 51 Appendix S II.A.12, part 51 Appendix S II.A.34, part 51 Appendix S II.B; and §§ 52.21(b)(12), 52.21(b)16)(i), 52.21(b)(17), and 52.21(j)(1).

6. *Outdated exemptions.*

The PSD regulations at §§ 51.166 and 52.21 contain various exemption provisions that allow permit applicants under specific conditions (*e.g.,* portable stationary sources, nonprofit health or nonprofit educational institutions), to be exempt from all or a portion of the PSD preconstruction review requirements. In some cases, these provisions have allowed permit applicants to be excluded from certain new requirements (*e.g.,* new or revised NAAQS or PSD increments), which became effective before a final permit could be issued (*i.e.,* commonly known as grandfathering provisions). Some of the existing exemption provisions are outdated because the time in which they were relevant has long since passed. Accordingly, the EPA is proposing to remove such outdated provisions, which allow for grandfathering or the implementation of alternative procedures, for PSD permit applicants under the regulations at §§ 51.166 and 52.21. The EPA is particularly interested in any comments that may provide a basis for retaining any of these exemption provisions that the EPA otherwise considers outdated. *See* proposed §§ 51.166(i)(6)–(10); 52.21(i)(1)(i)–(v), 52.21(i)(viii)–(x); 52.21(i)(4), 52.21(i)(6)–(11), and 52.21(m)(1)(v), and 52.21(m)(1)(vii)–(viii).

III. Environmental Justice Considerations

This action proposes corrections to minor, inadvertent, and non-substantive errors in 40 CFR parts 51 and 52 regulatory text concerning NSR permitting programs, and updates the regulatory text to reflect statutory changes or certain court decisions vacating elements of the regulatory text, but does not change the requirements within these programs. Therefore, these proposed changes will not change the protection for all those residing, working, attending school, or otherwise present in the applicable areas, regardless of minority and economic status. Further, this action will not have potential disproportionately high and adverse human health or environmental effects on minority, low-income, or indigenous populations.

IV. 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 an information collection burden under the PRA. This action is clerical in nature addressing non-controversial edits to errors in the NSR regulatory text. Therefore, this proposed rulemaking does not impose any new information collection burden. 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 2060–0003.

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 corrects minor, inadvertent and non-substantive errors in existing rules. We have therefore concluded that this action will have no net regulatory burden for all 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.

This action corrects minor, inadvertent and non-substantive errors in existing rules.

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 action only makes technical amendments to correct minor, inadvertent, and non-substantive errors in existing rules. None of these technical amendments has a substantial direct effect on any tribal land; thus, Executive Order 13175 does not apply to this action.

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

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

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

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

J. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

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

This action does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations, and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994).

The documentation for this decision is contained in Section III of this preamble titled ''Environmental Justice Considerations.'' This action makes technical amendments to correct minor, inadvertent, and non-substantive errors to existing rules.

List of Subjects

40 CFR Part 51

Environmental protection, Administrative practice and procedure, Air pollution control, Carbon monoxide, Intergovernmental relations, Lead, National Ambient Air Quality Standards, New Source Review, Nitrogen dioxide, Ozone, Particulate matter, Preconstruction permitting, Sulfur oxides, Transportation, Volatile organic compounds.

40 CFR Part 52

Environmental protection, Administrative practice and procedure, Air pollution control, BACT, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, National Ambient Air Quality Standards, New Source Review, Nitrogen dioxide, Ozone, Particulate matter, Preconstruction permitting, Sulfur oxides, Volatile organic compounds.

Dated: November 22, 2019.

Andrew R. Wheeler,

Administrator.

For the reasons set forth in the preamble, title 40, Chapter I of the Code of Federal Regulations is proposed to be corrected as follows:

PART 51—REQUIREMENTS FOR PREPARATION, ADOPTION AND SUBMITTAL OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 51 continues to read as follows:

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

Subpart I—Review of New Sources and Modifications

■ 2. Amend § 51.165 by:
■ a. Revising paragraph (a)(1)(iv)(C)(*8*);
■ b. Revising paragraph (a)(1)(v)(C)(*1*);
■ c. Revising paragraph (a)(1)(v)(C)(*5*)(*i*);
■ d. Revising paragraph (a)(1)(v)(C)(*6*);
■ e. Revising paragraph (a)(1)(viii);
■ f. Revising paragraph (a)(1)(xi)(A);
■ g. Revising paragraph (a)(1)(xiv);
■ h. Revising paragraph (a)(1)(xxi)(C);
■ i. Adding paragraphs (a)(1)(xxi)(E) and (F);
■ j. Revising paragraph (a)(1)(xl);
■ k. Removing paragraphs (a)(1)(xliii) through (xlvi);
■ l. Revising paragraph (a)(2)(ii)(A);
■ m. Revising paragraph (a)(2)(iii);
■ n. Revising paragraph (a)(3)(ii)(D);
■ o. Revising paragraph (a)(4)(viii);
■ p. Removing and reserving paragraph (h);

The revisions read as follows:

§ 51.165 Permit requirements. [Corrected]

(a) * * *

(1) * * *

(iv) * * *

(C) * * *

(*8*) *Municipal incinerators capable of charging more than 50 tons of refuse per day;*

* * * * *

(v) * * *

(C) * * *

(*1*) Routine maintenance, repair and replacement.

* * * * *

(*5*) * * *

(*i*) The source was capable of accommodating before December 21, 1976, unless such change would be prohibited under any federally enforceable permit condition which was established after December 12, 1976 pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR part 51, subpart I.

* * * * *

(*6*) An increase in the hours of operation or in the production rate, unless such change is prohibited under any federally enforceable permit condition which was established after December 21, 1976 pursuant to 40 CFR 52.21 or regulations approved pursuant to 40 CFR part 51, subpart I.

* * * * *

(viii) *Secondary emissions* means emissions which would occur as a result of the construction or operation of a major stationary source or major modification, but do not come from the major stationary source or major modification itself. For the purpose of this section, secondary emissions must be specific, well defined, quantifiable, and impact the same general area as the stationary source or modification which causes the secondary emissions. Secondary emissions include emissions from any offsite support facility which would not be constructed or increase its emissions except as a result of the construction or operation of the major stationary source or major modification. Secondary emissions do not include any emissions which come directly from a mobile source, such as emissions from the tailpipe of a motor vehicle, from a train, or from a vessel.

* * * * *

(xi) * * *

(A) The applicable standards set forth in 40 CFR part 60, 61, or 63;

* * * * *

(xiv) *Federally enforceable* means all limitations and conditions which are enforceable by the Administrator, including those requirements developed pursuant to 40 CFR parts 60, 61, and 63 requirements within any applicable State implementation plan, any permit requirements established pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR part 51, subpart I, including operating permits issued under an EPA-approved program that is incorporated into the State implementation plan and expressly

requires adherence to any permit issued under such program.

* * * * *

(xxi) * * *

(A) * * *

* * * * *

(C) The replacement does not alter the basic design parameters (as discussed in paragraph (a)(1)(xxi)(E) of this section) of the process unit (as discussed in paragraph (a)(1)(xxi)(F) of this section).

* * * * *

(E) *Basic design parameters.* The replacement does not change the basic design parameter(s) of the process unit to which the activity pertains.

(*1*) Except as provided in paragraph (a)(1)(xxi)(E)(*3*) of this section, for a process unit at a steam electric generating facility, the owner or operator may select as its basic design parameters either maximum hourly heat input and maximum hourly fuel consumption rate or maximum hourly electric output rate and maximum steam flow rate. When establishing fuel consumption specifications in terms of weight or volume, the minimum fuel quality based on British Thermal Units content shall be used for determining the basic design parameter(s) for a coal-fired electric utility steam generating unit.

(*2*) Except as provided in paragraph (a)(1)(xxi)(E)(*3*) of this section, the basic design parameter(s) for any process unit that is not at a steam electric generating facility are maximum rate of fuel or heat input, maximum rate of material input, or maximum rate of product output. Combustion process units will typically use maximum rate of fuel input. For sources having multiple end products and raw materials, the owner or operator should consider the primary product or primary raw material when selecting a basic design parameter.

(*3*) If the owner or operator believes the basic design parameter(s) in paragraphs (a)(1)(xxi)(E)(1) and (2) of this section is not appropriate for a specific industry or type of process unit, the owner or operator may propose to the reviewing authority an alternative basic design parameter(s) for the source's process unit(s). If the reviewing authority approves of the use of an alternative basic design parameter(s), the reviewing authority shall issue a permit that is legally enforceable that records such basic design parameter(s) and requires the owner or operator to comply with such parameter(s).

(*4*) The owner or operator shall use credible information, such as results of historic maximum capability tests, design information from the manufacturer, or engineering calculations, in establishing the magnitude of the basic design parameter(s) specified in paragraphs (a)(1)(xxi)(E)(*1*) and (*2*) of this section.

(5) If design information is not available for a process unit, then the owner or operator shall determine the process unit's basic design parameter(s) using the maximum value achieved by the process unit in the five-year period immediately preceding the planned activity.

(*6*) Efficiency of a process unit is not a basic design parameter.

(F) (*1*) In general, *process unit* means any collection of structures and/or equipment that processes, assembles, applies, blends, or otherwise uses material inputs to produce or store an intermediate or a completed product. A single stationary source may contain more than one process unit, and a process unit may contain more than one emissions unit.

(*2*) The following list identifies the process units at specific categories of stationary sources:

(*i*) For a steam electric generating facility, the process unit consists of those portions of the plant that contribute directly to the production of electricity. For example, at a pulverized coal-fired facility, the process unit would generally be the combination of those systems from the coal receiving equipment through the emission stack (excluding post-combustion pollution controls), including the coal handling equipment, pulverizers or coal crushers, feedwater heaters, ash handling, boiler, burners, turbine-generator set, condenser, cooling tower, water treatment system, air preheaters, and operating control systems. Each separate generating unit is a separate process unit.

(*ii*) For a petroleum refinery, there are several categories of process units: Those that separate and/or distill petroleum feedstocks; those that change molecular structures; petroleum treating processes; auxiliary facilities, such as steam generators and hydrogen production units; and those that load, unload, blend or store intermediate or completed products.

(*iii*) For an incinerator, the process unit would consist of components from the feed pit or refuse pit to the stack, including conveyors, combustion devices, heat exchangers and steam generators, quench tanks, and fans.

* * * * *

(xl) *Best available control technology (BACT)* means an emissions limitation (including a visible emissions standard) based on the maximum degree of reduction for each regulated NSR pollutant which would be emitted from any proposed major stationary source or major modification which the reviewing authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such pollutant. In no event shall application of best available control technology result in emissions of any pollutant which would exceed the emissions allowed by any applicable standard under 40 CFR parts 60, 61, or 63. If the reviewing authority determines that technological or economic limitations on the application of measurement methodology to a particular emissions unit would make the imposition of an emissions standard infeasible, a design, equipment, work practice, operational standard, or combination thereof, may be prescribed instead to satisfy the requirement for the application of BACT. Such standard shall, to the degree possible, set forth the emissions reduction achievable by implementation of such design, equipment, work practice or operation, and shall provide for compliance by means which achieve equivalent results.

* * * * *

(2) * * *

(ii) * * *

(A) Except as otherwise provided in paragraph (a)(2)(iii) of this section, and consistent with the definition of major modification contained in paragraph (a)(1)(v)(A) of this section, a project is a major modification for a regulated NSR pollutant (as defined in paragraph (a)(1)(xxxvii) of this section) if it causes two types of emissions increases—a significant emissions increase (as defined in paragraph (a)(1)(xxvii) of this section) and a significant net emissions increase (as defined in paragraphs (a)(1)(vi) and (x) of this section). The project is not a major modification if it does not cause a significant emissions increase. If the project causes a significant emissions increase, then the project is a major modification only if it also results in a significant net emissions increase.

* * * * *

(iii) The plan shall require that for any major stationary source with a PAL for a regulated NSR pollutant, the major stationary source shall comply with requirements under paragraph (f) of this section.

* * * * *

(3)(i) * * *

(ii) * * *

(D) No emissions credit may be allowed for replacing one hydrocarbon compound with another of lesser reactivity, except for those compounds listed as having negligible photochemical reactivity in § 51.100(s).

* * * * *

(4) * * *

(viii) Municipal incinerators capable of charging more than 50 tons of refuse per day;

* * * * *

(h) [Reserved]

* * * * *

■ 3. Amend § 51.166 by:
■ a. Revising paragraph (a)(7);
■ b. Revising paragraph (a)(7)(iv)(*a*);
■ c. Revising paragraph (a)(7)(v);
■ d. Revising paragraph (b)(1)(i)(*a*);
■ e. Revising paragraph (b)(1)(i)(*c*);
■ f. Revising paragraph (b)(1)(iii)(*h*);
■ g. Revising paragraph (b)(1)(iii)(*z*);
■ h. Revising paragraph (b)(2)(iii)(*a*);
■ i. Revising paragraph (b)(2)(iii)(*e*)(*1*);
■ j. Revising paragraph (b)(2)(iii)(*f*);
■ k. Removing and reserving paragraph (b)(3)(iii)(*c*);
■ l. Revising paragraph (b)(12);
■ m. Revising paragraph (b)(16)(i);
■ n. Revising paragraph (b)(17);
■ o. Revising paragraph (b)(23)(ii);
■ p. Revising paragraph (b)(32)(iii);
■ q. Adding paragraphs (b)(32)(v) and (vi);
■ r. Revising paragraph (b)(48)(i);
■ s. Revising paragraph (b)(48)(ii) introductory text and paragraph (b)(48)(ii)(*a*);
■ t. Revising paragraph (b)(48)(iii);
■ u. Revising paragraph (b)(48)(iv)(*b*);
■ v. Removing paragraphs (b)(53) through (56);
■ w. Revising paragraph (g)(4);
■ x. Revising paragraph (i)(1)(ii)(*h*);
■ y. Removing and reserving paragraphs (i)(6) through (10);
■ z. Revising paragraph (j)(1);
■ aa. Revising paragraph (j)(2);
■ bb. Revising paragraph (j)(4);
■ cc. Revising paragraph (k)(1);
■ dd. Revising paragraph (m)(1)(iii);
■ ee. Revising paragraph (p)(3);
■ ff. Revising paragraph (p)(4);
■ gg. Revising paragraph (p)(5)(i);
■ hh. Revising paragraph (p)(5)(iii);
■ ii. Revising paragraph (p)(6)(iii);
■ jj. Revising paragraph (p)(7);
■ kk. Revising paragraph (r)(2);
■ ll. Revising paragraph (r)(6)(vi)(*b*);
■ mm. Revising paragraph (w)(7)(vii);
■ nn. Revising paragraph (w)(9)(ii);
■ oo. Removing paragraph (y).

The revisions read as follows:

§ 51.166 Prevention of significant deterioration of air quality. [Corrected]

(a) * * *

(7) *Applicability.* Each plan shall contain procedures that incorporate the requirements in paragraphs (a)(7)(i) through (v) of this section.

* * * * *

(iv) * * *

(*a*) Except as otherwise provided in paragraph (a)(7)(v) of this section, and consistent with the definition of major modification contained in paragraph (b)(2) of this section, a project is a major modification for a regulated NSR pollutant if it causes two types of emissions increases—a significant emissions increase (as defined in paragraph (b)(39) of this section) and a significant net emissions increase (as defined in paragraphs (b)(3) and (b)(23) of this section). The project is not a major modification if it does not cause a significant emissions increase. If the project causes a significant emissions increase, then the project is a major modification only if it also results in a significant net emissions increase.

* * * * *

(v) The plan shall require that for any major stationary source with a PAL for a regulated NSR pollutant, the major stationary source shall comply with requirements under paragraph (w) of this section.

* * * * *

(b) * * *

(1) * * *

(i) * * *

(*a*) Any of the following stationary sources of air pollutants which emits, or has the potential to emit, 100 tons per year or more of any regulated NSR pollutant: Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input, coal cleaning plants (with thermal dryers), kraft pulp mills, portland cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants (with thermal dryers), primary copper smelters, municipal incinerators capable of charging more than 50 tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production plants, chemical process plants (which does not include ethanol production facilities that produce ethanol by natural fermentation included in NAICS codes 325193 or 312140), fossil-fuel boilers (or combinations thereof) totaling more than 250 million British thermal units per hour heat input, petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels, taconite ore processing plants, glass fiber processing plants, and charcoal production plants;

* * * * *

(*c*) Any physical change that would occur at a stationary source not otherwise qualifying under paragraph (b)(1) of this section as a major stationary source, if the change would constitute a major stationary source by itself.

* * * * *

(iii) * * *

(*h*) Municipal incinerators capable of charging more than 50 tons of refuse per day;

* * * * *

(*z*) Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input, and

* * * * *

(2) * * *

(iii) * * *

(*a*) Routine maintenance, repair and replacement.

* * * * *

(*e*) * * *

(*1*) The source was capable of accommodating before January 6, 1975, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975 pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR part 51, subpart I.

* * * * *

(*f*) An increase in the hours of operation or in the production rate, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975, pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR part 51, subpart I.

* * * * *

(12) *Best available control technology* means an emissions limitation (including a visible emissions standard) based on the maximum degree of reduction for each regulated NSR pollutant which would be emitted from any proposed major stationary source or major modification which the reviewing authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combination techniques for control of such pollutant. In no event shall application of best available control technology result in emissions of any pollutant which would exceed

the emissions allowed by any applicable standard under 40 CFR parts 60, 61, or 63. If the reviewing authority determines that technological or economic limitations on the application of measurement methodology to a particular emissions unit would make the imposition of an emissions standard infeasible, a design, equipment, work practice, operational standard or combination thereof, may be prescribed instead to satisfy the requirement for the application of best available control technology. Such standard shall, to the degree possible, set forth the emissions reduction achievable by implementation of such design, equipment, work practice or operation, and shall provide for compliance by means which achieve equivalent results.

* * * * *

(16) * * *

(i) The applicable standards as set forth in 40 CFR parts 60, 61, and 63;

* * * * *

(17) *Federally enforceable* means all limitations and conditions which are enforceable by the Administrator, including those requirements developed pursuant to 40 CFR parts 60, 61, and 63, requirements within any applicable State implementation plan, any permit requirements established pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR part 51, subpart I, including operating permits issued under an EPA-approved program that is incorporated into the State implementation plan and expressly requires adherence to any permit issued under such program.

* * * * *

(23)(i) * * *

(ii) *Significant* means, in reference to a net emissions increase or the potential of a source to emit a regulated NSR pollutant that paragraph (b)(23)(i) of this section does not list, any emissions rate.

* * * * *

(32) * * *

(i) * * *

(iii) The replacement does not change the basic design parameter(s) (as discussed in paragraph (b)(32)(v) of this section) of the process unit (as discussed in paragraph (b)(32)(vi) of this section).

* * * * *

(v) *Basic design parameters.* The replacement does not change the basic design parameter(s) of the process unit to which the activity pertains.

(*a*) Except as provided in paragraph (b)(32)(v)(*c*) of this section, for a process unit at a steam electric generating facility, the owner or operator may select as its basic design parameters either maximum hourly heat input and maximum hourly fuel consumption rate or maximum hourly electric output rate and maximum steam flow rate. When establishing fuel consumption specifications in terms of weight or volume, the minimum fuel quality based on British Thermal Units content shall be used for determining the basic design parameter(s) for a coal-fired electric utility steam generating unit.

(*b*) Except as provided in paragraph (b)(32)(v)(*c*) of this section, the basic design parameter(s) for any process unit that is not at a steam electric generating facility are maximum rate of fuel or heat input, maximum rate of material input, or maximum rate of product output. Combustion process units will typically use maximum rate of fuel input. For sources having multiple end products and raw materials, the owner or operator should consider the primary product or primary raw material when selecting a basic design parameter.

(*c*) If the owner or operator believes the basic design parameter(s) in paragraphs (b)(32)(v)(*a*) and (*b*) of this section is not appropriate for a specific industry or type of process unit, the owner or operator may propose to the reviewing authority an alternative basic design parameter(s) for the source's process unit(s). If the reviewing authority approves of the use of an alternative basic design parameter(s), the reviewing authority shall issue a permit that is legally enforceable that records such basic design parameter(s) and requires the owner or operator to comply with such parameter(s).

(*d*) The owner or operator shall use credible information, such as results of historic maximum capability tests, design information from the manufacturer, or engineering calculations, in establishing the magnitude of the basic design parameter(s) specified in paragraphs (b)(32)(v)(*a*) and (*b*) of this section.

(*e*) If design information is not available for a process unit, then the owner or operator shall determine the process unit's basic design parameter(s) using the maximum value achieved by the process unit in the five-year period immediately preceding the planned activity.

(*f*) Efficiency of a process unit is not a basic design parameter.

(vi) (*a*) In general, *process unit* means any collection of structures and/or equipment that processes, assembles, applies, blends, or otherwise uses material inputs to produce or store an intermediate or a completed product. A single stationary source may contain more than one process unit, and a process unit may contain more than one emissions unit.

(*b*) The following list identifies the process units at specific categories of stationary sources.

(*1*) For a steam electric generating facility, the process unit consists of those portions of the plant that contribute directly to the production of electricity. For example, at a pulverized coal-fired facility, the process unit would generally be the combination of those systems from the coal receiving equipment through the emission stack (excluding post-combustion pollution controls), including the coal handling equipment, pulverizers or coal crushers, feedwater heaters, ash handling, boiler, burners, turbine-generator set, condenser, cooling tower, water treatment system, air preheaters, and operating control systems. Each separate generating unit is a separate process unit.

(*2*) For a petroleum refinery, there are several categories of process units: Those that separate and/or distill petroleum feedstocks; those that change molecular structures; petroleum treating processes; auxiliary facilities, such as steam generators and hydrogen production units; and those that load, unload, blend or store intermediate or completed products.

(*3*) For an incinerator, the process unit would consist of components from the feed pit or refuse pit to the stack, including conveyors, combustion devices, heat exchangers and steam generators, quench tanks, and fans.

* * * * *

(48) * * *

(i) *Greenhouse gases (GHGs),* the air pollutant defined in § 86.1818–12(a) of this chapter as the aggregate group of six greenhouse gases: Carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride, shall not be subject to regulation except as provided in paragraph (b)(48)(iv) of this section.

(ii) For purposes of paragraphs (b)(48)(iii) through (iv) of this section, the term tpy *CO_2 equivalent emissions (CO_2e)* shall represent an amount of GHGs emitted, and shall be computed as follows:

(*a*) Multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published at Table A–1 to subpart A of part 98 of this chapter.

* * * * *

(iii) The term *emissions increase* as used in paragraph (b)(48)(iv) of this section shall mean that both a significant emissions increase (as calculated using the procedures in paragraph (a)(7)(iv) of this section) and a significant net emissions increase (as

defined in paragraphs (b)(3) and (b)(23) of this section) occur. For the pollutant GHGs, an emissions increase shall be based on tpy CO_2e, and shall be calculated assuming the pollutant GHGs is a regulated NSR pollutant, and ''significant'' is defined as 75,000 tpy CO_2e instead of applying the value in paragraph (b)(23)(ii) of this section.

(iv) * * *

(*b*) The stationary source is an existing major stationary source for a regulated NSR pollutant that is not GHGs, and also will have an emissions increase of a regulated NSR pollutant, and an emissions increase of 75,000 tpy CO_2e or more.

* * * * *

(g) * * *

(4) The plan shall provide that lands within the exterior boundaries of Indian Reservations may be redesignated only by the appropriate Indian Governing Body. The appropriate Indian Governing Body may submit to the Administrator a proposal to redesignate areas Class I, Class II, or Class III provided that:

* * * * *

(i) *Exemptions* (1) * * *

(ii) * * *

(*h*) Municipal incinerators capable of charging more than 50 tons of refuse per day;

* * * * *

(j) * * *

(1) A major stationary source or major modification shall meet each applicable emissions limitation under the State implementation plan and each applicable emission standards and standard of performance under 40 CFR parts 60, 61, and 63.

(2) A new major stationary source shall apply best available control technology for each regulated NSR pollutant that it would have the potential to emit in significant amounts.

* * * * *

(4) For phased construction projects, the determination of best available control technology shall be reviewed and modified as appropriate at the latest reasonable time which occurs no later than 18 months prior to commencement of construction of each independent phase of the project. At such time, the owner or operator of the applicable stationary source may be required to demonstrate the adequacy of any previous determination of best available control technology for the source.

* * * * *

(k) * * * (1) Required demonstration. The plan shall provide that the owner or operator of the proposed source or modification shall demonstrate that allowable emission increases from the proposed source or modification, in conjunction with all other applicable emissions increases or reductions (including secondary emissions), would not cause or contribute to air pollution in violation of:

* * * * *

(m) *Air quality analysis*—(1) *Preapplication analysis.* (i) * * *

* * * * *

(iii) The plan shall provide that with respect to any such pollutant (other than nonmethane hydrocarbons) for which such a standard does exist, the analysis shall contain continuous air quality monitoring data gathered for purposes of determining whether emissions of that pollutant would cause or contribute to a violation of the standard or any maximum allowable increase.

* * * * *

(p) * * *

(3) *Denial—impact on air quality related values.* The plan shall provide a mechanism whereby a Federal Land Manager of any such lands may present to the State, after the reviewing authority's preliminary determination required under procedures developed in accordance with paragraph (q) of this section, a demonstration that the emissions from the proposed source or modification would have an adverse impact on the air quality-related values (including visibility) of any Federal mandatory Class I lands, notwithstanding that the change in air quality resulting from emissions from such source or modification would not cause or contribute to concentrations which would exceed the maximum allowable increases for a Class I area. If the State concurs with such demonstration, the reviewing authority shall not issue the permit.

(4) *Class I Variances.* The plan may provide that the owner or operator of a proposed source or modification may demonstrate to the Federal Land Manager that the emissions from such source would have no adverse impact on the air quality related values of such lands (including visibility), notwithstanding that the change in air quality resulting from emissions from such source or modification would cause or contribute to concentrations which would exceed the maximum allowable increases for a Class I area. If the Federal land manager concurs with such demonstration and so certifies to the State, the reviewing authority may, provided that the applicable requirements are otherwise met, issue the permit with such emission limitations as may be necessary to assure that emissions of sulfur dioxide, $PM_{2.5}$, PM_{10}, and nitrogen oxides would not exceed the following maximum allowable increases over minor source baseline concentration for such pollutants:

(5) * * *

(i) The owner or operator of a proposed source or modification which cannot be approved under procedures developed pursuant to paragraph (p)(4)of this section may demonstrate to the Governor that the source or modification cannot be constructed by reason of any maximum allowable increase for sulfur dioxide for periods of twenty-four hours or less applicable to any Class I area and, in the case of Federal mandatory Class I areas, that a variance under this clause would not adversely affect the air quality related values of the area (including visibility);

(ii) * * *

(iii) If such variance is granted, the reviewing authority may issue a permit to such source or modification in accordance with provisions developed pursuant to paragraph (p)(7) of this section provided that the applicable requirements of the plan are otherwise met.

(6) * * *

(iii) If such a variance is approved, the reviewing authority may issue a permit in accordance with provisions developed pursuant to the requirements of paragraph (p)(7) of this section provided that the applicable requirements of the plan are otherwise met.

(7) *Emission limitations for Presidential or gubernatorial variance.* The plan shall provide that, in the case of a permit issued under procedures developed pursuant to paragraph (p)(5) or (6) of this section, the source or modification shall comply with emission limitations as may be necessary to assure that emissions of sulfur dioxide from the source or modification would not (during any day on which the otherwise applicable maximum allowable increases are exceeded) cause or contribute to concentrations which would exceed the following maximum allowable increases over the baseline concentration and to assure that such emissions would not cause or contribute to concentrations which exceed the otherwise applicable maximum allowable increases for periods of exposure of 24 hours or less for more than 18 days, not necessarily consecutive, during any annual period:

* * * * *

(r) * * *

(2) The plan shall provide that at such time that a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforceable

limitation which was established after August 7, 1980, on the capacity of the source or modification otherwise to emit a pollutant, such as a restriction on hours of operation, then the requirements of paragraphs (j) through (r) of this section shall apply to the source or modification as though construction had not yet commenced on the source or modification.

* * * * *

(6) * * *

(vi) * * *

(*b*) A projected actual emissions increase that, added to the amount of emissions excluded under paragraph (b)(40)(ii)(*c*) of this section, sums to at least 50 percent of the amount that is a ''significant emissions increase,'' as defined under paragraph (b)(39) of this section (without reference to the amount that is a significant net emissions increase), for the regulated NSR pollutant. For a project for which a reasonable possibility occurs only within the meaning of this paragraph (r)(6)(vi)(*b*), and not also within the meaning of paragraph (r)(6)(vi)(*a*) of this section, then the provisions under paragraphs (r)(6)(ii) through (v) of this section do not apply to the project.

* * * * *

(w) * * *

(7) * * *

(vii) A requirement that the major stationary source owner or operator monitor all emissions units in accordance with the provisions under paragraph (w)(12) of this section.

* * * * *

(9) * * *

(ii) Each emissions unit(s) shall comply with the allowable emission limitation on a 12-month rolling basis. The reviewing authority may approve the use of monitoring systems (source testing, emission factors, etc.) other than CEMS, CERMS, PEMS or CPMS to demonstrate compliance with the allowable emission limitation.

* * * * *

■ 4. Appendix S to part 51 is corrected by:

■ a. Revising paragraph I. Introduction;
■ b. Revising paragraph II.A.4.(i)(*a*);
■ c. Revising paragraph II.A.4.(iii);
■ d. Revising paragraph II.A.4.(iii)(*h*);
■ e. Revising paragraphs II.A.5.(iii)(*e*)(*1*)–(*2*);
■ f. Revising paragraph II.A.5.(iii)(*f*);
■ g. Revising paragraph II.A.7.(ii);
■ h. Revising paragraph II.A.11.(i);
■ i. Revising paragraph II.A.12;
■ j. Revising paragraph II.A.34;
■ k. Revising paragraph II.A.35;
■ l. Adding new paragraph II.A.37;
■ m. Revising paragraph II.B;
■ n. Revising paragraph II.F.8;
■ o. Revising paragraph II.G;
■ p. Revising paragraph III.B;
■ q. Revising paragraph III.C;
■ r. Revising paragraph III.D. *Condition 1;*
■ s. Revising paragraph IV.A. *Condition 1;*
■ t. Revising paragraph IV.A. *Condition 4;*
■ u. Revising paragraph IV.B;
■ v. Revising paragraph IV.B.(i)(*1*);
■ w. Revising paragraph IV.C.3.(i);
■ x. Revising paragraph IV.C.3.(ii);
■ y. Revising paragraph IV.C.3.(ii)(2);
■ z. Revising paragraph IV.C.4;
■ aa. Revising paragraph IV.C.5;
■ bb. Revising paragraph IV.D;
■ cc. Revising paragraph IV.G.1;
■ dd. Revising paragraph IV.H;
■ ee. Revising paragraph IV.I.2;
■ ff. Revising paragraph IV.J.6.(ii);
■ gg. Revising paragraph IV.K.5;
■ hh. Revising paragraph IV.K.14;
■ ii. Revising paragraphs V.A (1) and (2);

The revisions read as follows:

Appendix S to Part 51—Emission Offset Interpretative Ruling

I. Introduction

This appendix sets forth EPA's Interpretative Ruling on the preconstruction review requirements for stationary sources of air pollution (not including indirect sources) under subpart I of this part and section 129 of the Clean Air Act Amendments of 1977, Public Law 95–95, (note under 42 U.S.C. 7502). A major new source or major modification which would locate in any area designated under section 107(d) of the Act as attainment or unclassifiable for ozone that is located in an ozone transport region or which would locate in an area designated in 40 CFR part 81, subpart C, as nonattainment for a pollutant for which the source or modification would be major may be allowed to construct only if the stringent conditions set forth below are met. These conditions are designed to ensure that the new source's emissions will be controlled to the greatest degree possible; that more than equivalent offsetting emission reductions (emission offsets) will be obtained from existing sources; and that there will be progress toward achievement of the NAAQS.

For each area designated as exceeding a NAAQS (nonattainment area) under 40 CFR part 81, subpart C, or for any area designated under section 107(d) of the Act as attainment or unclassifiable for ozone that is located in an ozone transport region, this Interpretative Ruling will be superseded after June 30, 1979 (a) by preconstruction review provisions of the revised SIP, if the SIP meets the requirements of part D, Title 1, of the Act; or (b) by a prohibition on construction under the applicable SIP and section 110(a)(2)(I) of the Act, if the SIP does not meet the requirements of part D. The Ruling will remain in effect to the extent not superseded under the Act. This prohibition on major new source construction does not apply to a source whose permit to construct was applied for during a period when the SIP was in compliance with part D, or before the deadline for having a revised SIP in effect that satisfies part D.

* * * * *

II. Initial Screening Analyses and Determination of Applicable Requirements

A.* * *

4. (i) * * *

(*a*) Any stationary source of air pollutants which emits, or has the potential to emit, 100 tons per year or more of a regulated NSR pollutant (as defined in paragraph II.A.31 of this Ruling), except that lower emissions thresholds shall apply in areas subject to subpart 2, subpart 3, or subpart 4 of part D, title I of the Act, according to paragraphs II.A.4(i)(*a*)(*1*) through (*8*) of this Ruling.

* * * * *

(iii) The fugitive emissions of a stationary source shall not be included in determining for any of the purposes of this Ruling whether it is a major stationary source, unless the source belongs to one of the following categories of stationary sources:

* * * * *

(*h*) Municipal incinerators capable of charging more than 50 tons of refuse per day;

* * * * *

5. * * *

(iii) * * *

(*e*) * * *

(*1*) The source was capable of accommodating before December 21, 1976, unless such change would be prohibited under any federally enforceable permit condition which was established after December 21, 1976, pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR part 51, subpart I; or

(*2*) The source is approved to use under any permit issued under this Ruling;

(*f*) An increase in the hours of operation or in the production rate, unless such change is prohibited under any federally enforceable permit condition which was established after December 21, 1976 pursuant to 40 CFR

52.21 or under regulations approved pursuant to 40 CFR part 51, subpart I;

* * * * *

7. * * *

(ii) An existing emissions unit is any emissions unit that does not meet the requirements in paragraph II.A.7(i) of this Ruling. A replacement unit, as defined in paragraph II.A.37 of this Ruling, is an existing emissions unit.

11. * * *

(i) Applicable standards as set forth in 40 CFR parts 60, 61, and 63;

* * * * *

12. *Federally enforceable* means all limitations and conditions which are enforceable by the Administrator, including those requirements developed pursuant to 40 CFR parts 60, 61, or 63, requirements within any applicable State implementation plan, any permit requirements established pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR part 51, subpart I, including operating permits issued under an EPA-approved program that is incorporated into the State implementation plan and expressly requires adherence to any permit issued under such program.

* * * * *

34. *Best available control technology (BACT)* means an emissions limitation (including a visible emissions standard) based on the maximum degree of reduction for each regulated NSR pollutant which would be emitted from any proposed major stationary source or major modification which the reviewing authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such pollutant. In no event shall application of best available control technology result in emissions of any pollutant which would exceed the emissions allowed by any applicable standard under 40 CFR parts 60, 61, or 63. If the reviewing authority determines that technological or economic limitations on the application of measurement methodology to a particular emissions unit would make the imposition of an emissions standard infeasible, a design, equipment, work practice, operational standard, or combination thereof, may be prescribed instead to satisfy the requirement for the application of BACT. Such standard shall, to the degree possible, set forth the emissions reduction achievable by implementation of such design, equipment, work practice or operation, and shall provide for compliance by means which achieve equivalent results.

35. *Prevention of Significant Deterioration (PSD) permit* means any permit that is issued under a major source preconstruction permit program that has been approved by the Administrator and incorporated into the plan to implement the requirements of § 51.166, or under the program in § 52.21 of this chapter.

* * * * *

37. *Replacement unit* means an emissions unit for which all the criteria listed in paragraphs II.A.37.(i) through (iv) of this Ruling are met. No creditable emission reductions shall be generated from shutting down the existing emissions unit that is replaced.

(i) The emissions unit is a reconstructed unit within the meaning of § 60.15(b)(1) of this chapter, or the emissions unit completely takes the place of an existing emissions unit.

(ii) The emissions unit is identical to or functionally equivalent to the replaced emissions unit.

(iii) The replacement does not alter the basic design parameters (as discussed in paragraph II.A.37.(v) of this Ruling) of the process unit (as discussed in paragraph II.A.37(vi) of this section).

(iv) The replaced emissions unit is permanently removed from the major stationary source, otherwise permanently disabled, or permanently barred from operation by a permit that is enforceable as a practical matter. If the replaced emissions unit is brought back into operation, it shall constitute a new emissions unit.

(v) *Basic design parameters.* The replacement does not change the basic design parameter(s) of the process unit to which the activity pertains.

(*a*) Except as provided in paragraph II.A.37.(v)(*c*) of this Ruling, for a process unit at a steam electric generating facility, the owner or operator may select as its basic design parameters either maximum hourly heat input and maximum hourly fuel consumption rate or maximum hourly electric output rate and maximum steam flow rate. When establishing fuel consumption specifications in terms of weight or volume, the minimum fuel quality based on British Thermal Units content shall be used for determining the basic design parameter(s) for a coal-fired electric utility steam generating unit.

(*b*) Except as provided in paragraph II.A.37.(v)(*c*) of this Ruling, the basic design parameter(s) for any process unit that is not at a steam electric generating facility are maximum rate of fuel or heat input, maximum rate of material input, or maximum rate of product output. Combustion process units will typically use maximum rate of fuel input. For sources having multiple end products and raw materials, the owner or operator should consider the primary product or primary raw material when selecting a basic design parameter.

(*c*) If the owner or operator believes the basic design parameter(s) in paragraphs II.A.37.(v)(*a*) and (*b*) of this Ruling is not appropriate for a specific industry or type of process unit, the owner or operator may propose to the reviewing authority an alternative basic design parameter(s) for the source's process unit(s). If the reviewing authority approves of the use of an alternative basic design parameter(s), the reviewing authority shall issue a permit that is legally enforceable that records such basic design parameter(s) and requires the owner or operator to comply with such parameter(s).

(*d*) The owner or operator shall use credible information, such as results of historic maximum capability tests, design information from the manufacturer, or engineering calculations, in establishing the magnitude of the basic design parameter(s) specified in paragraphs II.A.37.(v)(*a*) and (*b*) of this Ruling.

(*e*) If design information is not available for a process unit, then the owner or operator shall determine the process unit's basic design parameter(s) using the maximum value achieved by the process unit in the five-year period immediately preceding the planned activity.

(*f*) Efficiency of a process unit is not a basic design parameter.

(vi) (*a*) In general, *process unit* means any collection of structures and/or equipment that processes, assembles, applies, blends, or otherwise uses material inputs to produce or store an intermediate or a completed product. A single stationary source may contain more than one process unit, and a process unit may contain more than one emissions unit.

(*b*) The following list identifies the process units at specific categories of stationary sources:

(*1*) For a steam electric generating facility, the process unit consists of those portions of the plant that contribute directly to the production of electricity. For example, at a pulverized coal-fired facility, the process unit would generally be the combination of those systems from the coal receiving equipment through the emission stack (excluding post-combustion pollution controls), including the coal handling equipment, pulverizers or coal crushers, feedwater heaters, ash handling, boiler,

burners, turbine-generator set, condenser, cooling tower, water treatment system, air preheaters, and operating control systems. Each separate generating unit is a separate process unit.

(*2*) For a petroleum refinery, there are several categories of process units: Those that separate and/or distill petroleum feedstocks; those that change molecular structures; petroleum treating processes; auxiliary facilities, such as steam generators and hydrogen production units; and those that load, unload, blend or store intermediate or completed products.

(*3*) For an incinerator, the process unit would consist of components from the feed pit or refuse pit to the stack, including conveyors, combustion devices, heat exchangers and steam generators, quench tanks, and fans.

B. *Review of all sources for emission limitation compliance.* The reviewing authority must examine each proposed major new source and proposed major modification [1] to determine if such a source will meet all applicable emission requirements in the SIP, any applicable new source performance standard in part 60 of this chapter, or any national emission standard for hazardous air pollutants in parts 61 or 63 of this chapter. If the reviewing authority determines that the proposed major new source cannot meet the applicable emission requirements, the permit to construct must be denied.

* * * * *

F. * * *

(8) Municipal incinerators capable of charging more than 50 tons of refuse per day;

* * * * *

G. *Secondary emissions.* Secondary emissions need not be considered in determining whether the emission rates in section II.C. above would be exceeded. However, if a source is subject to this Ruling on the basis of the direct emissions from the source, the applicable conditions of this Ruling must also be met for secondary emissions. However, secondary emissions may be exempt from Conditions 1 and 2 of section IV of this Ruling. Also, since EPA's authority to perform or require indirect source review relating to mobile sources regulated under Title II of the Act (motor vehicles and aircraft) has been restricted by statute, consideration of the indirect impacts of motor vehicles and aircraft traffic is not required under this Ruling.

* * * * *

III. * * *

B. Sources to which this section applies must meet Conditions 1, 2, and 4 of section IV.A. of this Ruling.[2] However, such sources may be exempt from Condition 3 of section IV.A. of this Ruling.

[2] The discussion in this paragraph is a proposal but represents EPA's interim policy until final rulemaking is completed.

C. *Review of specified sources for air quality impact.* For *stable* air pollutants (*i.e.,* SO_2, particulate matter and CO), the determination of whether a source will cause or contribute to a violation of a NAAQS generally should be made on a case-by-case basis as of the proposed new source's start-up date using the source's allowable emissions in an atmospheric simulation model (unless a source will clearly impact on a receptor which exceeds a NAAQS).

For sources of nitrogen oxides, the initial determination of whether a source would cause or contribute to a violation of the NAAQS for NO_2 should be made using an atmospheric simulation model assuming all the nitric oxide emitted is oxidized to NO_2 by the time the plume reaches ground level. The initial concentration estimates may be adjusted if adequate data are available to account for the expected oxidation rate.

For ozone, sources of volatile organic compounds locating outside a designated ozone nonattainment area will be presumed to have no significant impact on the designated nonattainment area. If ambient monitoring indicates that the area of source location is in fact nonattainment, then the source may be permitted under the provisions of any State plan adopted pursuant to section 110(a)(2)(D) of the Act until the area is designated nonattainment and a State implementation plan revision is approved. If no State plan pursuant to section 110(a)(2)(D) of the Act has been adopted and approved, then this Ruling shall apply.

As noted above, the determination as to whether a source would cause or contribute to a violation of a NAAQS should be made as of the new source's start-up date. Therefore, if a designated nonattainment area is projected to be an attainment area as part of an approved SIP control strategy by the new source start-up date, offsets would not be required if the new source would not cause a new violation.

D. * * *

Condition 1. The new source is required to meet a more stringent emission limitation [3] and/or the control of existing sources below allowable levels is required so that the source will not cause a violation of any NAAQS.

[3] If the reviewing authority determines that technological or economic limitations on the application of measurement methodology to a particular class of sources would make the imposition of an enforceable numerical emission standard infeasible, the authority may instead prescribe a design, operational, or equipment standard. In such cases, the reviewing authority shall make its best estimate as to the emission rate that will be achieved and must specify that rate in the required submission to EPA (see part V of this Ruling). Any permits issued without an enforceable numerical emission standard must contain enforceable conditions which assure that the design characteristics or equipment will be properly maintained (or that the operational conditions will be properly performed) so as to continuously achieve the assumed degree of control. Such conditions shall be enforceable as emission limitations by private parties under section 304 of the Act. Hereafter, the term *emission limitation* shall also include such design, operational, or equipment standards.

* * * * *

IV. * * *

A. * * *

Condition 1. The new source is required to meet an emission limitation [4] which specifies the lowest achievable emission rate for such source.

[4] If the reviewing authority determines that technological or economic limitations on the application of measurement methodology to a particular class of sources would make the imposition of an enforceable numerical emission standard infeasible, the authority may instead prescribe a design, operational or equipment standard. In such cases, the reviewing authority shall make its best estimate as to the emission rate that will be achieved and must specify that rate in the required submission to EPA (see part V of this Ruling). Any permits issued without an enforceable numerical emission standard must contain enforceable conditions which assure that the design characteristics or equipment will be properly maintained (or that the operational conditions will be properly performed) so as to continuously achieve the assumed degree of control. Such conditions shall be enforceable as emission limitations by private parties under section 304 of the Act. Hereafter, the term emission limitation shall also include such

design, operational, or equipment standards.

* * * * *

Condition 4. The emission offsets will provide a positive net air quality benefit in the affected area (see section IV.D. of this Ruling). Atmospheric simulation modeling is not necessary for volatile organic compounds and NO_X. Fulfillment of Condition 3 under section IV.A of this Ruling and the requirements under section IV.D. of this Ruling will be considered adequate to meet this condition.

* * * * *

B. *Exemptions from certain conditions.* The reviewing authority may exempt the following sources from Condition 1 under section III.D of this Ruling or Conditions 3 and 4 under section IV.A. of this Ruling:

(i) * * *

1. The applicant demonstrates that it made its best efforts to obtain sufficient emission offsets to comply with Condition 1 under section III.D. of this Ruling or Conditions 3 and 4 under section IV.A. of this Ruling and that such efforts were unsuccessful;

* * * * *

C. * * *

3. * * *

(i) Emissions reductions achieved by shutting down an existing source or curtailing production or operating hours may be generally credited for offsets if they meet the requirements in paragraphs IV.C.3.(i)(1) and (2) of this Ruling.

* * * * *

(ii) Emissions reductions achieved by shutting down an existing source or curtailing production or operating hours and that do not meet the requirements in paragraphs IV.C.3.(i)(*1*) and (*2*) of this Ruling may be generally credited only if:

* * * * *

(2) The applicant can establish that the proposed new source is a replacement for the shutdown or curtailed source, and the emissions reductions achieved by the shutdown or curtailment met the requirements of paragraphs IV.C.3.(i)(1) and (2) of this Ruling.

4. *Credit for VOC substitution.* EPA has found that almost all non-methane VOCs are photochemically reactive and that low reactivity VOCs eventually form as much ozone as the highly reactive VOCs. Therefore, no emission offset credit may be allowed for replacing one VOC compound with another of lesser reactivity, except for those compounds listed as having negligible photochemical reactivity in § 51.100(s).

5. ''*Banking*'' *of emission offset credit.* For new sources obtaining permits by applying offsets after January 16, 1979, the reviewing authority may allow offsets that exceed the requirements of reasonable progress toward attainment (Condition 3 under paragraph IV.A of this Ruling) to be ''banked'' (*i.e.,* saved to provide offsets for a source seeking a permit in the future) for use under this Ruling. Likewise, the reviewing authority may allow the owner of an existing source that reduces its own emissions to bank any resulting reductions beyond those required by the SIP for use under this Ruling, even if none of the offsets are applied immediately to a new source permit. A reviewing authority may allow these banked offsets to be used under the preconstruction review program required by part D of the Act, as long as these banked emissions are identified and accounted for in the SIP control strategy. A reviewing authority may not approve the construction of a source using banked offsets if the new source would interfere with the SIP control strategy or if such use would violate any other condition set forth for use of offsets. To preserve banked offsets, the reviewing authority should identify them in either a SIP revision or a permit and establish rules as to how and when they may be used.

* * * * *

D. *Location of offsetting emissions.* The owner or operator of a new or modified major stationary source may comply with any offset requirement in effect under this Ruling for increased emissions of any air pollutant only by obtaining emissions reductions of such air pollutant from the same source or other sources in the same nonattainment area, except that the reviewing authority may allow the owner or operator of a source to obtain such emissions reductions in another nonattainment area if the conditions under paragraphs V.D.1 and 2 of this Ruling are met.

* * * * *

G. * * *

1. In meeting the emissions offset requirements of Condition 3 under paragraph IV.A. of this Ruling, the ratio of total actual emissions reductions to the emissions increase shall be at least 1:1 unless an alternative ratio is provided for the applicable nonattainment area in paragraphs IV.G.2 through IV.G.4 of this Ruling.

* * * * *

H. *Additional provisions for emissions of nitrogen oxides in ozone transport regions and nonattainment areas.* The requirements of this Ruling applicable to major stationary sources and major modifications of volatile organic compounds shall apply to nitrogen oxides emissions from major stationary sources and major modifications of nitrogen oxides in an ozone transport region or in any ozone nonattainment area, except in ozone nonattainment areas where the Administrator has granted a NO_X waiver applying the standards set forth under section 182(f) of the Act and the waiver continues to apply

I. * * *

2. For any major stationary source with a PAL for a regulated NSR pollutant, the major stationary source shall comply with requirements under paragraph IV.K of this Ruling.

J. * * *

6. * * *

(ii) A projected actual emissions increase that, added to the amount of emissions excluded under paragraph II.A.24(ii)(*c*) of this Ruling, sums to at least 50 percent of the amount that is a ''significant emissions increase,'' as defined under paragraph II.A.23 of this Ruling (without reference to the amount that is a significant net emissions increase), for the regulated NSR pollutant. For a project for which a reasonable possibility occurs only within the meaning of paragraph IV.J.6(ii) of this Ruling, and not also within the meaning of section IV.J.6(i) of this Ruling, then provisions in paragraphs IV.J.2 through IV.J.5 of this Ruling do not apply to the project.

* * * * *

K. * * *

5. *Public participation requirement for PALs.* PALs for existing major stationary sources shall be established, renewed, or increased through a procedure that is consistent with §§ 51.160 and 51.161. This includes the requirement that the reviewing authority provide the public with notice of the proposed approval of a PAL permit and at least a 30-day period for submittal of public comment. The reviewing authority must address all material comments before taking final action on the permit.

* * * * *

14. *Reporting and notification requirements.* The owner or operator shall submit semi-annual monitoring reports and prompt deviation reports to the reviewing authority in accordance with the applicable title V operating permit program. The reports shall meet the requirements in paragraphs IV.K.14(i) through (iii) of this Ruling.

* * * * *

V. * * *

A. * * *

(1) Reductions from sources controlled by the source owner (internal emission offsets); and/or (2) reductions from neighboring sources (external emission offsets). The source does not have to investigate all possible emission offsets. As long as the emission offsets obtained represent reasonable progress toward attainment, they will be acceptable. It is the reviewing authority's responsibility to assure that the emission offsets will be as effective as proposed by the source. An internal emission offset will be considered enforceable if it is made a SIP requirement by inclusion as a condition of the new source permit and the permit is forwarded to the appropriate EPA Regional Office.[7] An external emission offset will not be enforceable unless the affected source(s) providing the emission reductions is subject to a new SIP requirement to ensure that its emissions will be reduced by a specified amount in a specified time. Thus, if the source(s) providing the emission reductions does not obtain the necessary reduction, it will be in violation of a SIP requirement and subject to enforcement action by EPA, the State, and/or private parties.

[7] The emission offset will, therefore, be enforceable by EPA under section 113 of the Act as an applicable SIP requirement and will be enforceable by private parties under section 304 of the Act as an emission limitation.

The form of the SIP revision may be a State or local regulation, operating permit condition, consent or enforcement order, or any other mechanism available to the State that is enforceable under the Clean Air Act. If a SIP revision is required, the public hearing on the revision may be substituted for the normal public comment procedure required for all major sources under § 51.165. The formal publication of the SIP revision approval in the **Federal Register** need not appear before the source may proceed with construction. To minimize uncertainty that may be caused by these procedures, EPA will, if requested by the State, propose a SIP revision for public comment in the **Federal Register** concurrently with the State public hearing process. Of course, any major change in the final permit/SIP revision submitted by the State may require a reproposal by EPA.

* * * * *

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 A—GENERAL PROVISIONS

■ 2. Amend § 52.21 by:
■ a. Revising paragraph (a)(2)(iv)(*a*);
■ b. Revising paragraph (a)(2)(iv)(*f*);
■ c. Revising paragraphs (b)(1)(i)(*a*) through (*c*);
■ d. Revising paragraph (b)(1)(iii)(*h*);
■ e. Revising paragraph (b)(2)(iii)(*a*);
■ f. Revising paragraph (b)(2)(iii)(*e*)(*1*);
■ g. Revising paragraph (b)(2)(iii)(*f*);
■ h. Removing and reserving paragraph (b)(3)(iii)(*b*);
■ i. Revising paragraph (b)(3)(vi)(*c*);
■ j. Revising paragraph (b)(12);
■ k. Revising paragraph (b)(16(i);
■ l. Revising paragraph (b)(17);
■ m. Revising paragraph (b)(23)(ii);
■ n. Revising paragraph (b)(33)(iii);
■ o. Adding paragraphs (b)(33)(v) and (vi);
■ p. Revising paragraph (b)(41)(ii)(*c*);
■ q. Revising paragraph (b)(48)(ii)(*d*);
■ r. Revising paragraph (b)(49)(i) through (iii);
■ s. Revising paragraph (b)(49)(iv)(*b*);
■ t. Revising paragraph (b)(51);
■ u. Removing paragraphs (b)(55) through (58);
■ v. Revising paragraph (g)(4);
■ w. Removing and reserving paragraphs (i)(1)(i) through (v);
■ x. Revising paragraph (i)(1)(vii)(*h*);
■ y. Removing paragraphs (i)(1)(ix) and (x);
■ z. Removing and reserving paragraphs (i)(6) through (11);
■ aa. Revising paragraph (j)(1);
■ bb. Revising paragraph (m)(1)(i)(*a*);
■ cc. Removing and reserving paragraph (m)(1)(v);
■ dd. Removing paragraphs (m)(1)(vii) and (viii);
■ ee. Revising paragraph (n)(1);
■ ff. Revising paragraph (p)(5) through (8);
■ gg. Revising paragraph (r)(4);
■ hh. Revising paragraph (u)(2)(ii);
■ ii. Revising paragraph (u)(3);
■ jj. Revising paragraph (w)(1)
■ kk. Removing paragraph (cc);

The revisions read as follows:

§ 52.21 Prevention of significant deterioration of air quality [Corrected]

(a) * * *

(2) * * *

(iv) * * *

(*a*) Except as otherwise provided in paragraph (a)(2)(v) of this section, and consistent with the definition of major modification contained in paragraph (b)(2) of this section, a project is a major modification for a regulated NSR pollutant if it causes two types of emissions increases—a significant emissions increase (as defined in paragraph (b)(40) section) and a significant net emissions increase (as defined in paragraphs (b)(3) and (b)(23) of this section). The project is not a major modification if it does not cause a significant emissions increase. If the project causes a significant emissions increase, then the project is a major modification only if it also results in a significant net emissions increase.

* * * * *

(*f*) *Hybrid test for projects that involve multiple types of emissions units.* A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the emissions increases for each emissions unit, using the method specified in paragraphs (a)(2)(iv)(*c*) and (*d*) of this section as applicable with respect to each emissions unit, for each type of emissions unit equals or exceeds the significant amount for that pollutant (as defined in paragraph (b)(23) of this section).

* * * * *

(b) * * *

(1) * * *

(i) * * *

(*a*) Any of the following stationary sources of air pollutants which emits, or has the potential to emit, 100 tons per year or more of any regulated NSR pollutant: Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input, coal cleaning plants (with thermal dryers), kraft pulp mills, portland cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants (with thermal dryers), primary copper smelters, municipal incinerators capable of charging more than 50 tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production plants, chemical process plants (which does not include ethanol production facilities that produce ethanol by natural fermentation included in NAICS codes 325193 or 312140), fossil-fuel boilers (or combinations thereof) totaling more than 250 million British thermal units per hour heat input, petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels, taconite ore processing plants, glass fiber processing plants, and charcoal production plants;

(*b*) Notwithstanding the stationary source size specified in paragraph (b)(1)(i)(*a*) of this section, any stationary source which emits, or has the potential

to emit, 250 tons per year or more of a regulated NSR pollutant; or

(*c*) Any physical change that would occur at a stationary source not otherwise qualifying under paragraph (b)(1) of this section as a major stationary source, if the change would constitute a major stationary source by itself.

* * * * *

(iii) * * *

(*h*) Municipal incinerators capable of charging more than 50 tons of refuse per day;

* * * * *

(2)(i) * * *

(iii) * * *

(*a*) Routine maintenance, repair and replacement.

* * * * *

(*e*) * * *

(*1*) The source was capable of accommodating before January 6, 1975, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975, pursuant to 40 CFR 52.21 or under regulations approved pursuant to part 51, subpart I; or

* * * * *

(*f*) An increase in the hours of operation or in the production rate, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975, pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR part 51, subpart I.

* * * * *

(3) * * *

(vi) * * *

(*c*) It has approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change.

* * * * *

(12) *Best available control technology* means an emissions limitation (including a visible emission standard) based on the maximum degree of reduction for each pollutant subject to regulation under the Act which would be emitted from any proposed major stationary source or major modification which the Administrator, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such pollutant. In no event shall application of best available control technology result in emissions of any pollutant which would exceed the emissions allowed by any applicable standard under 40 CFR parts 60, 61, and 63. If the Administrator determines that technological or economic limitations on the application of measurement methodology to a particular emissions unit would make the imposition of an emissions standard infeasible, a design, equipment, work practice, operational standard, or combination thereof, may be prescribed instead to satisfy the requirement for the application of best available control technology. Such standard shall, to the degree possible, set forth the emissions reduction achievable by implementation of such design, equipment, work practice or operation, and shall provide for compliance by means which achieve equivalent results.

* * * * *

(16) * * *

(i) The applicable standards as set forth in 40 CFR parts 60, 61, and 63;

* * * * *

(17) *Federally enforceable* means all limitations and conditions which are enforceable by the Administrator, including those requirements developed pursuant to 40 CFR parts 60, 61, and 63, requirements within any applicable State implementation plan, any permit requirements established pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR part 51, subpart I, including operating permits issued under an EPA-approved program that is incorporated into the State implementation plan and expressly requires adherence to any permit issued under such program.

* * * * *

(23)(i) * * *

(ii) *Significant* means, in reference to a net emissions increase or the potential of a source to emit a regulated NSR pollutant that paragraph (b)(23)(i) of this section does not list, any emissions rate.

* * * * *

(33) * * *

(iii) The replacement does not alter the basic design parameters (as discussed in paragraph (b)(33)(v) of this section) of the process unit (as discussed in paragraph (b)(33)(vi) of this section).

(iv) The replaced emissions unit is permanently removed from the major stationary source, otherwise permanently disabled, or permanently barred from operation by a permit that is enforceable as a practical matter. If the replaced emissions unit is brought back into operation, it shall constitute a new emissions unit.

(v) *Basic design parameters.* The replacement does not change the basic design parameter(s) of the process unit to which the activity pertains.

(*a*) Except as provided in paragraph (b)(33)(v)(iii) of this section, for a process unit at a steam electric generating facility, the owner or operator may select as its basic design parameters either maximum hourly heat input and maximum hourly fuel consumption rate or maximum hourly electric output rate and maximum steam flow rate. When establishing fuel consumption specifications in terms of weight or volume, the minimum fuel quality based on British Thermal Units content shall be used for determining the basic design parameter(s) for a coal-fired electric utility steam generating unit.

(*b*) Except as provided in paragraph (b)(33)(v)(iii) of this section, the basic design parameter(s) for any process unit that is not at a steam electric generating facility are maximum rate of fuel or heat input, maximum rate of material input, or maximum rate of product output. Combustion process units will typically use maximum rate of fuel input. For sources having multiple end products and raw materials, the owner or operator should consider the primary product or primary raw material when selecting a basic design parameter.

(*c*) If the owner or operator believes the basic design parameter(s) in paragraphs (b)(33)(v)(i) and (ii) of this section is not appropriate for a specific industry or type of process unit, the owner or operator may propose to the reviewing authority an alternative basic design parameter(s) for the source's process unit(s). If the reviewing authority approves of the use of an alternative basic design parameter(s), the reviewing authority shall issue a permit that is legally enforceable that records such basic design parameter(s) and requires the owner or operator to comply with such parameter(s).

(*d*) The owner or operator shall use credible information, such as results of historic maximum capability tests, design information from the manufacturer, or engineering calculations, in establishing the magnitude of the basic design parameter(s) specified in paragraphs (b)(33)(v)(i) and (ii) of this section.

(*e*) If design information is not available for a process unit, then the owner or operator shall determine the process unit's basic design parameter(s) using the maximum value achieved by the process unit in the five-year period immediately preceding the planned activity.

(*f*) Efficiency of a process unit is not a basic design parameter.

(vi)(*a*) In general, *process unit* means any collection of structures and/or equipment that processes, assembles, applies, blends, or otherwise uses material inputs to produce or store an intermediate or a completed product. A single stationary source may contain more than one process unit, and a process unit may contain more than one emissions unit.

(*b*) The following list identifies the process units at specific categories of stationary sources:

(*1*) For a steam electric generating facility, the process unit consists of those portions of the plant that contribute directly to the production of electricity. For example, at a pulverized coal-fired facility, the process unit would generally be the combination of those systems from the coal receiving equipment through the emission stack (excluding post-combustion pollution controls), including the coal handling equipment, pulverizers or coal crushers, feedwater heaters, ash handling, boiler, burners, turbine-generator set, condenser, cooling tower, water treatment system, air preheaters, and operating control systems. Each separate generating unit is a separate process unit.

(*2*) For a petroleum refinery, there are several categories of process units: Those that separate and/or distill petroleum feedstocks; those that change molecular structures; petroleum treating processes; auxiliary facilities, such as steam generators and hydrogen production units; and those that load, unload, blend or store intermediate or completed products.

(*3*) For an incinerator, the process unit would consist of components from the feed pit or refuse pit to the stack, including conveyors, combustion devices, heat exchangers and steam generators, quench tanks, and fans.

* * * * *

(41) * * *

(ii) * * *

(*c*) Shall exclude, in calculating any increase in emissions that results from the particular project, that portion of the unit's emissions following the project that an existing unit could have accommodated during the consecutive 24-month period used to establish the baseline actual emissions under paragraph (b)(48) of this section and that are also unrelated to the particular project, including any increased utilization due to product demand growth; or

* * * * *

(48) * * *

(ii) * * *

(*d*) For a regulated NSR pollutant, when a project involves multiple emissions units, only one consecutive 24-month period must be used to determine the baseline actual emissions for all the emissions units being changed. A different consecutive 24-month period can be used for each regulated NSR pollutant.

* * * * *

(49) * * *

(i) *Greenhouse gases (GHGs),* the air pollutant defined in § 86.1818–12(a) of this chapter as the aggregate group of six greenhouse gases: Carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride, shall not be subject to regulation except as provided in paragraph (b)(49)(iv) of this section and shall not be subject to regulation if the stationary source maintains its total source-wide emissions below the GHG PAL level, meets the requirements in paragraphs (aa)(1) through (15) of this section, and complies with the PAL permit containing the GHG PAL.

(ii) For purposes of paragraphs (b)(49)(iii) through (iv) of this section, the term *tpy CO2 equivalent emissions (CO_2e)* shall represent an amount of GHGs emitted, and shall be computed as follows:

(*a*) Multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published at Table A–1 to subpart A of part 98 of this chapter—Global Warming Potentials.

(*b*) Sum the resultant value from paragraph (b)(49)(ii)(*a*) of this section for each gas to compute a tpy CO_2e.

(iii) The term *emissions increase* as used in paragraph (b)(49)(iv) of this section shall mean that both a significant emissions increase (as calculated using the procedures in paragraph (a)(2)(iv) of this section) and a significant net emissions increase (as defined in paragraphs (b)(3) and (b)(23) of this section) occur. For the pollutant GHGs, an emissions increase shall be based on tpy CO_2e, and shall be calculated assuming the pollutant GHGs is a regulated NSR pollutant, and ''significant'' shall be defined as 75,000 tpy CO_2e instead of applying the value in paragraph (b)(23)(ii) of this section.

(iv) * * *

(*a*) * * *

(*b*) The stationary source is an existing major stationary source for a regulated NSR pollutant that is not GHGs, and also will have an emissions increase of a regulated NSR pollutant, and an emissions increase of 75,000 tpy CO_2e or more.

* * * * *

(51) *Reviewing authority* means the State air pollution control agency, local agency, other State agency, Indian tribe, or other agency authorized by the Administrator to carry out a permit program under § 51.165 or § 51.166 of this chapter, or the Administrator in the case of EPA-implemented permit programs under this section.

* * * * *

(g) * * *

(4) Lands within the exterior boundaries of Indian Reservations may be redesignated only by the appropriate Indian Governing Body. The appropriate Indian Governing Body may submit to the Administrator a proposal to redesignate areas Class I, Class II, or Class III provided that:

* * * * *

(*h*) Municipal incinerators capable of charging more than 50 tons of refuse per day;

* * * * *

(j)(1) A major stationary source or major modification shall meet each applicable emissions limitation under the State Implementation Plan and each applicable emissions standard and standard of performance under 40 CFR parts 60, 61, and 63.

* * * * *

(m) *Air quality analysis*—(1) *Preapplication analysis.* (i) * * *

(*a*) For the source, each pollutant that it would have the potential to emit in a significant amount;

* * * * *

(n) * * *

(1) With respect to a source or modification to which paragraphs (j), (k), (m), and (o) of this section apply, such information shall include:

* * * * *

(p) * * *

* * * * *

(5) *Class I variances.* The owner or operator of a proposed source or modification may demonstrate to the Federal Land Manager that the emissions from such source or modification would have no adverse impact on the air quality related values of any such lands (including visibility), notwithstanding that the change in air quality resulting from emissions from such source or modification would cause or contribute to concentrations which would exceed the maximum allowable increases for a Class I area. If the Federal Land Manager concurs with such demonstration and he so certifies, the State may authorize the Administrator, provided that the applicable requirements of this section are otherwise met, to issue the permit with such emission limitations as may be necessary to assure that emissions of sulfur dioxide, $PM_{2.5}$, PM_{10}, and nitrogen

oxides would not exceed the following maximum allowable increases over minor source baseline concentration for such pollutants:

(6) *Sulfur dioxide variance by Governor with Federal Land Manager's concurrence.* The owner or operator of a proposed source or modification which cannot be approved under paragraph (p)(5) of this section may demonstrate to the Governor that the source cannot be constructed by reason of any maximum allowable increase for sulfur dioxide for a period of 24 hours or less applicable to any Class I area and, in the case of Federal mandatory Class I areas, that a variance under this clause would not adversely affect the air quality related values of the area (including visibility). The Governor, after consideration of the Federal Land Manager's recommendation (if any) and subject to his concurrence, may, after notice and public hearing, grant a variance from such maximum allowable increase. If such variance is granted, the Administrator shall issue a permit to such source or modification pursuant to the requirements of paragraph (p)(8) of this section provided that the applicable requirements of this section are otherwise met.

(7) *Variance by the Governor with the President's concurrence.* In any case where the Governor recommends a variance with which the Federal Land Manager does not concur, the recommendations of the Governor and the Federal Land Manager shall be transmitted to the President. The President may approve the Governor's recommendation if he finds that the variance is in the national interest. If the variance is approved, the Administrator shall issue a permit pursuant to the requirements of paragraph (p)(8) of this section provided that the applicable requirements of this section are otherwise met.

(8) *Emission limitations for Presidential or gubernatorial variance.* In the case of a permit issued pursuant to paragraph (p)(6) or (7) of this section, the source or modification shall comply with such emission limitations as may be necessary to assure that emissions of sulfur dioxide from the source or modification would not (during any day on which the otherwise applicable maximum allowable increases are exceeded) cause or contribute to concentrations which would exceed the following maximum allowable increases over the baseline concentration and to assure that such emissions would not cause or contribute to concentrations which exceed the otherwise applicable maximum allowable increases for periods of exposure of 24 hours or less for more than 18 days, not necessarily consecutive, during any annual period:

* * * * *

(r) * * *

(4) At such time that a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforceable limitation which was established after August 7, 1980, on the capacity of the source or modification otherwise to emit a pollutant, such as a restriction on hours of operation, then the requirements of paragraphs (j) through (s) of this section shall apply to the source or modification as though construction had not yet commenced on the source or modification.

* * * * *

(u) * * *

(2) * * *

(i) * * *

(ii) The delegate agency shall send a copy of any public comment notice required under paragraph (q) of this section to the Administrator through the appropriate Regional Office.

(3) In the case of a source or modification which proposes to construct in a Class III area, emissions from which would cause or contribute to air quality exceeding the maximum allowable increase applicable if the area were designated a Class III area, and where no standard under section 111 of the Act has been promulgated for such source category, the Administrator must approve the determination of best available control technology as set forth in the permit.

* * * * *

(w) *Permit rescission.* (1) Any permit issued under this section or a prior version of this section shall remain in effect, unless and until it expires under paragraph (r)(2) of this section or is rescinded under this paragraph (w).

* * * * *

[FR Doc. 2019–25973 Filed 12–19–19; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2018–0146; FRL–10003–39–Region 9]

Approval of Air Quality Implementation Plans; California; Ventura County; 8-Hour Ozone Nonattainment Area Requirements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve, or conditionally approve, all or portions of two state implementation plan (SIP) revisions submitted by the State of California to meet Clean Air Act (CAA or ''the Act'') requirements for the 2008 8-hour ozone national ambient air quality standards (NAAQS or ''standards'') in the Ventura County, California (''Ventura County'') ozone nonattainment area. The two SIP revisions include the ''Final 2016 Ventura County Air Quality Management Plan,'' and the Ventura County portion of the ''2018 Updates to the California State Implementation Plan.'' In today's action, the EPA refers to these submittals collectively as the ''2016 Ventura County Ozone SIP.'' The 2016 Ventura County Ozone SIP addresses the nonattainment area requirements for the 2008 ozone NAAQS, including the requirements for an emissions inventory, attainment demonstration, reasonable further progress, reasonably available control measures, contingency measures, among others; and establishes motor vehicle emissions budgets. The EPA is proposing to approve the 2016 Ventura County Ozone SIP as meeting all the applicable ozone nonattainment area requirements except for the contingency measure requirement, for which the EPA is proposing conditional approval. In addition, the EPA is beginning the adequacy process for the 2020 motor vehicle emissions budgets in the 2016 Ventura County Air Quality Management Plan through this proposed rule.

DATES: Written comments must arrive on or before January 21, 2020.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R09–OAR–2018–0146 at *https://www.regulations.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.* The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or

other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: John Kelly, Air Planning Office (AIR–2), EPA Region IX, 75 Hawthorne Street, San Francisco, CA 94105, (415) 947–4151, or by email at *kelly.johnj@epa.gov.*

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

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I. Other Clean Air Act Requirements Applicable to Serious Ozone Nonattainment Areas
IV. Proposed Action
V. Statutory and Executive Order Reviews

I. Regulatory Context

A. Ozone Standards, Area Designations, and SIPs

Ground-level ozone pollution is formed from the reaction of volatile organic compounds (VOC) and oxides of nitrogen (NO_X) in the presence of sunlight.[1] These two pollutants, referred to as ozone precursors, are emitted by many types of sources, including on- and off-road motor vehicles and engines, power plants and industrial facilities, and smaller area sources such as lawn and garden equipment and paints.

Scientific evidence indicates that adverse public health effects occur following exposure to ozone, particularly in children and adults with lung disease. Breathing air containing ozone can reduce lung function and inflame airways, which can increase respiratory symptoms and aggravate asthma or other lung diseases.[2]

Under section 109 of the CAA, the EPA promulgates NAAQS for pervasive air pollutants, such as ozone. The NAAQS are concentration levels that, the attainment and maintenance of which, the EPA has determined to be requisite to protect public health and welfare. In 1979, the EPA established the 1-hour ozone NAAQS of 0.12 parts per million (ppm) (referred to herein as the ''1-hour ozone NAAQS'').[3] Section 110 of the CAA requires states to develop and submit SIPs to implement, maintain, and enforce the NAAQS.

Under the CAA, as amended in 1977, the EPA designated all areas of the country as ''nonattainment,'' ''attainment,'' or ''unclassifiable'' with respect to each NAAQS, and in so doing, designated Ventura County (excluding the Channel Islands) as a nonattainment area for photochemical oxidant (later ozone).[4] States with nonattainment areas are required to submit revisions to their SIPs that include a control strategy and technical analysis to demonstrate how the area will attain the NAAQS (referred to as an ''attainment demonstration''), and the EPA took action on a number of related SIP revisions submitted by the California Air Resources Board (CARB) in the late 1970s and 1980s for Ventura County.[5] Under the 1977 CAA Amendments, nonattainment areas were to have attained the 1-hour ozone NAAQS no later than 1987. By 1990, however, like many other areas throughout the country, Ventura County had not yet attained the 1-hour ozone NAAQS, and the CAA was amended to include new SIP requirements and new attainment deadlines.

Under the CAA Amendments of 1990, Ventura County (excluding the Channel Islands) was classified as a ''Severe-15'' nonattainment area for the 1-hour ozone NAAQS based on a 1-hour ozone design value of 0.17 parts per million (ppm).[6] As a Severe-15 ozone nonattainment area, Ventura County was required to attain the 1-hour ozone NAAQS no later than November 15, 2005 and was subject to additional SIP planning requirements, including a revised attainment demonstration.

In the wake of the classification of Ventura County as a Severe-15 nonattainment area for the 1-hour ozone NAAQS, CARB submitted a number of SIP revisions for Ventura County that contained an attainment demonstration for the 1-hour ozone NAAQS and other SIP elements, and that relied on a combination of mobile source control measures adopted by CARB and stationary source control measures adopted by the Ventura County Air Pollution Control District (VCAPCD or ''District''). In connection with these submittals, the EPA took the following actions:

- 1994 Air Quality Management Plan for Ventura County and related State Strategy—The EPA approved the control measures, the 15 percent rate of progress demonstration and attainment demonstration, among other elements, for the 1-hour ozone NAAQS at 62 FR 1150 (January 8, 1997);
- Ventura County 1995 Air Quality Management Plan Revision—The EPA approved the revised rule adoption and implementation schedule at 62 FR 1150 (January 8, 1997);
- Ventura County 1997 Air Quality Management Plan—The EPA approved certain commitments to adopt and implement control measures at 63 FR 19659 (April 21, 1998).

As noted previously, Ventura County was required to attain the 1-hour ozone NAAQS no later than 2005, and in 2009, the EPA determined that Ventura County had attained the 1-hour ozone NAAQS by the 2005 applicable attainment date.[7] Since 2005, 1-hour

[1] The State of California refers to reactive organic gases (ROG) rather than VOC in some of its ozone-related SIP submissions. As a practical matter, ROG and VOC refer to the same set of chemical constituents, and for the sake of simplicity, we refer to this set of gases as VOC in this proposed rule.

[2] ''Fact Sheet—2008 Final Revisions to the National Ambient Air Quality Standards for Ozone,'' dated March 2008.

[3] 44 FR 8202 (February 8, 1979).

[4] 43 FR 8962, at 8972 (March 3, 1978). Ventura County lies within California's South Central Coast Air Basin, which includes the counties of Santa Barbara and San Luis Obispo in addition to Ventura County.

[5] Under California law, CARB is the state agency that is responsible for the adoption and submission to the EPA of California SIPs and SIP revisions, and it has broad authority to establish emissions standards and other requirements for mobile sources. Local and regional air pollution control districts in California are responsible for the regulation of stationary sources and are generally responsible for the development of regional air quality plans. In Ventura County, the Ventura County Air Pollution Control District develops and adopts air quality management plans to address CAA planning requirements applicable to that region. Such plans are then submitted to CARB for adoption and submittal to the EPA as revisions to the California SIP.

[6] 56 FR 56694 (November 6, 1991). For the 1-hour ozone NAAQS, the Channel Islands of Ventura County are part of the unclassifiable/attainment area comprised by the Channel Islands portion of the South Central Coast Air Basin. See 56 FR 56694, at 56732 (November 6, 1991).

[7] 74 FR 25153 (May 27, 2009).

ozone design values in Ventura County have decreased from 0.12 ppm in 2005 (based on 2003–2005 data) to 0.10 ppm in 2018 (based on 2016–2018 data) and are consistent with continued attainment of the 1-hour ozone NAAQS.[8]

In 1997, the EPA revised the NAAQS for ozone, setting it at 0.08 ppm averaged over an 8-hour timeframe (referred to herein as the ''1997 ozone NAAQS'') to replace the existing 1-hour ozone NAAQS of 0.12 ppm.[9] In 2004, the EPA designated and classified Ventura County (excluding the Channel Islands) as a ''Moderate'' nonattainment area for the 1997 ozone NAAQS but later granted CARB's request to reclassify Ventura County to ''Serious'' nonattainment for the 1997 ozone NAAQS.[10] Serious ozone nonattainment areas were required to attain the 1997 ozone NAAQS as expeditiously as practicable, but no later than June 15, 2013. In 2012, the EPA determined that Ventura County attained the 1997 ozone NAAQS based on the ambient data for years 2009–2011.[11] Since 2011, the eight-hour ozone design values for Ventura County have decreased from 0.083 ppm in 2011 (based on 2009–2011 data) to 0.078 ppm in 2018 (based on 2016–2018 data) and are consistent with continued attainment of the 1997 ozone NAAQS.[12]

In 2008, the EPA lowered the 8-hour ozone NAAQS to 0.075 ppm (referred to herein as the ''2008 ozone NAAQS'') to replace the 1997 ozone NAAQS of 0.08 ppm.[13] In 2012, the EPA designated Ventura County (excluding the Channel Islands) as nonattainment for the 2008 ozone NAAQS and classified the area as Serious.[14] Areas classified as Serious must attain the NAAQS within 9 years of the effective date of the nonattainment designation.[15] The SIP revisions that are the subject of today's proposed action address the Serious nonattainment area requirements that apply to Ventura County for the 2008 ozone NAAQS.

B. The Ventura County Ozone Nonattainment Area

The Ventura County nonattainment area for the 2008 ozone NAAQS consists of the Ventura County portion of California's South Central Coast Air Basin, excluding the Channel Islands. Ventura County encompasses approximately 2,200 square miles and has a population of approximately 874,000 (in 2018); it is located west of Los Angeles County and is bordered by Kern County to the north, Santa Barbara County and the Pacific Ocean to the west, and the Pacific Ocean and Los Angeles County to the south. Ozone in the Ventura County nonattainment area is caused by both locally generated emissions and transport from the South Coast Air Basin.[16] Ocean-going vessels calling on Port Hueneme or the ports of Los Angeles or Long Beach and transiting vessels passing through southern California waters, but without calling at the ports, also impact Ventura County's air quality.

C. CAA and Regulatory Requirements for 2008 Ozone Nonattainment Area SIPs

States must implement the 2008 ozone NAAQS under title I, part D of the CAA, including sections 171–179B of subpart 1 (''Nonattainment Areas in General'') and sections 181–185 of subpart 2 (''Additional Provisions for Ozone Nonattainment Areas''). To assist states in developing effective plans to address ozone nonattainment problems, in 2015, the EPA issued a SIP Requirements Rule (SRR) for the 2008 ozone NAAQS (''2008 Ozone SRR'') that addressed implementation of the 2008 standards, including attainment dates, requirements for emissions inventories, attainment and reasonable further progress (RFP) demonstrations, among other SIP elements, as well as the transition from the 1997 ozone NAAQS to the 2008 ozone NAAQS and associated anti-backsliding requirements.[17] The 2008 Ozone SRR is codified at 40 CFR part 51, subpart AA. We discuss the CAA and regulatory requirements for the elements of 2008 ozone plans relevant to this proposal in more detail below.

The EPA's 2008 Ozone SRR was challenged, and on February 16, 2018, the U.S. Court of Appeals for the D.C. Circuit (''D.C. Circuit'') published its decision in *South Coast Air Quality Management District* v. *EPA*[18] (''*South Coast II*'')[19] vacating portions of the 2008 Ozone SRR. The only aspect of the *South Coast II* decision that affects this proposed action is the vacatur of the alternative baseline year for RFP plans. More specifically, the 2008 Ozone SRR required states to develop the baseline emissions inventory for RFP plans using the emissions for the most recent calendar year for which states submit a triennial inventory to the EPA under subpart A (''Air Emissions Reporting Requirements'') of 40 CFR part 51, which was 2011. However, the 2008 Ozone SRR allowed states to use an alternative year, between 2008 and 2012, for the baseline emissions inventory provided that the state demonstrated why the alternative baseline year was appropriate. In the *South Coast II* decision, the D.C. Circuit vacated the provisions of the 2008 Ozone SRR that allowed states to use an alternative baseline year for demonstrating RFP.

II. Submissions From the State of California To Address 2008 Ozone Requirements in Ventura County

A. Summary of Submissions

In this document, we are proposing action on all or portions of two SIP revisions, which are described in detail in the following paragraphs. Collectively, we refer to the relevant portions of the two SIP revisions as the 2016 Ventura County Ozone SIP.

[8] Under EPA regulations at 40 CFR 50.9 and appendix H, the 1-hour ozone NAAQS is attained at a site when the expected number of days per calendar year with maximum hourly average concentrations above 0.12 ppm is equal to or less than 1. The design value for 1-hour ozone is generally the fourth highest daily maximum 1-hour ozone concentration measured during a 3-year period at each site in the area, assuming 3 complete years of data. The highest design value among the various ozone monitoring sites represents the design value for the area. The data for Ventura County is from CARB, Aerometric Data Analysis System Air Quality Database, Ventura County Ozone Trends Summary Report, September 11, 2019.

[9] 62 FR 38856 (July 18, 1997).

[10] 69 FR 23857 at 23889 (April 30, 2004); 73 FR 29073 (May 20, 2008).

[11] 77 FR 56775 (September 14, 2012).

[12] Under EPA regulations at 40 CFR 50.10 and appendix I, the 1997 ozone NAAQS is attained at a site when the 3-year average of the annual fourth-highest daily maximum 8-hour average ozone concentration is less than or equal to 0.08 ppm. This 3-year average is referred to as the design value. When the design value is less than or equal to 0.084 ppm (based on the rounding convention in 40 CFR part 50, appendix I) at each monitoring site within the area, then the area is meeting the 1997 ozone NAAQS. The highest design value among the various ozone monitoring sites in the area represents the design value for the area. The data for Ventura County is from EPA, Design Value Report, dated July 3, 2019.

[13] 73 FR 16436 (March 27, 2008). The EPA further tightened the 8-hour ozone NAAQS to 0.070 ppm in 2015, but this proposed action relates to the requirements for the 2008 ozone NAAQS. Information on the 2015 ozone NAAQS is available at 80 FR 65292 (October 26, 2015).

[14] 77 FR 30088 (May 21, 2012).

[15] CAA section 181(a)(1), 40 CFR 51.1102 and 51.1103(a).

[16] The South Coast Air Basin includes Orange County, the southwestern two-thirds of Los Angeles County, southwestern San Bernardino County, and western Riverside County.

[17] 80 FR 12264 (March 6, 2015).

[18] *South Coast Air Quality Management District* v. *EPA,* 882 F.3d 1138 (D.C. Cir. 2018) (''*South Coast II*'').

[19] The term ''*South Coast II*'' is used in reference to the 2018 court decision to distinguish it from a decision published in 2006 also referred to as ''*South Coast.*'' The earlier decision involved a challenge to the EPA's Phase 1 implementation rule for the 1997 ozone NAAQS. *South Coast Air Quality Management Dist.* v. *EPA,* 472 F.3d 882 (D.C. Cir. 2006).

1. VCAPCD's 2016 Air Quality Management Plan

On April 11, 2017, CARB submitted the Final 2016 Ventura County Air Quality Management Plan (February 14, 2017) (''2016 Ventura County AQMP'') to the EPA as a revision to the California SIP.[20] The 2016 Ventura County AQMP addresses the nonattainment area requirements for Ventura County for the 2008 ozone NAAQS.

More specifically, the 2016 Ventura County AQMP includes a base year emissions inventory,[21] reasonably available control measure (RACM) demonstration, RFP demonstration, attainment demonstration, contingency measures, motor vehicle and general conformity emissions budgets, and it also addresses the emissions statement requirement. The appendices to the 2016 Ventura County AQMP provide documentation for the emissions inventories, RACM demonstration, and the photochemical modeling conducted in support of the attainment demonstration. Further support for the attainment demonstration is provided in Appendix J (''Ventura County Unmonitored Area Analysis'') and Appendix K (''Ventura County Weight of Evidence Assessment''). The April 11, 2017 SIP submittal of the 2016 Ventura County AQMP was accompanied by public process documentation at both the County and State levels.

Since submittal of the 2016 Ventura County AQMP, CARB has replaced or supplemented certain elements of the 2016 Ventura County AQMP (such as the RFP demonstration and contingency measure element) through a SIP revision submittal dated December 5, 2018 and discussed in more detail in the following subsection. In addition, by letter dated August 29, 2019, CARB has provided some additional information related to the motor vehicle emissions budgets in the 2016 Ventura County AQMP.[22]

2. CARB's 2018 Updates to the California State Implementation Plan

On December 5, 2018, CARB submitted the 2018 Updates to the California State Implementation Plan (''2018 SIP Update'') to the EPA as a revision to the California SIP.[23] CARB adopted the 2018 SIP Update on October 25, 2018. CARB developed the 2018 SIP Update in response to the court's decision in *South Coast II* vacating the 2008 Ozone SRR with respect to the use of an alternate baseline year for demonstrating RFP and to provide additional information pertaining to the contingency measure requirement in the wake of the court decision in *Bahr* v. *EPA*.[24] The 2018 SIP Update includes an RFP demonstration using the required 2011 baseline year for Ventura County for the 2008 ozone NAAQS. The RFP demonstration in the 2018 SIP Update for Ventura County supersedes and replaces the RFP demonstration in the 2016 Ventura County AQMP.[25]

The 2018 SIP Update includes updates for 8 different California ozone nonattainment areas. We have already taken action to approve the San Joaquin Valley and South Coast portions of the 2018 SIP Update.[26] In today's document, we are proposing action on the Ventura County portion of the 2018 SIP Update. Also, to supplement the contingency measure element of the 2016 Ventura County Ozone SIP, in a letter dated August 30, 2019, CARB forwarded to the EPA an August 16, 2019 letter of commitment from the District.[27] In its letter, the District commits to modify at least one of three existing rules to create a contingency measure that will be triggered if the area fails to meet an RFP milestone or to attain the 2008 ozone NAAQS and to transmit the rule, as amended, to CARB for submittal to the EPA.[28] In the August 30, 2019 letter, CARB commits to submit the revised District rule or rules to the EPA as a SIP revision within 12 months of the effective date of the EPA's final conditional approval of the contingency measure element of the 2016 Ventura County Ozone SIP.

B. CAA Procedural Requirements for Adoption and Submission of SIP Revisions

Sections 110(a) and 110(l) of the CAA require a state to provide reasonable public notice and opportunity for public hearing prior to the adoption and submission of a SIP or SIP revision. To meet this requirement, every SIP submittal should include evidence that adequate public notice was given and an opportunity for a public hearing was provided consistent with the EPA's implementing regulations in 40 CFR 51.102.

Both the District and CARB have satisfied the applicable statutory and regulatory requirements for reasonable public notice and hearing prior to the adoption and submittal of the SIP revisions that comprise the 2016 Ventura County Ozone SIP. With respect to the 2016 Ventura County AQMP, the District provided two public review periods: One for the initial draft 2016 Ventura County AQMP and a second for the final draft 2016 Ventura County AQMP. Combined, the public review periods lasted 43 days. The District published notices of the two public review periods on its website and in a local newspaper. The District also published notice of a public hearing to be held on February 14, 2017, for the adoption of the 2016 Ventura County AQMP. On February 14, 2017, the District held the public hearing, and, through a minute order, adopted the 2016 Ventura County AQMP and

[20] Letter dated April 11, 2017, from Richard W. Corey, Executive Officer, CARB, to Alexis Strauss, Acting Regional Administrator, EPA Region IX.

[21] The 2012 base year emissions inventory included in the 2016 Ventura County AQMP supersedes and replaces a previous submittal of the 2012 base year emissions inventory for Ventura County in the ''8-Hour Ozone State Implementation Plan Emission Inventory Submittal'' (the ''Multi-Area Emission Inventory''). The Multi-Area Emission Inventory was submitted by CARB on July 17, 2014, and included 2012 base year emissions inventories for 16 nonattainment areas, including Ventura County. Relative to the corresponding inventory for Ventura County in the Multi-Area Emission Inventory, the 2012 base year emissions inventory in the 2016 Ventura County AQMP reflects updated stationary, area, and nonroad source calculations as well as an updated version of the EMFAC model for on-road motor vehicle estimates. In a letter dated November 15, 2019, CARB withdrew the earlier submitted 2012 base year emissions inventory for Ventura County in light of the updated inventory in the 2016 Ventura County AQMP. Letter dated November 15, 2019, from Richard W. Corey, Executive Officer, CARB, to Mike Stoker, Regional Administrator, EPA Region IX. In section III.A of this document, we are proposing approval of the superseding 2012 base year emissions inventory in the 2016 Ventura County AQMP.

[22] Letter dated August 29, 2019, from Dr. Michael T. Benjamin, Chief, Air Quality Planning and Science Division, CARB, to Amy Zimpfer, Assistant Director, Air Division, EPA Region IX, including attachments A and B.

[23] Letter dated December 5, 2018, from Richard Corey, Executive Officer, CARB, to Mike Stoker, Regional Administrator, EPA Region IX.

[24] *Bahr* v. *EPA,* 836 F.3d 1218 (9th Cir. 2016) (''*Bahr* v. *EPA*''). In *Bahr* v. *EPA,* the court rejected the EPA's longstanding interpretation of CAA section 172(c)(9) as allowing for early implementation of contingency measures. The court concluded that a contingency measure must take effect at the time the area fails to make RFP or attain by the applicable attainment date, not before.

[25] CARB withdrew the RFP demonstration from the 2016 Ventura County AQMP in light of the revised RFP demonstration for Ventura County in the 2018 SIP Update. Letter dated November 15, 2019, from Richard W. Corey, Executive Officer, CARB, to Mike Stoker, Regional Administrator, EPA Region IX. In section III.E of this document, we are proposing approval of the superseding RFP demonstration for Ventura County in the 2018 SIP Update.

[26] 84 FR 11198 (March 25, 2019) (final approval of the San Joaquin Valley portion of the 2018 SIP Update) and 84 FR 52005 (October 1, 2019) (final approval of the South Coast portion of the 2018 SIP Update).

[27] Letter dated August 30, 2019, from Richard Corey, Executive Officer, CARB, to Mike Stoker, Regional Administrator, EPA Region IX.

[28] Letter dated August 16, 2019, from Michael Villegas, VCAPCD Air Pollution Control Officer, to Richard Corey, CARB Executive Officer, provided as enclosure to August 30, 2019 CARB letter.

directed staff to forward the plan to CARB for inclusion in the California SIP.

CARB also provided public notice and opportunity for public comment on the 2016 Ventura County AQMP. On February 17, 2017, CARB released for public review its Staff Report for the 2016 Ventura County AQMP and published a notice of public meeting to be held on March 23, 2017, to consider adoption of the 2016 Ventura County AQMP.[29] On March 23, 2017, CARB held the hearing and adopted the 2016 Ventura County AQMP as a revision to the California SIP, and directed the Executive Officer to submit the 2016 Ventura County AQMP to the EPA for approval into the California SIP.[30] On April 11, 2017, the Executive Officer of CARB submitted the 2016 Ventura County AQMP to the EPA and included a public comments log entry indicating that there were no public comments during the Board hearing held on March 23, 2017.[31]

With respect to the 2018 SIP Update, CARB also provided public notice and opportunity for public comment. On September 21, 2018, CARB released for public review the 2018 SIP Update and published a notice of public meeting to be held on October 23, 2018, to consider adoption of the 2018 SIP Update.[32] On October 23, 2018, through Resolution 18–50, CARB adopted the 2018 SIP Update. On December 5, 2018, CARB submitted the 2018 SIP Update to the EPA.

Based on information provided in each of the SIP revisions summarized above, the EPA has determined that all hearings were properly noticed. Therefore, we find that the submittals of the 2016 Ventura County AQMP and the 2018 SIP Update meet the procedural requirements for public notice and hearing in CAA sections 110(a) and 110(l) and 40 CFR 51.102.

III. Evaluation of the 2016 Ventura County Ozone SIP

A. Emissions Inventories

1. Statutory and Regulatory Requirements

CAA sections 172(c)(3) and 182(a)(1) require states to submit for each ozone nonattainment area a ''base year inventory'' that is a comprehensive, accurate, current inventory of actual emissions from all sources of the relevant pollutant or pollutants in the area. In addition, the 2008 Ozone SRR requires that the inventory year be selected consistent with the baseline year for the RFP demonstration, which is the most recent calendar year for which a complete triennial inventory is required to be submitted to the EPA under the Air Emissions Reporting Requirements.[33]

The EPA has issued guidance on the development of base year and future year emissions inventories for ozone and other pollutants.[34] Emissions inventories for ozone must include emissions of VOC and NO_X and represent emissions for a typical ozone season weekday.[35] States should include documentation explaining how the emissions data were calculated. In estimating mobile source emissions, states should use the latest emissions models and planning assumptions available at the time the SIP is developed.[36]

Future baseline emissions inventories must reflect the most recent population, employment, travel and congestion projections for the area. In this context, future ''baseline'' emissions inventories refer to emissions estimates for a given year and area that reflect rules and regulations and other measures that are already adopted and that take into account expected growth. Future baseline emissions inventories are necessary to show the projected effectiveness of SIP control measures. Both the base year and future year inventories are necessary for photochemical modeling to demonstrate attainment.

2. Summary of State's Submission

The 2016 Ventura County AQMP includes base year (2012) and future year baseline inventories for NO_X and VOC for the Ventura County ozone nonattainment area. Documentation for the inventories is found in Chapter 2 (''2012 Baseline Emissions Inventory'') and Appendix A (''Ventura County Emissions Inventory Documentation'') of the 2016 Ventura County AQMP. Because ozone levels in Ventura County are typically higher from May through October, these inventories represent average summer day emissions. The 2012 base year and future year inventories in the 2016 Ventura County AQMP reflect District rules adopted prior to July 2015, and CARB rules adopted by November 2015.[37] The mobile source portions of both base year and projected future year inventories were developed using California's EPA-approved mobile source emissions model, EMFAC2014, for estimating on-road motor vehicle emissions.[38]

Emissions estimates of VOC and NO_X in the 2016 Ventura County AQMP are grouped into two general categories: (1) Stationary and area-wide sources, and (2) mobile sources, which are comprised of on-road motor vehicles and other mobile (off-road) sources. Stationary sources refer to larger ''point'' sources that have a fixed geographic location, such as power plants, industrial engines, and oil storage tanks, and that are subject to District permits. Area-wide sources are emissions sources occuring over a wide geographic area such as consumer products and architectural coatings. The emissions inventories for the 2016 Ventura County AQMP account for smaller permitted stationary sources in the area source categories. The mobile sources category is divided into two major subcategories, ''on-road'' and ''off-road'' mobile sources. On-road mobile sources include light-duty automobiles, light-, medium-, and heavy-duty trucks, and motorcycles. Off-road mobile sources include aircraft and boats.

For the 2016 Ventura County AQMP, point source emissions for the 2012 base year emissions inventory are based on reported data from facilities using the District's annual emissions reporting program, which applies under District Rule 24 (''Source Recordkeeping, Reporting and Emissions Statements'') to all stationary sources in Ventura County that emit more than 25 tons per year (tpy) or more of VOC or NO_X. Area sources include smaller emissions sources distributed across the nonattainment area. CARB and the

[29] Notice of Public Meeting to Consider the 2016 Ozone SIP for Ventura County, signed by Richard Corey, Executive Officer, CARB, February 17, 2017.

[30] CARB Resolution 17–5.

[31] CARB ''Public Comment Log,'' dated March 30, 2017. See also, Transcript of the March 23, 2017 Meeting of the State of California Air Resources Board, 7–8.

[32] Notice of Public Meeting to Consider the 2018 Updates to the California State Implementation Plan signed by Richard Corey, Executive Officer, CARB, September 21, 2018.

[33] 2008 Ozone SRR at 40 CFR 51.1115(a) and the Air Emissions Reporting Requirements at 40 CFR part 51, subpart A.

[34] ''Emissions Inventory Guidance for Implementation of Ozone and Particulate Matter National Ambient Air Quality Standards (NAAQS) and Regional Haze Regulations,'' EPA–454/B–17–002, May 2017. At the time the 2016 Ventura County AQMP was developed, the following EPA emissions inventory guidance applied: ''Emissions Inventory Guidance for Implementation of Ozone and Particulate Matter National Ambient Air Quality Standards (NAAQS) and Regional Haze Regulations,'' EPA–454–R–05–001, August 2005.

[35] 40 CFR 51.1115(a) and (c), and 40 CFR 51.1100(bb) and (cc).

[36] 80 FR 12264, at 12290 (March 6, 2015).

[37] The 2012 base year and future year baseline emissions inventories in the 2016 Ventura County AQMP exclude non-anthropogenic ''natural sources'' emissions such as biogenics, geogenics, and wildfires. However, emissions from such natural sources are included in the emissions inventories used for the attainment demonstration because they affect ozone formation.

[38] EMFAC is short for EMission FACtor.

District estimate emissions for area sources using established inventory methods, including publicly available emission factors and activity information. Area source methodologies are described in Appendix A of the 2016 Ventura County AQMP. To improve and update the emissions inventory, District staff evaluate the data and methods used on an annual basis. CARB and District staff coordinate the update process through the State's Emissions Inventory Technical Advisory Committee.

On-road emissions inventories in the 2016 Ventura County AQMP are calculated using CARB's EMFAC2014 model [39] and the travel activity data provided by the Southern California Association of Governments (SCAG) in ''The 2016–2040 Regional Transportation Plan/Sustainable Communities Strategy.'' [40] CARB provided emissions inventories for off-road equipment, including construction and mining equipment, industrial and commercial equipment, lawn and garden equipment, agricultural equipment, ocean-going vessels, commercial harbor craft, locomotives, cargo handling equipment, pleasure craft, and recreational vehicles. CARB uses several models to estimate emissions for more than one hundred off-road equipment categories.[41] The District estimates aircraft emissions based on information provided by the airport operators in Ventura County.

The 2016 Ventura County AQMP distinguishes between emission sources within Ventura County, which includes coastal emissions (including marine vessel emissions) within three miles of the coastline, and emissions sources operating outside the county but within 100 nautical miles of the coastline. The latter are included in the Outer Continental Shelf (OCS) category. The base year emissions inventory reflects only those emissions sources that operate within the nonattainment area (*i.e.,* within the three miles of the coastline), but OCS emissions sources affect ozone concentrations in the nonattainment area and thus are included in the emissions inventories used for the attainment demonstration in the 2016 Ventura County AQMP.

Future emissions forecasts in the 2016 Ventura County AQMP are primarily based on demographic and economic growth projections provided by SCAG (*i.e.,* the metropolitan planning organization (MPO) for Ventura County), and control factors developed by the District in reference to the 2012 base year. Growth factors used to project these baseline inventories are derived mainly from data obtained from SCAG.[42]

Under EPA's SIP regulations for nonattainment new source review (NSR) programs, a state may allow new major stationary sources or major modifications to use emission reductions credits (ERCs) that were generated through shutdown or curtailed emissions units occuring before the base year of an attainment plan. However, to use such ERCs, the projected emissions inventory used to develop the attainment demonstration must explicitly include the emissions from such previously shutdown or curtailed emissions units.[43] The District has elected to provide for use of pre-base year ERCs as offsets by explicitly including such ERCs in the 2020 attainment year inventory. The ERC set-aside in the attainment year (2020) amounts to 1.72 tons per day (tpd) of VOC and 0.82 tpd of NO_X.

Table 1 provides a summary of the District's 2012 base year and future attainment year baseline emissions estimates in tpd (average summer day) for VOC and NO_X. These inventories provide the basis for the control measure analysis and the attainment demonstration in the 2016 Ventura County AQMP. Based on the inventory for 2012, stationary, area and mobile sources contribute roughly equally to county-wide VOC emissions, whereas mobile sources are the predominant sources of NO_X emissions. The inventory for 2012 also shows the extent (about 40 percent) to which OCS sources contribute to the overall anthropogenic NO_X emissions total used for attainment modeling purposes.

TABLE 1—VENTURA COUNTY 2012 BASE YEAR AND 2020 ATTAINMENT YEAR EMISSIONS INVENTORIES

[Summer planning inventory, tpd]

Category	2012		2020	
	VOC	NO_X	VOC	NO_X
Stationary	8.55	2.08	8.67	1.87
Area Sources	11.57	0.95	10.91	0.62
On-Road Mobile Sources	8.54	12.62	4.21	6.01
Other (Off-Road) Mobile Sources	8.14	8.78	6.63	7.25
ERCs	.....	.....	1.72	0.82
Total for Ventura County Nonattainment Area	36.81	24.44	32.14	16.57
OCS Sources	0.96	16.11	1.37	15.49
Total Anthropogenic Emissions Used for Attainment Demonstration	37.76	40.55	33.50	32.06

Source: 2016 Ventura County AQMP, Appendix A, tables A–7 and A–8. The sum of the emissions values may not equal the total shown due to rounding of the numbers.

Following the *South Coast II* decision, CARB submitted the 2018 SIP Update to the EPA to, among other things, revise the RFP demonstration in the 2016 Ventura County AQMP based on a 2011 RFP baseline year (*i.e.,* rather than 2012).[44] Our analysis of the emissions inventories for the 2011 RFP baseline year and RFP milestone years 2017 and 2020 can be found in section III.E below.

[39] In December 2015, the EPA approved EMFAC2014 for SIP development and transportation conformity purposes in California. 80 FR 77337 (December 14, 2015). EMFAC2014 was the most recently approved version of the EMFAC model that was available at the time of preparation of the 2016 Ventura County AQMP. Recently, the EPA approved an updated version of the EMFAC model, EMFAC2017, for future SIP development and transportation purposes in California. 84 FR 41717 (August 15, 2019).

[40] See *http://scagrtpscs.net/Pages/FINAL2016RTPSCS.aspx.*

[41] 2016 Ventura County AQMP, 22.

[42] 2016 Ventura County AQMP, Appendix A, tables A–4 and A–6.

[43] 40 CFR 51.165(a)(3)(ii)(C)(1).

[44] See 2018 SIP Update, Section III (''SIP Elements for Ventura County''), 15–20; and Appendix A, pp. A–7—A–10.

3. The EPA's Review of the State's Submission

We have reviewed the 2012 base year emissions inventory in the 2016 Ventura County AQMP and the inventory methodologies used by the District and CARB for consistency with CAA requirements and EPA guidance. First, as required by EPA regulation, we find that the 2012 inventory includes estimates for VOC and NO_X for a typical ozone season weekday, and that CARB has provided adequate documentation explaining how the emissions are calculated. Second, we find that the 2012 base year emissions inventory in the 2016 Ventura County AQMP reflects appropriate emissions models and methodologies, and, therefore, represents a comprehensive, accurate, and current inventory of actual emissions during that year in the Ventura County nonattainment area. Third, we find that selection of year 2012 for the base year emissions inventory is appropriate because it is consistent with the 2011 RFP baseline year (from the 2018 SIP Update) because both inventories are derived from a common set of models and methods. Therefore, the EPA is proposing to approve the 2012 emissions inventory in the 2016 Ventura County AQMP as meeting the requirements for a base year inventory set forth in CAA section 182(a)(1) and 40 CFR 51.1115. In addition, although the requirement for a base year emissions inventory applies to the nonattainment area, we find that the District's estimates of OCS emissions out to 100 nautical miles (*i.e.,* beyond the nonattainment area boundary that extends 3 miles offshore) are reasonable and appropriate to include in the 2016 Ventura County AQMP given that such emissions must be accounted for in the ozone attainment demonstration for this nonattainment area.

With respect to future year baseline projections, we have reviewed the growth and control factors and find them acceptable and conclude that the future baseline emissions projections in the 2016 Ventura County AQMP reflect appropriate calculation methods and the latest planning assumptions.

Furthermore, we note that the future year baseline projections take into account emissions reductions from adopted State and local rules and regulations. As a general matter, the EPA will approve a SIP revision that takes emissions reduction credit for such control measures only where the EPA has approved the control measures as part of the SIP. Table 1 in the EPA's memorandum dated September 11, 2019, to the docket for this rulemaking lists District VOC and NO_X rules that the 2016 Ventura County AQMP relied upon in developing future year baseline emissions projections. Table 1 also includes information on EPA approval of these rules and shows that emissions reductions for stationary sources assumed by the 2016 Ventura County AQMP for future years are supported by rules approved as part of the SIP.[45] With respect to mobile sources, the EPA has taken action in recent years to approve CARB mobile source regulations into the California SIP.[46] We therefore find that the future year baseline projections in the 2016 Ventura County AQMP are properly supported by SIP-approved stationary and mobile source control measures.

B. Emissions Statement

1. Statutory and Regulatory Requirements

Section 182(a)(3)(B)(i) of the Act requires states to submit a SIP revision requiring owners or operators of stationary sources of VOC or NO_X to provide the state with statements of actual emissions from such sources. Statements must be submitted at least every year and must contain a certification that the information contained in the statement is accurate to the best knowledge of the individual certifying the statement. Section 182(a)(3)(B)(ii) of the Act allows states to waive the emissions statement requirement for any class or category of stationary sources that emit less than 25 tpy of VOC or NO_X, if the state provides an inventory of emissions from such class or category of sources as part of the base year or periodic inventories required under CAA sections 182(a)(1) and 182(a)(3)(A), based on the use of emission factors established by the EPA or other methods acceptable to the EPA.

The 2008 Ozone SRR provides that nonattainment areas are subject to the requirements of subpart 2 of part D of title I of the CAA that apply for that area's classification.[47] For all areas classified under subpart 2, the emissions statement requirement under CAA section 182(a)(3)(B)(i) applies. The preamble of the 2008 Ozone SRR states that if an area has a previously approved emissions statement rule for the 1997 ozone NAAQS or the 1-hour ozone NAAQS that covers all portions of the nonattainment area for the 2008 ozone NAAQS, such rule should be sufficient for purposes of the emissions statement requirement for the 2008 ozone NAAQS.[48] The state should review the existing rule to ensure it is adequate and, if so, may rely on it to meet the emissions statement requirement for the 2008 ozone NAAQS. Where an existing SIP-approved emissions statement rule is adequate to meet the requirements of the 2008 Ozone SRR, states can provide the rationale for that determination to the EPA in a written statement in their SIP submittal for the 2008 ozone NAAQS to meet this requirement. States should identify the various requirements and how each is met by the existing SIP-approved emissions statement program. Where an emissions statement requirement is modified for any reason, the state must provide the revision to the emissions statement rule as part of its SIP.

2. Summary of the State's Submission

The 2016 Ventura County AQMP addresses compliance with the emissions statement requirement in CAA section 182(a)(3)(B) for the 2008 ozone NAAQS by reference to District Rule 24 (''Source Recordkeeping, Reporting and Emissions Statements'').[49] District Rule 24 requires, among other things, emissions reporting from all Ventura County stationary sources of NO_X and VOC, but provides for waiver of the requirement by the Air Pollution Control Officer for sources that emit less than 25 tpy.[50] The EPA approved District Rule 24 as a revision to the Ventura County portion of the California SIP in 2000.[51] The District determined in the 2016 Ventura County AQMP that the existing provisions of District Rule 24 meet the emissions statement requirements for the 2008 ozone NAAQS.[52]

3. The EPA's Review of the State's Submission

For this action, we have reviewed VCAPCD's evaluation of SIP-approved District Rule 24 for compliance with the specific requirements for emissions statements under CAA section 182(a)(3)(B). We agree with the District that District Rule 24 applies within the entire ozone nonattainment area and that the nonattainment area is the same for both the 1-hour and 2008 ozone NAAQS; applies to all stationary sources of VOC and NO_X, except those

[45] The list of rules in Table 1 of our September 11, 2019 memorandum includes all the District rules for which specific future year emissions reductions are assumed as shown in Table 3–1 of the 2016 Ventura County AQMP.

[46] See 81 FR 39424 (June 16, 2016), 82 FR 14446 (March 21, 2017), and 83 FR 23232 (May 18, 2018).

[47] 40 CFR 51.1102.

[48] See 80 FR 12264, at 12291 (March 6, 2015).

[49] 2016 Ventura County AQMP, 16–18.

[50] District Rule 24 refers to ''reactive organic compounds,'' another term for ''volatile organic compounds.''

[51] 65 FR 76567 (December 7, 2000).

[52] 2016 Ventura County AQMP, 17.

emitting less than 25 tpy for which the District has waived the requirement (consistent with CAA section 182(a)(3)(B)(ii)); and requires reporting, on an annual basis, of total emissions of VOC and NO_X. Also, as required under CAA section 182(a)(3)(B), we note that District Rule 24 requires certification that the information provided to the District is accurate to the best knowledge of the individual certifying the emissions data.

Therefore, we propose to approve the emissions statement element of the 2016 Ventura County AQMP as meeting the requirements of CAA section 182(a)(3)(B) and the 40 CFR 51.1102.

C. Reasonably Available Control Measures Demonstration

1. Statutory and Regulatory Requirements

CAA section 172(c)(1) requires that each attainment plan provide for the implementation of all RACM as expeditiously as practicable (including such reductions in emissions from existing sources in the area as may be obtained through implementation of reasonably available control technology), and also provide for attainment of the NAAQS. The 2008 Ozone SRR requires that, for each nonattainment area required to submit an attainment demonstration, the state concurrently submit a SIP revision demonstrating that it has adopted all RACM necessary to demonstrate attainment as expeditiously as practicable and to meet any RFP requirements.[53]

The EPA has previously provided guidance interpreting the RACM requirement in the General Preamble for the Implementation of the Clean Air Act Amendments of 1990 (''General Preamble'') and in a memorandum titled ''Guidance on the Reasonably Available Control Measure Requirement and Attainment Demonstration Submissions for Ozone Nonattainment Areas.'' [54] In short, to address the requirement to adopt all RACM, states should consider all potentially reasonable control measures for source categories in the nonattainment area to determine whether they are reasonably available for implementation in that area and whether they would, if implemented individually or collectively, advance the area's attainment date by one year or more.[55] Any measures that are necessary to meet these requirements that are not already either federally promulgated, or part of the state's SIP, must be submitted in enforceable form as part of the state's attainment plan for the area.[56]

2. Summary of the State's Submission

For the 2016 Ventura County AQMP, the District, the Ventura County Transportation Commission (VCTC) and CARB each undertook a process to identify and evaluate potential RACM that could contribute to expeditious attainment of the 2008 ozone NAAQS in Ventura County. We describe these efforts in the three sections below. To determine what RACM may be necessary, the District compares, in the 2016 Ventura County AQMP, the projected 2019 emissions inventory to the 2020 attainment year. Comparing the levels of VOC and NO_X in these two years, during which emissions are declining, allows a simple subtraction to determine what amount of emissions reductions would result in 2020 attainment year-level emissions in the year 2019. Since levels of VOC are identical in both 2019 and 2020, no reduction was necessary to achieve the attainment year VOC emissions level. However, for NO_X the difference was 2 tpd, so the RACM analyses of the 2016 Ventura County AQMP appendices E, F and G focus on determining whether one or more control measures would be potentially reasonable and would result in a 2 tpd reduction of NO_X emissions prior to the 2020 attainment year.

a. District's RACM Analysis

The District's portion of the RACM demonstration for the 2008 ozone NAAQS focuses on stationary source controls and is described in the 2016 Ventura County AQMP on pages 54 and 55, and in Appendix E (''Ventura County Stationary Source Reasonably Available Control Measure Assessment''). Appendix E contains analyses of all potential stationary source control measures in the District's jurisdiction.

As background, the District notes that Ventura County was nonattainment for all prior ozone NAAQS, therefore the District's RACM analysis builds upon a foundation of District rules developed for earlier ozone plans. We provide a list of the District's NO_X and VOC rules approved into the California SIP in Table 1 of our September 11, 2019 memorandum to the docket for this proposed action.[57] The 48 SIP-approved District VOC or NO_X rules listed in Table 1 of our September 11, 2019 memorandum establish emission limits or other types of emissions controls for a wide range of sources, including use of solvents, refineries, gasoline storage, architectural coatings, oilfield drilling operations, various types of commercial coatings, boilers, steam generators and process heaters, marine coating operations, dry cleaning, and others. These rules have already provided significant and ongoing reductions toward attainment of the 2008 ozone NAAQS by 2020. In describing its stationary source controls, the District also notes the EPA's 2015 approval of its reasonably available control technology (RACT) SIP and our finding in that action that District rules that apply to ozone precursor emissions fulfill RACT requirements for the 2008 ozone NAAQS.[58]

For the stationary source RACM demonstration, the District evaluated the VOC and NO_X rules that were not fully addressed in the District's 2014 RACT SIP for potential RACM emissions reductions. The District compared that subset of District rules to analogous rules adopted by other air districts having nonattainment areas with higher ozone nonattainment classifications (*i.e.,* South Coast and San Joaquin Valley, which are both ''Extreme'' nonattainment areas for the

[53] 40 CFR 51.1112(c).

[54] See General Preamble, 57 FR 13498 at 13560 (April 16, 1992) and memorandum dated November 30, 1999, from John S. Seitz, Director, EPA Office of Air Quality Planning and Standards (OAQPS), to Regional Air Division Directors, titled ''Guidance on the Reasonably Available Control Measures (RACM) Requirement and Attainment Demonstration Submissions for Ozone Nonattainment Areas.''

[55] Id. See also 44 FR 20372 (April 4, 1979), and memorandum dated December 14, 2000, from John S. Seitz, Director, EPA OAQPS, to Regional Air Division Directors (Regions I, II, III, V and VI), titled ''Additional Submission on RACM from States with Severe 1-hour Ozone Nonattainment Area SIPs.''

[56] For ozone nonattainment areas classified as Moderate or above, CAA section 182(b)(2) also requires implementation of reasonably available control technology (RACT) for all major sources of VOC and for each VOC source category for which the EPA has issued a control techniques guideline. CAA section 182(f) requires that RACT under section 182(b)(2) also apply to major stationary sources of NO_X. In Serious areas, a major source is a stationary source that emits or has the potential to emit at least 50 tpy of VOC or NO_X (see CAA section 182(c) and (f)). Under the 2008 Ozone SRR, states were required to submit SIP revisions meeting the RACT requirements of CAA sections 182(b)(2) and 182(f) no later than 24 months after the effective date of designation for the 2008 Ozone NAAQS and to implement the required RACT measures as expeditiously as practicable but no later than January 1 of the 5th year after the effective date of designation (see 40 CFR 51.1112(a)). California submitted the CAA section 182 RACT SIP for Ventura County on July 18, 2014, and the EPA fully approved this submission at 80 FR 2016 (January 15, 2015).

[57] Memorandum dated September 11, 2019, from John J. Kelly, Air Planning Office, EPA Region 9 to ''Approval of Air Quality Implementation Plans; California; Ventura County; 8-Hour Ozone Nonattainment Area Requirements; Docket ID EPA–R09–OAR–2018–0146,'' subject: *District Rules Assumed for Purposes of Developing Baseline Emissions Projections.*

[58] 80 FR 2016, January 15, 2015.

2008 ozone NAAQS), as well as certain other air districts such as the Bay Area Air Quality Management District, to evaluate whether control technologies available and cost-effective within other areas would be available and cost-effective for use in Ventura County. The District also identified a few rules from other air districts that apply to unregulated source categories in Ventura County. Tables E–2 and E–3 in Appendix E of the 2016 Ventura County AQMP list the rules that the District evaluated for the RACM demonstration. Table E–2 includes 13 rules that the District has previously adopted that were compared to rules in other areas. Table E–3 includes five source categories the District evaluated, where there is no corresponding rule for that source category in Ventura County.

The District provides an evaluation of the controls it reviewed for RACM purposes in Appendix E of the 2016 Ventura County AQMP. The evaluation includes the following: Description of the Ventura County sources within the category or sources that would be subject to the rule; potential NO_X and VOC emissions reductions expected from implementing the rule in Ventura County for the source category affected by the rule; discussion of the current requirements of the rule; and discussion of potential additional control measures. This includes comparison of each District rule to analogous control measures adopted by other agencies.

Among the 13 existing District NO_X or VOC rules that the District compared to rules in other areas, the District found that eight of the VCAPCD rule emission limits were as stringent as those found in analogous rules adopted by the other districts or were not applicable for the purposes of comparison. The District estimated the emissions reductions for the remaining five rules that could be made more stringent to match the most stringent of the other district rules' limits.[59] Among the five source categories for which the District has no current rules, the District identified four categories for which other districts have adopted rules that could be adopted for Ventura County.[60]

The District estimated the potential emissions reduction associated with revisions to the five existing District rules and adoption of the four new rules to be approximately 0.5 tpd of VOC and 0.01 tpd of NO_X. Based on the District's threshold of 2 tpd of NO_X as the minimum reduction necessary to advance attainment by one year, the District concluded that its current set of VOC and NO_X rules represent all RACM within regulatory jurisdiction, and that no further RACM are necessary to meet the RACM requirement for the 2008 ozone NAAQS. We note that the new stationary source control measures in the 2016 Ventura County AQMP include revisions to two existing District rules, Rule 74.2 (''Architectural Coatings'') and Rule 74.22 (''Natural Gas-Fired, Central Fan-Type Furnaces''), and adoption of one new rule, proposed new Rule 74.32 (''Compostable Material Handing and Conversion Operations''), that are part of the RACM analysis. However, the purpose of these stationary source control measures in the 2016 Ventura County AQMP was not to meet the RACM requirement but to provide emissions reductions for the 2015 ozone NAAQS and to fulfill State air quality requirements.

b. Local Jurisdiction's RACM Analysis and Transportation Control Measures

Transportation Control Measures (TCMs) are projects that reduce air pollutants from transportation sources by reducing vehicle use, traffic congestion, or vehicle miles traveled. Appendix B (''Ventura County Transportation Control Measure Commitments'') of the 2016 Ventura County AQMP lists the current TCMs identified by SCAG and the District as committed TCMs. ''Committed'' TCMs are subject to the timely implementation requirement in CAA section 176(c)(2)(B). For the 2016 Ventura County AQMP, the District and VCTC worked together to determine whether additional TCMs are necessary to meet the RACM requirement. The TCM RACM component of the 2016 Ventura County AQMP is found on page 55 of the AQMP and in Appendix F (''Ventura County Transportation Control Measures Reasonably Available Control Measure Assessment'').

First, the District prepared a list of candidate RACM using the CAA's list of TCMs in section 108(f)(1)(A) by reviewing the TCMs in the 2008 Ventura County AQMP, and other air district and planning agency plans, such as the 2012 South Coast AQMP, 2007 San Joaquin Valley Ozone Plan, 2013 Sacramento Regional 8-Hour Ozone Attainment and Reasonable Further Progress Plan, and the 2004/2007 Metropolitan Washington Council of Governments SIP. Second, the District, along with staff of the VCTC, sorted the candidate TCMs based on their feasibility or infeasibility for implementation in Ventura County.[61] Table F–1 of Appendix F of the 2016 Ventura County AQMP summarizes the results of the sorting process. Justification is provided in Table F–1 for those candidate TCMs deemed by the District and VCTC to be infeasible. All candidate TCMs are organized in Table F–1 according to the sixteen categories specified in section 108(f)(1)(A) of the CAA.

The District found that the majority of TCMs that were deemed to be feasible in Ventura County were already being implemented, or had been implemented in the county, and that implementing all additional feasible TCMs in the county would not advance attainment by a year. Based on its comprehensive review of TCM projects in other nonattainment areas or otherwise identified, the District determined that the TCMs being implemented in Ventura County are inclusive of all RACM.[62]

c. CARB's RACM Analysis

Source categories for which CARB has primary jurisdiction for reducing emissions in California include most new and existing on- and off-road engines and vehicles, motor vehicle fuels, and consumer products. CARB's RACM assessment is contained in the 2016 Ventura County AQMP, Appendix G (''Ventura County Mobile Source Reasonably Available Control Measures Assessment''). In the 2016 Ventura County AQMP, CARB has also provided a general description of CARB's key mobile source regulations and programs and a comprehensive table listing on- and off-road mobile source regulatory actions taken by CARB from 1985 through 2016.[63] The RACM assessment contains CARB's evaluation of mobile source and other statewide control measures that reduce emissions of NO_X and VOC in Ventura County.

Given the need for substantial emissions reductions from mobile and area sources to meet the NAAQS in California nonattainment areas, CARB established stringent control measures for on-road and off-road mobile sources and the fuels that power them. California has unique authority under CAA section 209 (subject to a waiver by the EPA) to adopt and implement new

[59] The five District rules include Rule 74.2 (''Architectural Coatings''), Rule 74.19.1 (''Screen Printing Operations''), Rule 74.21 (''Semiconductor Manufacturing''); Rule 74.22 (''Natural Gas-Fired, Central Fan-Type Furnaces''), and Rule 74.34 (''NO_X Reductions from Miscellaneous Sources'').

[60] The four source categories include composting and organic material conversion operations, vacuum truck operations, emissions of oxides of nitrogen from commercial food ovens, and food products manufacturing and processing operations.

[61] See 2016 Ventura County AQMP, Appendix F, page F–1.

[62] See 2016 Ventura County AQMP, Appendix F, page F–3.

[63] See 2016 Ventura County AQMP, Appendix C (''Key ARB Mobile Source Regulations and Programs'') and Appendix D (''Air Resources Board Control Measures, 1985–2016'').

emission standards for many categories of on-road vehicles and engines, and new and in-use off-road vehicles and engines.

CARB's mobile source program extends beyond regulations that are subject to the waiver or authorization process set forth in CAA section 209, to include standards and other requirements to control emissions from in-use heavy-duty trucks and buses, gasoline and diesel fuel specifications, and many other types of mobile sources. Generally, these regulations have been submitted and approved as revisions to the California SIP.[64]

In the RACM assessment, CARB concludes that there are no additional RACM that would advance attainment of the 2008 ozone NAAQS in Ventura County. As a result, CARB concludes that California's mobile source programs fully meet the RACM requirement.[65]

3. The EPA's Review of the State's Submission

As described above, the District already implements many rules to reduce VOC and NO_X emissions from stationary sources in Ventura County. For the 2016 Ventura County AQMP, the District evaluated a range of potentially available control measures. We find that the process followed by the District in the 2016 Ventura County AQMP to identify additional RACM is generally consistent with the EPA's recommendations in the General Preamble, the District's evaluation of potential measures is appropriate, and the District has provided reasoned justifications for rejection of measures deemed not reasonably available.

With respect to mobile sources, CARB's current program addresses the full range of mobile sources in Ventura County through regulatory programs for both new and in-use vehicles. With respect to TCMs, we find that the District's and VCTC's process for identifying additional TCM RACM and the District's conclusion that the TCMs being implemented in Ventura County (*i.e.,* the TCMs listed in Table B–1 in Appendix B of the 2016 Ventura County AQMP) are inclusive of all TCM RACM to be reasonably justified and supported.

Based on our review of these RACM analyses, the District's and CARB's adopted rules, and SCAG's committed TCMs, we propose to find that there are, at this time, no additional RACM that would advance attainment of the 2008 ozone NAAQS in Ventura County.[66] For the foregoing reasons, we propose to find that the 2016 Ventura County AQMP provides for the implementation of all RACM as required by CAA section 172(c)(1) and 40 CFR 51.1112(c).

D. Attainment Demonstration

1. Statutory and Regulatory Requirements

An attainment demonstration consists of the following: (1) Technical analyses, such as base year and future year modeling, to locate and identify sources of emissions that are contributing to violations of the ozone NAAQS within the nonattainment area (*i.e.,* analyses related to the emissions inventory for the nonattainment area and the emissions reductions necessary to attain the standard); (2) a list of adopted measures (including RACT controls) with schedules for implementation and other means and techniques necessary and appropriate for demonstrating RFP and attainment as expeditiously as practicable but no later than the outside attainment date for the area's classification; (3) a RACM analysis; and (4) contingency measures required under sections 172(c)(9) and 182(c)(9) of the CAA that can be implemented without further action by the state or the EPA to cover emissions shortfalls in RFP plans and failures to attain.[67] This subsection of today's proposed rule addresses the first two components of the attainment demonstration—the technical analyses and a list of adopted measures. Section III.C, Reasonably Available Control Measures Demonstration, of this document addresses the RACM component, and section III.F, Contingency Measures, addresses the contingency measures component of the attainment demonstration in the 2016 Ventura County AQMP.

With respect to the technical analyses, section 182(c)(2)(A) of the CAA requires that a plan for an ozone nonattainment area classified Serious or above include a ''demonstration that the plan . . . will provide for attainment of the ozone [NAAQS] by the applicable attainment date. This attainment demonstration must be based on photochemical grid modeling or any other analytical method determined . . . to be at least as effective.'' The attainment demonstration predicts future ambient concentrations for comparison to the NAAQS, making use of available information on measured concentrations, meteorology, and current and projected emissions inventories of ozone precursors, including the effect of control measures in the plan.

Areas classified Serious for the 2008 ozone NAAQS must demonstrate attainment as expeditiously as practicable, but no later than 9 years after the effective date of designation to nonattainment. Ventura County was designated nonattainment effective July 20, 2012, and the area must demonstrate attainment of the 2008 ozone NAAQS by July 20, 2021.[68] An attainment demonstration must show attainment of the standards for a full calendar year before the attainment date, so in practice, Serious nonattainment areas must demonstrate attainment in 2020.

The EPA's recommended procedures for modeling ozone as part of an attainment demonstration are contained in ''Modeling Guidance for Demonstrating Attainment of Air Quality Goals for Ozone, $PM_{2.5}$, and Regional Haze'' (''Modeling Guidance'').[69] The Modeling Guidance includes recommendations for a modeling protocol, model input preparation, model performance evaluation, use of model output for the numerical NAAQS attainment test, and modeling documentation. Air quality modeling is performed using meteorology and emissions from a base year, and the predicted concentrations from this base case modeling are compared to air quality monitoring data from that year to evaluate model performance.

Once the model performance is determined to be acceptable, future year

[64] See, *e.g.,* the EPA's approval of standards and other requirements to control emissions from in-use heavy-duty diesel-powered trucks, at 77 FR 20308 (April 4, 2012), revisions to the California on-road reformulated gasoline and diesel fuel regulations at 75 FR 26653 (May 12, 2010), and revisions to the California motor vehicle inspection and maintenance program at 75 FR 38023 (July 1, 2010).

[65] See 2016 Ventura County AQMP, Appendix G, page G–5.

[66] We find that the District's identification of a 2-tpd threshold for the minimum reduction necessary to advance attainment of the 2008 ozone NAAQS in Ventura County by one year to be reasonable. The nonattainment area relies on both VOC and NO_X controls, and the potential emissions reductions of NO_X and VOC (considered together) from potential RACM (stationary source, TCM, and mobile) would not achieve the necessary emissions reductions to advance attainment by one year, and therefore, such additional measures are not required to meet the RACM requirement.

[67] 78 FR 34178, at 34184 (June 6, 2013) (proposed rule for implementing the 2008 ozone NAAQS).

[68] 80 FR 12264, at 12268 (March 6, 2015).

[69] Modeling Guidance, December 2014 Draft, EPA OAQPS; available at *https://www.epa.gov/scram/state-implementation-plan-sip-attainment-demonstration-guidance.* The 2014 modeling guidance updates, but is largely consistent with, the earlier ''Guidance on the Use of Models and Other Analyses for Demonstrating Attainment of Air Quality Goals for the 8-Hour Ozone and $PM_{2.5}$ NAAQS and Regional Haze,'' EPA–454/B–07–002, April 2007. Additional EPA modeling guidance can be found in 40 CFR 51 Appendix W, ''Guideline on Air Quality Models,'' 82 FR 5182 (January 17, 2017); available at *https://www.epa.gov/scram/clean-air-act-permit-modeling-guidance.*

emissions are simulated with the model. The relative (or percent) change in modeled concentration due to future emissions reductions provides a Relative Response Factor (RRF). Each monitoring site's RRF is applied to its monitored base year design value to provide the future design value for comparison to the NAAQS. The Modeling Guidance also recommends supplemental air quality analyses, which may be used as part of a Weight of Evidence (WOE) analysis. A WOE analysis corroborates the attainment demonstration by considering evidence other than the main air quality modeling attainment test, such as trends and additional monitoring and modeling analyses.

The Modeling Guidance does not require a particular year to be used as the base year for 2008 ozone NAAQS plans.[70] The Modeling Guidance states that the most recent year of the National Emissions Inventory may be appropriate for use as the base year for modeling, but that other years may be more appropriate when considering meteorology, transport patterns, exceptional events, or other factors that may vary from year to year.[71] Therefore, the base year used for the attainment demonstration need not be the same year used to meet the requirements for RFP.

With respect to the list of adopted measures, CAA section 172(c)(6) requires that nonattainment area plans include enforceable emissions limitations, and such other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emission rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to provide for timely attainment of the NAAQS.[72] Under the 2008 Ozone SRR, all control measures needed for attainment must be implemented no later than the beginning of the attainment year ozone season.[73] The attainment year ozone season is defined as the ozone season immediately preceding a nonattainment area's maximum attainment date.[74]

2. Summary of the State's Submission

a. Photochemical Modeling

The 2016 Ventura County AQMP includes photochemical modeling for the 2008 ozone NAAQS. The South Coast Air Quality Management District (SCAQMD) performed the air quality modeling for the 2016 Ventura County AQMP. The modeling relies on a 2012 base year and demonstrates attainment of the 2008 ozone NAAQS by the applicable Serious area attainment year (*i.e.* 2020).

The modeling and modeled attainment demonstration are described in Chapter 5 (''Attainment Demonstration'') of the 2016 Ventura County AQMP and in four appendices. Appendix H (''Protocol for Photochemical Modeling of Ozone in Ventura County'') of the 2016 Ventura County AQMP is the modeling protocol and contains all the elements recommended in the Modeling Guidance. Those include: Selection of model, time period to model, modeling domain, and model boundary conditions and initialization procedures; a discussion of emissions inventory development and other model input preparation procedures; model performance evaluation procedures; selection of days; and other details for calculating RRFs. Appendix H of the 2016 Ventura County AQMP also provides the coordinates of the modeling domain and thoroughly describes the development of the modeling emissions inventory, including its chemical speciation, its spatial and temporal allocation, its temperature dependence, and quality assurance procedures.

The modeling analysis used version 5.0.2 of the Community Multiscale Air Quality (CMAQ) photochemical model, developed by the EPA. To prepare meteorological input for CMAQ, the Weather and Research Forecasting model version 3.6 (WRF) from the National Center for Atmospheric Research was used. CMAQ and WRF are both recognized in the Modeling Guidance as technically sound, state-of-the-art models. The areal extent and the horizontal and vertical resolution used in these models were adequate for modeling ozone in the southern California domain, including Ventura.

The performance of the WRF meteorological model was assessed through a series of simulations, and the SCAQMD concluded that the daily WRF simulation for 2012 provided representative meteorological fields that well characterized the observed conditions. The SCAQMD's conclusions were supported by hourly time series graphs of wind speed, direction, and temperature.[75]

Ozone model performance statistics are described in the 2016 Ventura County AQMP Appendix I (''Ventura County Community Multiscale Air Quality Model Performance Analysis''), which include tables of statistics recommended in the Modeling Guidance for 8-hour daily maximum ozone for Ventura County. Hourly time series are presented, as well as density scatter plots and plots of bias against concentration. Note that only relative changes are used from the modeling, therefore the overprediction or underprediction of absolute ozone concentrations does not mean that future concentrations will be overestimated or underestimated.

After model performance for the 2012 base case was accepted, the model was applied to develop RRFs for the attainment demonstration. This entailed running the model with the same meteorological inputs as before, but with adjusted emissions inventories to reflect the expected changes between 2012 and the 2020 attainment year. The base year or ''reference year'' modeling inventory was the same as the inventory for the modeling base case. The 2020 inventory projects the base year into the future by including the effect of economic growth and emissions control measures. The set of 153 days from May 1 through September 30, 2012, was simulated and analyzed to determine daily 8-hour average maximum ozone concentrations for the 2020 emissions inventory. To develop the RRFs for the 2008 ozone NAAQS, only the top 10 days were used.

The Modeling Guidance addresses attainment demonstrations with ozone NAAQS based on 8-hour averages. For the 2008 ozone NAAQS, the 2016 Ventura County AQMP carried out the attainment test procedure consistent with the Modeling Guidance. The RRFs were calculated as the ratio of future to base year concentrations. The resulting RRFs were then applied to 2012 weighted base year design values[76] for each monitor to arrive at a 2020 future year design value.[77] The highest 2020 ozone design value is 0.072 ppm at the Simi Valley site; this value demonstrates attainment of the

[70] Modeling Guidance at section 2.7.1.

[71] Ibid.

[72] See also CAA section 110(a)(2)(A).

[73] 40 CFR 51.1108(d).

[74] 40 CFR 51.1100(h).

[75] SCAQMD, 2016 South Coast AQMP (March 2017), Appendix V (''Modeling and Attainment Demonstration''), Chapter 3 (''Meteorological Modeling and Sensitivity Analyses''), Attachment 1 (''WRF Model Performance Time Series'').

[76] The Modeling Guidance recommends that RRFs be applied to the average of three three-year design values centered on the base year, in this case the design values for 2010–2012, 2011–2013, and 2012–2014. This amounts to a 5-year weighted average of individual year 4th-high concentrations, centered on the base year of 2012, and so is referred to as a weighted design value.

[77] 2016 Ventura County AQMP, Appendix I, Table I–2 (''Base Year and Future Year Ozone Design Values'').

corresponding 2008 ozone NAAQS of 0.075 ppm.

The 2016 Ventura County AQMP modeling also includes a WOE demonstration in Appendix K (Ventura County Weight of Evidence Assessment) prepared by CARB. To complement regional photochemical modeling analyses included in the 2016 Ventura County AQMP, the WOE demonstration includes detailed analyses of ambient ozone data, county level precursor emissions trends, population exposure trends, and a discussion of conditions that contribute to exceedances of the 0.075 ppm 2008 ozone NAAQS. Further, the rate of progress toward air quality goals was evaluated by considering trends in ozone design values, precursor emissions reductions, and the relationship between ozone air quality and past emissions reductions.[78]

Finally, the 2016 Ventura County AQMP includes an unmonitored area analysis for the 2008 ozone NAAQS to assess the attainment status of locations other than monitoring sites.[79] The Modeling Guidance describes a ''gradient adjusted spatial fields'' procedure along with the EPA software (*i.e.,* Modeled Attainment Test Software) used to carry it out.[80] The unmonitored area analysis in the 2016 Ventura County AQMP shows concentrations below the 2008 ozone NAAQS for all locations.[81]

b. Control Strategy for Attainment

The control strategy for attainment of the 2008 ozone NAAQS in the 2016 Ventura County AQMP relies on emissions reductions from baseline (*i.e.,* already-adopted) measures. The baseline control measures include the District's stationary source rules, including those specifically included in the emissions inventories prepared for the 2016 Ventura County AQMP,[82] and CARB's mobile source and consumer product rules adopted through 2016 as listed in Appendix D of the 2016 Ventura County AQMP.

c. Attainment Demonstration

Table 2 below summarizes the attainment demonstration for the 2008 ozone NAAQS by listing the base year (2012) emissions level, the modeled attainment emissions level, and the reductions that the District and CARB estimate to achieve through baseline control measures taking into account growth and the District's ERC balance. As shown in Table 2, baseline measures are expected to reduce base year (2012) emissions of NO_X by 21 percent and VOC emissions by 11 percent by the 2020 attainment year, notwithstanding growth and the ERC balance, and to attain the 2008 ozone NAAQS in Ventura County by that year.

TABLE 2—SUMMARY OF VENTURA COUNTY 2008 OZONE NAAQS ATTAINMENT DEMONSTRATION

[Summer planning inventory, tpd]

	NO_X	VOC
A 2012 Base Year Emissions Level [a]	40.55	37.76.
B—2020 Modeled Attainment Emissions Level [a]	32.06	33.50.
C Total Reductions Needed from 2012 Base Year Levels to Demonstrate Attainment (A–B)	8.49	4.26.
D Reductions from Baseline (*i.e.*, adopted) Measures, net of growth and ERC balance	8.49	4.26.
E 2020 Emissions with Reductions from Baseline Control Strategy (compare to Row B)	32.06	33.50.
Attainment demonstrated?	Yes	Yes.

Notes and sources:

[a] 2016 Ventura County AQMP, Appendix A, tables A–6 and A–7. Includes emissions out to 100 nautical miles from the coast. Year 2020 Modeled Attainment Emissions Level includes ERC balance.

3. The EPA's Review of the State's Submission

a. Photochemical Modeling

To approve a SIP's attainment demonstration, the EPA must make several findings. First, we must find that the demonstration's technical bases, including the emissions inventories and air quality modeling, are adequate. As discussed above in section III.A of this document, we are proposing to approve the base year emissions inventory and to find that the future year emissions projections in the 2016 Ventura County AQMP reflect appropriate calculation methods and that the latest planning assumptions are properly supported by SIP-approved stationary and mobile source measures. These are the same inventories used for the attainment demonstration, and thus, we find that the emissions portion of the attainment demonstration is adequate.

With respect to the photochemical modeling in the 2016 Ventura County AQMP, based on our review of the 2016 Ventura County AQMP, the EPA finds that the modeling is adequate for purposes of supporting the attainment demonstration. First, we note the extensive discussion of modeling procedures, tests, and performance analyses called for in the Modeling Protocol (*i.e.,* Appendix H) and the good model performance. Second, we find the WRF meteorological model results and performance statistics, including hourly time series graphs of wind speed, direction, and temperature for the southern California modeling domain, to be satisfactory and consistent with our Modeling Guidance.[83]

The model performance statistics for ozone are described in the 2016 Ventura County AQMP, Appendix I. The analysis evaluated how well the photochemical model for the 2016 Ventura County AQMP was able to predict 8-hour ozone concentrations at each monitoring site in the county compared to observed 8-hour ozone concentrations at those same monitoring sites and is based on the statistical evaluation recommended in the Modeling Guidance. The base year average regional model performance was evaluated for May through September 2012 for days when maximum 8-hour ozone levels were at least 60 ppb.[84] Ozone measurements from air quality monitors in Thousand Oaks, Piru, Ojai, Simi Valley, and El Rio were compiled for the analysis. To develop the RRFs for the 2008 ozone

[78] 2016 Ventura County AQMP, Appendix K, page K–2.

[79] 2016 Ventura County AQMP, Appendix J (''Ventura County Unmonitored Area Analysis''), prepared by the SCAQMD.

[80] Modeling Guidance, section 4.7.

[81] 2016 Ventura County AQMP, Appendix J, Figure J–3 (''2020 Predicted 8-hr Ozone Design Values'').

[82] See 2016 Ventura County AQMP, Appendix A, Table A–5 (''District Rules Included in the SIP Inventory'').

[83] Modeling Guidance, 30.

[84] Only stations with more than 74.5% (the EPA's data completeness requirement) of the hourly measurements during each month of the ozone season were included in the analysis.

NAAQS, only the top 10 days were used. This is consistent with EPA guidance, which recommends the use of only the top 10 days in the RRF calculation because the modeling capability to predict high concentrations is more important than the prediction of low concentrations.[85]

The 2016 Ventura County AQMP's unmonitored area analysis showed concentrations below the 2008 ozone NAAQS for all locations. This analysis adds assurance to the attainment demonstration that all locations in Ventura County will attain the 2008 ozone NAAQS by the 2020 attainment year. In addition, the WOE analyses presented in the 2016 Ventura County AQMP provide additional information with respect to the sensitivity to emission changes and improve the understanding of the model performance. We are proposing to find the air quality modeling in the 2016 Ventura County AQMP adequate to support the attainment demonstration for the 2008 ozone NAAQS in Ventura County, based on reasonable meteorological and ozone modeling performance, and further supported by the unmonitored area and WOE analyses.

b. Control Strategy for Attainment

Second, we must find that the emissions reductions that are relied on for attainment are creditable and are sufficient to provide for attainment. As shown in Table 2 above, the 2016 Ventura County AQMP relies on baseline measures to achieve all the emissions reductions needed to attain the 2008 ozone NAAQS by 2020. The baseline measures are approved into the SIP and, as such, are fully creditable.

c. Attainment Demonstration

Based on our proposed determinations that the photochemical modeling and control strategy are acceptable, we propose to approve the attainment demonstration for the 2008 ozone NAAQS in the 2016 Ventura County AQMP as meeting the requirements of CAA section 182(c)(2)(A) and 40 CFR 51.1108.

E. Rate of Progress Plan and Reasonable Further Progress Demonstration

1. Statutory and Regulatory Requirements

Requirements for RFP for ozone nonattainment areas are specified in CAA sections 172(c)(2), 182(b)(1), and 182(c)(2)(B). Under CAA section 171(1), RFP is defined as meaning such annual incremental reductions in emissions of the relevant air pollutant as are required under CAA part D (''Plan Requirements for Nonattainment Areas'') or may reasonably be required by the EPA for the purpose of ensuring attainment of the applicable NAAQS by the applicable date. CAA section 172(c)(2) generally requires that a nonattainment plan include provisions for RFP. CAA section 182(b)(1) specifically requires that ozone nonattainment areas that are classified as Moderate or above demonstrate a 15 percent reduction in VOC between the years of 1990 and 1996. The EPA has typically referred to section 182(b)(1) as the rate of progress (ROP) requirement. For ozone nonattainment areas classified as Serious or higher, section 182(c)(2)(B) requires reductions averaged over each consecutive 3-year period, beginning 6 years after the baseline year until the attainment date, of at least 3 percent of baseline emissions per year. The provisions in CAA section 182(c)(2)(B)(ii) allow an amount less than 3 percent of such baseline emissions each year if the state demonstrates to the EPA that the plan includes all measures that can feasibly be implemented in the area in light of technological achievability.

In the 2008 Ozone SRR, the EPA provides that areas classified Moderate or higher for the 2008 ozone NAAQS will have met the ROP requirements of CAA section 182(b)(1) if the area has a fully approved 15 percent ROP plan for the 1-hour or 1997 ozone NAAQS, provided that the boundaries of the ozone nonattainment areas are the same.[86] For such areas, the EPA interprets the RFP requirements of CAA section 172(c)(2) to require areas classified as Moderate to provide a 15 percent emission reduction of ozone precursors within 6 years of the baseline year. Areas classified as Serious or higher must meet the RFP requirements of CAA section 182(c)(2)(B) by providing an 18 percent reduction of ozone precursors in the first 6-year period, and an average ozone precursor emission reduction of 3 percent per year for all remaining 3-year periods thereafter.[87] To meet CAA sections 172(c)(2) and 182(c)(2)(B) RFP requirements, the state may substitute NO_X emissions reductions for VOC reductions.[88]

Except as specifically provided in CAA section 182(b)(1)(C), emissions reductions from all SIP-approved, federally promulgated, or otherwise SIP-creditable measures that occur after the baseline year are creditable for purposes of demonstrating that the RFP targets are met. Because the EPA has determined that the passage of time has caused the effect of certain exclusions to be de minimis, the RFP demonstration is no longer required to calculate and specifically exclude reductions from measures related to motor vehicle exhaust or evaporative emissions promulgated by January 1, 1990; regulations concerning Reid vapor pressure promulgated by November 15, 1990; measures to correct previous RACT requirements; and, measures required to correct previous inspection and maintenance (I/M) programs.[89]

The 2008 Ozone SRR requires the RFP baseline year to be the most recent calendar year for which a complete triennial inventory was required to be submitted to the EPA. For the purposes of developing RFP demonstrations for the 2008 ozone NAAQS, the applicable triennial inventory year is 2011. As discussed previously, the 2008 Ozone SRR provided states with the opportunity to use an alternative baseline year for RFP,[90] but that provision of the 2008 Ozone SRR was vacated by the D.C. Circuit in the *South Coast II* decision.

2. Summary of the State's Submission

The 2016 Ventura County AQMP addresses both the ROP (VOC only) demonstration requirement and the RFP demonstration requirement. With respect to the former, the District cites the EPA's 1997 approval of the ROP demonstration for the 1-hour ozone NAAQS for Ventura County and concludes that, based on the 1997 approval, the ROP requirement has been met for Ventura County for the 2008 ozone NAAQS.[91]

With respect to the RFP demonstration requirement, the 2016 Ventura County AQMP includes an RFP demonstration derived from a 2012 RFP baseline year.[92] In response to the *South Coast II* decision, CARB developed the 2018 SIP Update, which includes a section that replaces the RFP portion of the 2016 Ventura County AQMP and includes emissions estimates for the RFP baseline year, subsequent milestone years, and the attainment year, and an updated RFP demonstration based on

[85] Modeling Guidance, 101.

[86] 70 FR 12264, at 12271 (March 6, 2015).

[87] Id.

[88] 40 CFR 51.1110(a)(2)(i)(C) and 40 CFR 51.1110(a)(2)(ii)(B); and 70 FR 12264, at 12271 (March 6, 2015).

[89] 40 CFR 51.1110(a)(7).

[90] 40 CFR 51.1110(b).

[91] See 2016 Ventura County AQMP, 89, and 62 FR 1150 (January 8, 1997).

[92] See 2016 Ventura County AQMP, chapter 6 (''Reasonable Further Progress'').

the 2011 RFP baseline year.[93] To develop the 2011 RFP baseline inventory, CARB relied on actual emissions reported from industrial point sources for year 2011. For emissions from smaller stationary sources and area sources, CARB backcast emissions from 2012 to 2011 using the same growth and control factors as were used for the 2016 Ventura County AQMP. To develop the emissions inventories for the 2017 RFP milestone year and 2020 RFP milestone/attainment year, CARB also relied upon the same growth and control factors as the 2016 Ventura County AQMP.

Documentation for the Ventura County RFP baseline and milestone emissions inventories is found in the 2018 SIP Update on pages 15–18 and Appendix A on pages A–7 through A–10. For both sets of baseline emissions inventories (those in the 2016 Ventura County AQMP and those in the 2018 SIP Update), emissions estimates reflect District rules adopted through July 2015 and CARB rules adopted through November 2015. Unlike the emissions inventories for the attainment demonstration in the 2016 Ventura County AQMP, the RFP baseline and milestone emissions inventories only include emissions within the Ventura County ozone nonattainment area and do not include marine emissions (*e.g.,* emissions from ocean-going vessels) beyond three nautical miles from the coastline. In contrast, the attainment demonstration inventories include emissions from marine vessels out to 100 nautical miles from the coastline.

Table 3 provides a summary of CARB's 2011 RFP baseline year, 2017 RFP milestone year, and 2020 RFP milestone/attainment year emissions estimates in tpd for VOC and NO_X.

TABLE 3—VENTURA COUNTY 2011 BASE YEAR, 2017 RFP MILESTONE YEAR AND 2020 ATTAINMENT YEAR EMISSIONS INVENTORIES

[Summer planning inventory, tpd]

Category	2011		2017		2020	
	VOC	NO_X	VOC	NO_X	VOC	NO_X
Stationary	8.4	2.0	8.4	1.9	8.6	1.9
Area Sources	11.7	1.0	10.8	0.7	11.0	0.6
On-Road Mobile Sources	9.2	13.9	5.4	8.0	4.2	6.0
Other (Off-Road) Mobile Sources	8.7	9.2	7.2	7.9	6.6	7.3
Total (not including ERC balance)	38.1	26.0	31.7	18.5	30.4	15.8
ERC Balance					1.7	0.8
Total (including ERC balance)	38.1	26.0	31.7	18.5	32.1	16.6

Source: 2018 SIP Update, pp. 15–18 and Appendix A, pp. A–7—A–10. The sum of the emissions values may not equal the total shown due to rounding of the numbers.

In August 2019, CARB provided a technical clarification of the RFP demonstration in the 2018 SIP Update for Ventura County.[94] Specifically, CARB revised the RFP demonstration in the 2018 SIP Update to include the safety margin included in the 2020 motor vehicle emissions budgets in the 2016 Ventura County AQMP. Table 4 presents the updated RFP demonstration for Ventura County for the 2008 ozone NAAQS as clarified by CARB in August 2019.

TABLE 4—RFP DEMONSTRATION FOR VENTURA COUNTY FOR THE 2008 OZONE NAAQS

[Summer planning inventory, tpd or percent]

	VOC		
	2011	2017	2020
Baseline VOC [a]	38.1	31.7	32.1
2020 Transportation Conformity Rounding Margin [b]			0.7
Baseline VOC + Rounding Margin		31.7	32.8
Required change since 2011 (VOC or NO_X), %		18%	27%
Target VOC level		31.2	27.8
Apparent shortfall (−)/surplus (+) in VOC		−0.5	−5.0
Apparent shortfall (−)/surplus (+) in VOC, %		−1.4%	−13.2%
VOC shortfall previously provided by NO_X substitution, %		0.0%	1.4%
Actual VOC shortfall (−)/surplus (+), %		−1.4%	−11.7%
	NO_X		
	2011	2017	2020
Baseline NO_X [a]	26.0	18.5	16.6
2020 Transportation Conformity Rounding Margin [b]			0.9
Baseline NO_X + Rounding Margin		18.5	17.5
Change in NO_X since 2011		7.5	8.5
Change in NO_X since 2011, %		28.8%	32.8%
NO_X reductions used for VOC substitution through last milestone year, %		0%	1.4%
NO_X reductions since 2011 available for VOC substitution in this milestone year, %		28.8%	31.4%

[93] 2018 SIP Update, RFP demonstration, chapter III (''SIP Elements for Ventura County''), section III–B (''Reasonable Further Progress'').

[94] Letter dated August 29, 2019, from Dr. Michael T. Benjamin, Chief, Air Quality Planning and Science Division, CARB, to Amy Zimpfer, Assistant Director, Air Division, EPA Region IX.

	NO_X		
	2011	2017	2020
NO_X reductions since 2011 used for VOC substitution in this milestone year, %		1.4%	11.7%
NO_X reductions since 2011 surplus after meeting VOC substitution needs in this milestone year, %.		27.4%	19.6%
Total shortfall for RFP		0%	0%
RFP met?		Yes	Yes

Source: Letter dated August 29, 2019, from Dr. Michael T. Benjamin, Chief, Air Quality Planning and Science Division, CARB, to Amy Zimpfer, Assistant Director, Air Division, EPA Region IX, Attachment A.
[a] 2020 projections include addition of ERC balance as of January 1, 2012.
[b] Transportation conformity rounding margin is referred to herein as a "safety margin."

The revised RFP demonstration calculates future year VOC targets from the 2011 baseline, consistent with CAA 182(c)(2)(B)(i), which requires reductions of "at least 3 percent of baseline emissions each year;" and it substitutes NO_X reductions for VOC reductions beginning in milestone year 2017 to meet VOC emission targets.[95] For Ventura County, CARB concludes that the revised RFP demonstration meets the applicable requirements for each milestone year as well as the attainment year.

3. The EPA's Review of the State's Submission

In 1997, the EPA approved a 15 percent ROP plan for the Ventura County ozone nonattainment area for the 1-hour ozone NAAQS, and the Ventura County nonattainment area for the 2008 ozone NAAQS is the same as the Ventura County nonattainment area for the 1-hour ozone NAAQS.[96] As a result, we agree with the District that the District and CARB have met the ROP requirements of CAA section 182(b)(1) for Ventura County with respect to the 2008 ozone NAAQS.

With respect to the RFP demonstration requirement, based on our review of the emissions inventory documentation in the 2016 Ventura County Ozone SIP, we find that CARB and the District have used the most recent planning and activity assumptions, emissions models, and methodologies in developing the RFP baseline and milestone year emissions inventories. We have also reviewed the calculations in Table III–3 of the 2018 SIP Update, as clarified by CARB in August 2019, and find that CARB has used an appropriate calculation method to demonstrate RFP.[97] For these reasons, we have determined that the 2016 Ventura County Ozone SIP, as clarified by CARB in August 2019, demonstrates RFP in the 2017 milestone year and the 2020 milestone/attainment year, consistent with applicable CAA requirements and EPA guidance. Therefore, we propose to approve the RFP demonstration for Ventura County for the 2008 ozone NAAQS under sections 172(c)(2) and 182(c)(2)(B) of the CAA and 40 CFR 51.1110(a)(2)(ii).

F. Contingency Measures

1. Statutory and Regulatory Requirements

Under the CAA, 8-hour ozone nonattainment areas classified under subpart 2 as Moderate or above must include in their SIPs contingency measures consistent with sections 172(c)(9) and 182(c)(9). Contingency measures are additional controls or measures to be implemented in the event the area fails to make reasonable further progress or to attain the NAAQS by the attainment date. The SIP should contain trigger mechanisms for the contingency measures, specify a schedule for implementation, and indicate that the measure will be implemented without significant further action by the state or the EPA.[98]

Neither the CAA nor the EPA's implementing regulations establish a specific level of emissions reductions that implementation of contingency measures must achieve, but the EPA's 2008 Ozone SRR reiterates the EPA's policy that contingency measures should provide for emissions reductions approximately equivalent to one year's worth of progress, amounting to reductions of 3 percent of the RFP baseline emissions inventory for the nonattainment area.[99]

It has been the EPA's longstanding interpretation of section 172(c)(9) that states may rely on federal measures (*e.g.,* federal mobile source measures based on the incremental turnover of the motor vehicle fleet each year) and local measures already scheduled for implementation that provide emissions reductions in excess of those needed to provide for RFP or expeditious attainment. The key is that the statute requires that contingency measures provide for additional emissions reductions that are not relied on for RFP or attainment and that are not included in the RFP or attainment demonstrations. The purpose of contingency measures is to provide continued emissions reductions while the plan is being revised to meet the missed milestone or attainment date.

The EPA has approved numerous SIPs under this interpretation—*i.e.,* SIPs that use as contingency measures one or more federal or local measures that are in place and provide reductions that are in excess of the reductions required by the attainment demonstration or RFP plan,[100] and there is case law supporting the EPA's interpretation in this regard.[101] However, in *Bahr* v. *EPA,* the Ninth Circuit rejected the EPA's interpretation of CAA section 172(c)(9) as allowing for early implementation of

[95] NO_X substitution is permitted under EPA regulations. See 40 CFR 51.1110(a)(2)(i)(C) and 40 CFR 51.1110(a)(2)(ii)(B); and 70 FR 12264, at 12271 (March 6, 2015).

[96] 62 FR 1150, at 1183 (January 8, 1997).

[97] We note a minor discrepancy between the safety margins included in the revised RFP demonstration for the 2020 attainment year and the safety margins included in the motor vehicle emissions budgets for 2020 in the 2016 Ventura County AQMP. The safety margins for the RFP demonstration, as shown in Table 4 of this document, are 0.7 tpd for VOC and 0.9 tpd for NO_X. The safety margins for the motor vehicle emissions budgets in the 2016 Ventura County AQMP are 0.79 tpd for VOC (0.8 tpd, if rounded to one significant figure) and 0.99 tpd (1.0 tpd, if rounded). Given the substantial extent to which the 2016 Ventura County Ozone SIP provides emissions reductions in excess of the RFP milestones, this minor discrepancy does not change our proposed finding that the 2016 Ventura County Ozone SIP meets the RFP demonstration requirement for the 2008 ozone NAAQS.

[98] 70 FR 71612 (November 29, 2005). See also 2008 Ozone SRR, 80 FR 12264, at 12285 (March 6, 2015).

[99] 80 FR 12264, at 12285 (March 6, 2015).

[100] See, *e.g.,* 62 FR 15844 (April 3, 1997) (direct final rule approving an Indiana ozone SIP revision); 62 FR 66279 (December 18, 1997) (final rule approving an Illinois ozone SIP revision); 66 FR 30811 (June 8, 2001) (direct final rule approving a Rhode Island ozone SIP revision); 66 FR 586 (January 3, 2001) (final rule approving District of Columbia, Maryland, and Virginia ozone SIP revisions); and 66 FR 634 (January 3, 2001) (final rule approving a Connecticut ozone SIP revision).

[101] See, *e.g., LEAN* v. *EPA,* 382 F.3d 575 (5th Cir. 2004) (upholding contingency measures that were previously required and implemented where they were in excess of the attainment demonstration and RFP SIP).

contingency measures.[102] The Ninth Circuit concluded that contingency measures must take effect at the time the area fails to make RFP or attain by the applicable attainment date, not before.[103] Thus, within the geographic jurisdiction of the Ninth Circuit, states cannot rely on early-implemented measures to comply with the contingency measure requirements under CAA section 172(c)(9) and 182(c)(9).[104]

2. Summary of the State's Submission

The District and CARB had largely prepared the 2016 Ventura County Ozone SIP prior to the *Bahr* v. *EPA* decision, and thus, consistent with contingency measure elements of previous ozone plans, it relies solely upon surplus emissions reductions from already-implemented control measures to demonstrate compliance with the contingency measure requirements of CAA sections 172(c)(9) and 182(c)(9).[105]

In the 2018 SIP Update, CARB revises the RFP demonstration for the 2008 ozone NAAQS for Ventura County and recalculates the extent of surplus emission reductions (*i.e.,* surplus to meeting the RFP milestone requirement for a given milestone year) in the milestone years and estimates the incremental emissions reductions in the year following the attainment year. In light of the *Bahr* v. *EPA* decision, however, the 2018 SIP Update does not rely on the surplus or incremental emissions reductions to comply with the contingency measures requirements of sections 172(c)(9) and 182(c)(9) but, rather, to provide context in which to evaluate the adequacy of *Bahr*-compliant (*i.e.,* to take effect if triggered) contingency measures for the 2008 ozone NAAQS.[106]

To comply with CAA sections 172(c)(9) and 182(c)(9), as interpreted in the *Bahr* v. *EPA* decision, the state must develop, adopt, and submit a contingency measure to be triggered upon a failure to meet an RFP milestone or attain the NAAQS by the applicable attainment date regardless of the extent to which already-implemented measures would achieve surplus or incremental emissions reductions beyond those necessary for RFP or attainment of the NAAQS. Therefore, to fully address the contingency measure requirement for the 2008 ozone NAAQS in Ventura County, the District has committed to supplement the contingency measure element of the 2016 Ventura County Ozone SIP by developing, adopting and submitting a contingency measure to CARB in sufficient time to allow CARB to submit the contingency measure as a SIP revision to the EPA within 12 months of the EPA's conditional approval of the contingency measure element of the 2016 Ventura County Ozone SIP.[107]

The District's specific commitment is to amend at least one of the following existing VCAPCD rules, through the required public review and subsequent VCAPCD board approval processes, to apply more stringent requirements upon a determination that the Ventura County nonattainment area failed to meet an RFP milestone or failed to attain the 2008 ozone NAAQS by the applicable attainment date.

- Amendments to Rule 74.26 (''Crude Oil Storage Tank Degassing Operations'') to add, if triggered by an RFP milestone failure or a failure to attain the 2008 ozone NAAQS, requirements for reducing VOC emissions from certain operations not covered by the existing rule, including cleaning, removing, repair and depressurizing of pipelines;
- Amendments to Rule 74.14 (''Polyester Resin Material Operations'') to add a non-monomer content VOC limit of no more than 5 percent by weight, if triggered; or
- Amendments to Rule 74.2 (''Architectural Coatings'') to lower the VOC limit for coating categories; delete the Specialty Primer, Sealer, and Undercoater categories and regulate them as just primers, sealers and undercoaters; add the specialty coating categories (Interior Stains, and Tile and Stone Sealers); and lower certain VOC content limits for colorants, once again, if triggered.

CARB attached the District's commitment to revise a rule to include contingency provisions to a letter committing CARB to adopt and submit the revised VCAPCD rule or rules to the EPA within one year of the effective date of the EPA's final conditional approval of the contingency measure element of the 2016 Ventura County Ozone SIP.[108]

3. The EPA's Review of the State's Submission

Sections 172(c)(9) and 182(c)(9) require contingency measures to address potential failure to achieve RFP milestones or failure to attain the NAAQS by the applicable attainment date. For the purposes of evaluating the contingency measure element of the 2016 Ventura County Ozone SIP, we find it useful to distinguish between contingency measures to address potential failure to achieve RFP milestones (''RFP contingency measures'') and contingency measures to address potential failure to attain the NAAQS (''attainment contingency measures'').

With respect to the RFP contingency measure requirement, we have reviewed the surplus emissions estimates in each of the RFP milestone years, as shown in the 2018 SIP Update (and clarified in August 2019), and find that the calculations are correct. Therefore, we agree that the 2016 Ventura County Ozone SIP provides surplus emissions reductions well beyond those necessary to demonstrate RFP in the RFP milestone years. While such surplus emissions reductions in the RFP milestone years do not represent contingency measures themselves, we believe they are relevant in evaluating the adequacy of RFP contingency measures that are submitted (or will be submitted) to meet the requirements of sections 172(c)(9) and 182(c)(9).

In this case, the District and CARB have committed to develop, adopt, and submit a revised District rule or rules as a contingency measure within one year of the effective date of our final conditional approval action. The specific types of revisions the District has committed to make, such as adding new limits or other requirements, upon a failure to achieve a milestone or a failure to attain would comply with the requirements in CAA sections 172(c)(9) and 182(c)(9) because they would be undertaken if the area fails to attain and would take effect without significant further action by the State or the EPA.

Next, we considered the adequacy of the RFP contingency measure (once adopted and submitted) from the standpoint of the magnitude of emissions reductions the measure would provide (if triggered). Neither the CAA nor the EPA's implementing regulations for the ozone NAAQS

[102] *Bahr* v. *EPA,* 836 F.3d 1218, at 1235–1237 (9th Cir. 2016).

[103] Id. at 1235–1237.

[104] The *Bahr* v. *EPA* decision involved a challenge to an EPA approval of contingency measures under the general nonattainment area plan provisions for contingency measures in CAA section 172(c)(9), but, given the similarity between the statutory language in section 172(c)(9) and the ozone-specific contingency measure provision in section 182(c)(9), we find that the decision affects how both sections of the Act must be interpreted.

[105] 2016 Ventura County AQMP, chapter 7 (''Contingency Measures''), 91 and 92.

[106] 2018 SIP Update, chapter III (''SIP Elements for Ventura County''), 18–20.

[107] Letter dated August 16, 2019, from Michael Villegas, Air Pollution Control Officer, VCAPCD, to Richard Corey, Executive Officer, CARB.

[108] Letter dated August 30, 2019, from Richard W. Corey, Executive Officer, CARB, to Mike Stoker, Regional Administrator, EPA Region IX.

establish a specific amount of emissions reductions that implementation of contingency measures must achieve, but we generally expect that contingency measures should provide for emissions reductions approximately equivalent to one year's worth of RFP, which, for ozone, amounts to reductions of 3 percent of the RFP baseline year emissions inventory for the nonattainment area. For the 2008 ozone NAAQS in Ventura County, one year's worth of RFP is approximately 1.1 tpd of VOC or 0.8 tpd of NO_X reductions.[109]

The District did not quantify the potential additional emission reductions from its contingency measure commitment, but we believe that it is unlikely that the attainment contingency measure, once adopted and submitted, will achieve one year's worth of RFP (*i.e.,* 1.1 tpd of VOC or 0.8 tpd of NO_X) given the types of rule revisions under consideration and the magnitude of emissions reductions constituting one year's worth of RFP. However, the 2018 SIP Update provides the larger SIP planning context in which to judge the adequacy of the to-be-submitted District contingency measure by calculating the surplus emissions reductions estimated to be achieved in the RFP milestone years and the year after the attainment year. More specifically, the 2018 SIP Update, as clarified by CARB in August 2019, identified surplus NO_X reductions in the various RFP milestone years. For Ventura County, the estimates of surplus NO_X reductions are 7.1 tpd in 2017 and 6.5 tpd in 2020 and are 8 or 9 times greater than one year's worth of progress (0.8 tpd of NO_X).[110]

The surplus reflects already implemented regulations and is primarily the result of vehicle turnover, which refers to the ongoing replacement by individuals, companies, and government agencies of older, more polluting vehicles and engines with newer vehicles and engines. In light of the extent of surplus NO_X emissions reductions in the RFP milestone years, the emissions reductions from the District contingency measure would be sufficient to meet the contingency measure requirements of the CAA with respect to RFP milestones, even though the measure would likely achieve emissions reductions lower than the EPA normally recommends for reductions from such a measure.

For attainment contingency measure purposes, we view the emissions reductions from the contingency measure in the context of the expected reduction in emissions within Ventura County in the year following the attainment year relative to those occuring in the attainment year. Based on the emission inventories in Appendix A to the 2018 SIP Update, we note that overall county-wide emissions are expected to be approximately 0.9 tpd of NO_X lower in 2021 than in 2020. Thus, baseline measures are expected to provide for continued progress (*i.e.,* incremental reduction in ozone precursors) greater than one year's worth of progress (*i.e.,* 0.8 tpd of NO_X). In light of these incremental year-over-year NO_X emissions reductions, we find that the emissions reductions from the District contingency measure would also be sufficient to meet the attainment contingency measure requirement of the CAA, even though the measure would likely achieve emissions reductions lower than the EPA normally recommends for reductions from such a measure.

For these reasons, we propose to approve conditionally the contingency measure element of the 2016 Ventura County Ozone SIP, as supplemented by commitments from the District and CARB to adopt and submit an additional contingency measure, to meet the contingency measure requirements of CAA sections 172(c)(9) and 182(c)(9). Our proposed approval is conditional because it relies upon commitments to adopt and submit a specific enforceable contingency measure (*i.e.,* a revised District rule or rules with contingent provisions). Conditional approvals are authorized under CAA section 110(k)(4).

G. Motor Vehicle Emissions Budgets for Transportation Conformity

1. Statutory and Regulatory Requirements

Section 176(c) of the CAA requires federal actions in nonattainment and maintenance areas to conform to the SIP's goals of eliminating or reducing the severity and number of violations of the NAAQS and achieving timely attainment of the standards. Conformity to the SIP's goals means that such actions will not: (1) Cause or contribute to violations of a NAAQS, (2) worsen the severity of an existing violation, or (3) delay timely attainment of any NAAQS or any interim milestone.

Actions involving Federal Highway Administration (FHWA) or Federal Transit Administration (FTA) funding or approval are subject to the EPA's transportation conformity rule, codified at 40 CFR part 93, subpart A. Under this rule, MPOs in nonattainment and maintenance areas coordinate with state and local air quality and transportation agencies, the EPA, the FHWA, and the FTA to demonstrate that an area's regional transportation plans and transportation improvement programs conform to the applicable SIP. This demonstration is typically done by showing that estimated emissions from existing and planned highway and transit systems are less than or equal to the motor vehicle emissions budgets (''budgets'') contained in all control strategy SIPs. Budgets are generally established for specific years and specific pollutants or precursors. Ozone plans should identify budgets for on-road emissions of ozone precursors (NO_X and VOC) in the area for each RFP milestone year and, if the plan demonstrates attainment, the attainment year.[111]

For budgets to be approvable, they must meet, at a minimum, the EPA's adequacy criteria (40 CFR 93.118(e)(4)). To meet these requirements, the budgets must be consistent with the attainment and RFP requirements and reflect all of the motor vehicle control measures contained in the attainment and RFP demonstrations.[112]

The EPA's process for determining adequacy of a budget consists of three basic steps: (1) Providing public notification of a SIP submission; (2) providing the public the opportunity to comment on the budget during a public comment period; and, (3) making a finding of adequacy or inadequacy.[113]

2. Summary of the State's Submission

The 2016 Ventura County AQMP includes budgets for the 2018 RFP milestone year and the 2020 attainment year.[114] The budgets for 2018 were derived from the 2012 RFP baseline year and the associated 2018 RFP milestone year. As such, the budgets are affected by the *South Coast II* decision vacating

[109] One year's worth of RFP for Ventura County corresponds to 3 percent of the RFP baseline year inventories for VOC (38.1 tpd) and NO_X (26.0 tpd).

[110] For the 2017 and 2020 RFP milestone years, surplus NO_X reductions correspond to 27.4 percent and 24.9 percent, respectively, of the 26.0 tpd 2011 RFP milestone inventory. See Table 4 in section III.E of this document.

[111] 40 CFR 93.102(b)(2)(i).

[112] 40 CFR 93.118(e)(4)(iii), (iv) and (v). For more information on the transportation conformity requirements and applicable policies on budgets, please visit our transportation conformity website at: *http://www.epa.gov/otaq/stateresources/transconf/index.htm.*

[113] 40 CFR 93.118(f)(2).

[114] When the 2016 Ventura County AQMP was developed, 2012 was used as the RFP baseline year, and 2020 was not considered an RFP milestone year because it was not one of the years that follow in the three-year cycle after the initial six-year period after the RFP baseline year. However, in the wake of the South Coast II decision, 2011 became the required RFP baseline year and year 2020 became an RFP milestone year because it is three years after the initial six-year period from the 2011 RFP baseline year. Thus, the 2020 budgets from the 2016 Ventura County AQMP now serve as both the RFP milestone and attainment budgets.

the alternative baseline year provision, and therefore, the EPA has not previously acted on the budgets. In the submittal letter for the 2016 Ventura County AQMP, CARB requested that the EPA limit the duration of our approval of the budgets in the 2016 Ventura County AQMP to last only until the effective date of future EPA adequacy findings for replacement budgets.[115] In August 2019, CARB provided further explanation in connection with its request to limit the duration of the approval of the budgets in the 2016 Ventura County AQMP.[116]

On December 5, 2018, CARB submitted the 2018 SIP Update, which revised the RFP demonstration consistent with the *South Coast II* decision (*i.e.,* by using a 2011 RFP baseline year). The 2018 SIP Update does not identify new budgets for Ventura County for VOC and NO_X for the 2017 RFP milestone year because budgets for the 2017 milestone year would never be used for conformity determinations given that milestone/attainment budgets for the immediate near-term year of 2020 have also been submitted. Today, we are proposing action only on the 2020 RFP milestone/attainment budgets from the 2016 Ventura County AQMP.

The budgets in the 2016 Ventura County AQMP were derived from motor vehicle emissions estimates prepared using EMFAC2014,[117] and the travel activity data provided by SCAG. The conformity budgets for NO_X and VOC in the 2016 Ventura County AQMP for Ventura County in 2020 are provided in Table 5 below. To develop the budgets, the District rounded up the motor vehicle emissions estimates for 2020 to the nearest ton. Thus, the motor vehicle emissions estimates for Ventura County for VOC and NO_X in 2020, *i.e.,* 4.21 tpd and 6.01 tpd, respectively, were rounded up to become budgets for VOC and NO_X of 5 tpd and 7 tpd, respectively.

TABLE 5—TRANSPORTATION CONFORMITY BUDGETS FOR THE 2008 OZONE NAAQS IN VENTURA COUNTY

[Summer planning inventory, tpd]

Budget year	VOC	NO_X
2020	5	7

Source: 2016 Ventura County AQMP, Table 3–7, 52.

3. The EPA's Review of the State's Submission

As part of our review of the approvability of the budgets in the 2016 Ventura County AQMP, we have evaluated the budgets using our adequacy criteria in 40 CFR 93.118(e)(4) and (5). We will complete the adequacy review concurrent with our final action on the 2016 Ventura County AQMP. The EPA is not required under its transportation conformity rule to find budgets adequate prior to proposing approval of them.[118] Today, the EPA is announcing that the adequacy process for these budgets begins, and the public has 30 days to comment on their adequacy, per the transportation conformity regulation at 40 CFR 93.118(f)(2)(i) and (ii).

As documented in a separate memorandum included in the docket for this rulemaking, we preliminarily conclude that the budgets in the 2016 Ventura County AQMP meet each adequacy criterion.[119] While adequacy and approval are two separate actions, reviewing the budgets in terms of the adequacy criteria informs the EPA's decision to propose to approve the budgets. We have completed our detailed review of the 2016 Ventura County AQMP and are proposing herein to approve the attainment and RFP demonstrations. We have also reviewed the budgets in the 2016 Ventura County AQMP and found that they are consistent with the attainment and RFP demonstrations for which we are proposing approval, are based on control measures that have already been adopted and implemented, and meet all other applicable statutory and regulatory requirements including the adequacy criteria in 40 CFR 93.1118(e)(4) and (5). Therefore, we are proposing to approve the 2020 budgets in the 2016 Ventura County AQMP. At the point when we either finalize the adequacy process or approve the budgets for the 2008 ozone NAAQS in the 2016 Ventura County AQMP as proposed (whichever occurs first; note that they could also occur concurrently per 40 CFR 93.118(f)(2)(iii)), they will replace the budgets that we previously found adequate for use in transportation conformity determinations.[120]

Under our transportation conformity rule, as a general matter, once budgets are approved, they cannot be superseded by revised budgets submitted for the same CAA purpose and the same year(s) addressed by the previously approved SIP until the EPA approves the revised budgets as a SIP revision. In other words, as a general matter, such approved budgets cannot be superseded by revised budgets found adequate, but rather only through approval of the revised budgets, unless the EPA specifies otherwise in its approval of a SIP by limiting the duration of the approval to last only until subsequently submitted budgets are found adequate.[121]

In this instance, as noted above, in its submittal letter, CARB requested that we limit the duration of our approval of the budgets in the 2016 Ventura County AQMP only until the effective date of the EPA's adequacy finding for subsequently submitted budgets, and in August 2019, CARB provided further explanation for its request. Generally, we will consider a state's request to limit an approval of a budget only if the request includes the following elements:[122]

- An acknowledgement and explanation as to why the budgets under consideration have become outdated or deficient;
- A commitment to update the budgets as part of a comprehensive SIP update; and
- A request that the EPA limit the duration of its approval to the time when new budgets have been found to be adequate for transportation conformity purposes.

CARB's request includes an explanation for why the budgets have become, or will become, outdated or deficient. In short, CARB requested that

[115] Letter dated April 11, 2017, from Richard Corey, Executive Officer, CARB, to Alexis Strauss, Acting Regional Administrator, EPA Region IX, transmitting the 2016 Ventura County AQMP.

[116] Letter dated August 29, 2019, from Dr. Michael T. Benjamin, Chief, Air Quality Planning and Science Division, CARB, to Amy Zimpfer, Assistant Director, Air Division, EPA Region IX.

[117] As previously noted, EMFAC2014 is CARB's model for estimating emissions from on-road vehicles operating in California. See 80 FR 77337 (December 14, 2015). We have recently announced the availability of an updated version of EMFAC, referred to as EMFAC2017. See 84 FR 41717 (August 15, 2019). For the 2016 Ventura County Ozone SIP, EMFAC2014 was the appropriate model to use for SIP development purposes at the time it was prepared.

[118] Under the transportation conformity regulations, the EPA may review the adequacy of submitted motor vehicle emission budgets simultaneously with the EPA's approval or disapproval of the submitted implementation plan. 40 CFR 93.118(f)(2).

[119] Memorandum dated September 5, 2019, from John J. Kelly, Air Planning Office, EPA Region 9, to docket for this proposed rulemaking, titled ''Adequacy Documentation for Plan Motor Vehicle Emission Budgets in 2016 Ventura County Ozone Plan.''

[120] In May 2008, we found adequate the 2009 budgets from the *Ventura County 2008 8-hour Ozone Early Progress Plan* (February 2008). 73 FR 24595 (May 5, 2008). The 2009 budgets are 13 tpd for VOC and 19 tpd for NO_X.

[121] 40 CFR 93.118(e)(1).

[122] 67 FR 69139 (November 15, 2002) (final action limiting our prior approval of budgets in certain California SIPs).

we limit the duration of the approval of the budgets in light of the EPA's recent approval of EMFAC2017, an updated version of the model (EMFAC2014) used for the budgets in the 2016 Ventura County AQMP. EMFAC2017 updates vehicle mix and emissions data of the previously approved version of the model, EMFAC2014.

Preliminary calculations by CARB indicate that EMFAC2017-derived motor vehicle emissions estimates for Ventura County will exceed the corresponding EMFAC2014-derived budgets in the 2016 Ventura County AQMP. In light of the approval of EMFAC2017, CARB explains that the budgets from the 2016 Ventura County AQMP, for which we are proposing approval in today's action, will become outdated and will need to be revised using EMFAC2017. In addition, CARB states that, without the ability to replace the budgets using the budget adequacy process, the benefits of using the updated data may not be realized for a year or more after the updated SIP (with the EMFAC2017-derived budgets) is submitted, due to the length of the SIP approval process. We find that CARB's explanation for limiting the duration of the approval of the budgets is appropriate and provides us with a reasonable basis on which to limit the duration of the approval of the budgets.

We note that CARB has not committed to update the budgets as part of a comprehensive SIP update, but as a practical matter, CARB must submit a SIP revision that includes updated demonstrations as well as the updated budgets to meet the adequacy criteria in 40 CFR 93.118(e)(4);[123] and thus, we do not need a specific commitment for such a plan at this time. For the reasons provided above, and in light of CARB's explanation for why the budgets will become outdated and should be replaced upon an adequacy finding for updated budgets, we propose to limit the duration of our approval of the budgets in the 2016 Ventura County AQMP until we find revised budgets based on EMFAC2017 to be adequate.

H. General Conformity Budgets

1. Statutory and Regulatory Requirements

Section 176(c) of the CAA requires federal actions in nonattainment and maintenance areas to conform to the SIP's goals of eliminating or reducing the severity and number of violations of the NAAQS and achieving timely attainment of the standards. Conformity to the SIP's goals means that such actions will not: (1) Cause or contribute to violations of a NAAQS, (2) worsen the severity of an existing violation, or (3) delay timely attainment of any NAAQS or any interim milestone.

Section 176(c)(4) of the CAA establishes the framework for general conformity. The EPA first promulgated general conformity regulations in November 1993.[124] On April 5, 2010, the EPA revised the general conformity regulations.[125] The general conformity regulations ensure that federal actions not covered by the transportation conformity rule will not interfere with the SIP and encourage consultation between the federal agency and the state or local air pollution control agencies before or during the environmental review process, as well as public participation (*e.g.,* notification of and access to federal agency conformity determinations and review of individual federal actions).

The general conformity regulations provide three phases: Applicability analysis, conformity determination, and review process. The applicability analysis phase under 40 CFR 93.153 is used to find if a federal action requires a conformity determination for a specific pollutant. If a conformity determination is needed, federal agencies can use one of several methods to show that the federal action conforms to the SIP. In an area without a SIP, a federal action may be shown to ''conform'' by demonstrating there will be no net increase in emissions in the nonattainment or maintenance area from the federal action. In an area with a SIP, conformity to the applicable SIP can be demonstrated in one of several ways. For actions where the direct and indirect emissions exceed the rates in 40 CFR 93.153(b), the federal action can include mitigation measures to offset the emission increases from the federal action or can show that the action will conform by meeting any of the following requirements:

- Showing that the net emission increases caused by an action are included in the SIP,
- documenting that the state agrees to include the emission increases in the SIP,
- offsetting the action's emissions in the same or nearby area of equal or greater classification, or
- providing an air quality modeling demonstration in some circumstances.[126]

The general conformity regulations at 40 CFR 93.161 allow state and local air quality agencies working with federal agencies with large facilities (*e.g.,* commercial airports, ports, and large military bases) that are subject to the general conformity regulations to develop and adopt an emissions budget for those facilities in order to facilitate future conformity determinations. Such a budget, referred to as a facility-wide emissions budget, may be used by federal agencies to demonstrate conformity as long as the total facility-wide budget level identified in the SIP is not exceeded.

According to 40 CFR 93.161, the state or local agency responsible for implementing and enforcing the SIP can develop and adopt an emissions budget to be used for demonstrating conformity under 40 CFR 93.158(a)(1). The requirements include the following: (1) The facility-wide budget must be for a set time period; (2) the budget must cover the pollutants or precursors of the pollutants for which the area is designated nonattainment or maintenance; (3) the budgets must be specific about what can be emitted on an annual or seasonal basis; (4) the emissions from the facility along with all other emissions in the area must not exceed the total SIP emissions budget for the nonattainment or maintenance area; (5) specific measures must be included to ensure compliance with the facility-wide budget, such as periodic reporting requirements or compliance demonstrations when the federal agency is taking an action that would otherwise require a conformity determination; (6) the budget must be submitted to the EPA as a SIP revision; and (7) the SIP revision must be approved by the EPA. Having or using a facility-wide emissions budget does not preclude a federal agency from demonstrating conformity in any other manner allowed by the conformity rule.

2. Summary of the State's Submission

The 2016 Ventura County AQMP establishes VOC and NO_X general conformity budgets for the Naval Base Ventura County (NBVC) for each year from 2017 through 2020 as shown in Table 6 below. The budgets are intended to reflect aircraft and missile operations associated with NBVC Point Mugu and ship operations at Port Hueneme occuring within the Ventura County

[123] Under 40 CFR 93.118(e)(4), the EPA will not find a budget in a submitted SIP to be adequate unless, among other criteria, the budgets, when considered together with all other emissions sources, are consistent with applicable requirements for RFP and attainment. 40 CFR 93.118(e)(4)(iv).

[124] 40 CFR part 51, subpart W, and 40 CFR part 93, subpart B.

[125] 75 FR 17254.

[126] 40 CFR 93.158; and VCAPCD Rule 220 (''General Conformity''), approved at 64 FR 19916 (April 23, 1999).

ozone nonattainment area. The budgets include a 4 percent growth allowance to account for uncertainties in potential projects resulting from future actions and unknown projects. As shown in Table 6, the budgets for NBVC in the attainment year (2020) are 198.0 tpy of VOC and 475.9 tpy of NO_X, which is equivalent to 0.54 tpd of VOC and 1.30 tpd of NO_X on an annual average daily basis.

TABLE 6—NBVC GENERAL CONFORMITY BUDGETS FOR THE 2008 OZONE NAAQS IN VENTURA COUNTY

[summer planning inventory, tpy]

Budget year	VOC	NO_X
2017	178.6	434.2
2018	184.8	447.6
2019	191.3	461.5
2020	198.0	475.9

Source: 2016 Ventura County Ozone AQMP, Table 4–9.

3. The EPA's Review of the State's Submission

We propose to approve the general conformity budgets in the 2016 Ventura County AQMP for NBVC shown in Table 6, as meeting the requirements of CAA section 176(c) and 40 CFR 93.161. We find that the general conformity budgets in the 2016 AQMP: are established for a set time period; cover both precursors of ozone; are precisely quantified in terms of tons per year; and, along with all other emissions in Ventura County, are consistent with the RFP and attainment demonstration for the 2008 ozone NAAQS.

If we finalize our approval of these budgets, NBVC can use these budgets to demonstrate that their projects conform to the SIP through a letter from the State and District confirming that the project emissions are accounted for in the SIP's general conformity budgets.

I. Other Clean Air Act Requirements Applicable to Serious Ozone Nonattainment Areas

In addition to the SIP requirements discussed in the previous sections, the CAA includes certain other SIP requirements applicable to Serious ozone nonattainment areas, such as Ventura County. We describe these provisions and their current status below.

1. Enhanced Vehicle Inspection and Maintenance Programs

Section 182(c)(3) of the CAA requires states with ozone nonattainment areas classified under subpart 2 as Serious or above to implement an enhanced motor vehicle I/M program in those areas. The requirements for those programs are provided in CAA section 182(c)(3) and 40 CFR part 51, subpart S.

Consistent with the 2008 Ozone SRR, no new I/M programs are currently required for nonattainment areas for the 2008 ozone NAAQS.[127] The EPA previously approved California's I/M program in Ventura County as meeting the requirements of the CAA and applicable EPA regulations for enhanced I/M programs.[128]

2. New Source Review Rules

Section 182(a)(2)(C) of the CAA requires states to develop SIP revisions containing permit programs for each of its ozone nonattainment areas. The SIP revisions are to include requirements for permits in accordance with CAA sections 172(c)(5) and 173 for the construction and operation of each new or modified major stationary source for VOC and NO_X anywhere in the nonattainment area. The 2008 Ozone SRR includes provisions and guidance for nonattainment NSR programs.[129] Earlier this year, the EPA proposed to approve the nonattainment NSR SIP submitted for Ventura County for the 2008 ozone NAAQS. The nonattainment NSR SIP includes a certification letter documenting how the VCAPCD's SIP-approved nonattainment NSR program, established in VCAPCD Rules 26 through 26.11, meets the applicable NSR requirements for Ventura County for the 2008 ozone NAAQS.[130] We expect to take final action on the nonattainment NSR SIP for Ventura County for the 2008 ozone NAAQS in the near future in a separate rulemaking.

3. Clean Fuels Fleet Program

Sections 182(c)(4)(A) and 246 of the CAA require California to submit to the EPA for approval measures to implement a Clean Fuels Fleet Program. Section 182(c)(4)(B) of the CAA allows states to opt-out of the federal clean-fuel vehicle fleet program by submitting a SIP revision consisting of a program or programs that will result in at least equivalent long-term reductions in ozone precursors and toxic air emissions.

In 1994, CARB submitted a SIP revision to the EPA to opt-out of the federal clean-fuel fleet program. The submittal included a demonstration that California's low-emissions vehicle program achieved emissions reductions at least as large as would be achieved by the federal program. The EPA approved the SIP revision to opt-out of the federal program on August 27, 1999.[131] There have been no changes to the federal Clean Fuels Fleet program since the EPA approved the California SIP revision to opt-out of the federal program, and no corresponding changes to the SIP are required. Thus, we find that the California SIP revision to opt-out of the federal program, as approved in 1999, meets the requirements of CAA sections 182(c)(4)(A) and 246 for Ventura for the 2008 ozone NAAQS.

4. Gasoline Vapor Recovery

Section 182(b)(3) of the CAA requires states to submit a SIP revision by November 15, 1992, that requires owners or operators of gasoline dispensing systems to install and operate gasoline vehicle refueling vapor recovery (''Stage II'') systems in ozone nonattainment areas classified as Moderate and above. California's ozone nonattainment areas implemented Stage II vapor recovery well before the passage of the CAA Amendments of 1990.[132]

Section 202(a)(6) of the CAA requires the EPA to promulgate standards requiring motor vehicles to be equipped with onboard refueling vapor recovery (ORVR) systems. The EPA promulgated the first set of ORVR system regulations in 1994 for phased implementation on vehicle manufacturers, and since the end of 2006, essentially all new gasoline-powered light- and medium-duty vehicles are ORVR-equipped.[133] Section 202(a)(6) also authorizes the EPA to waive the SIP requirement under CAA section 182(b)(3) for installation of Stage II vapor recovery systems after such time as the EPA determines that ORVR systems are in widespread use throughout the motor vehicle fleet. Effective May 16, 2012, the EPA waived the requirement of CAA section 182(b)(3) for Stage II vapor recovery systems in ozone nonattainment areas regardless of classification.[134] Thus, a SIP submittal meeting CAA section 182(b)(3) is not required for the 2008 ozone NAAQS.

While a SIP submittal meeting CAA section 182(b)(3) is not required for the 2008 ozone NAAQS, under California state law (*i.e.,* Health and Safety Code section 41954), CARB is required to adopt procedures and performance standards for controlling gasoline emissions from gasoline marketing

[127] 2008 Ozone SRR, 80 FR 12264, at 12283 (March 6, 2015).

[128] 75 FR 38023 (July 1, 2010).

[129] 80 FR 12264 (March 6, 2015).

[130] 84 FR 20604 (May 10, 2019); reproposed at 84 FR 43738 (August 22, 2019).

[131] 64 FR 46849 (August 27, 1999).

[132] General Preamble, 57 FR 13498 at 13514 (April 16, 1992).

[133] 77 FR 28772, at 28774 (May 16, 2012).

[134] See 40 CFR 51.126(b).

operations, including transfer and storage operations. State law also authorizes CARB, in cooperation with local air districts, to certify vapor recovery systems, to identify defective equipment and to develop test methods. CARB has adopted numerous revisions to its vapor recovery program regulations and continues to rely on its vapor recovery program to achieve emissions reductions in ozone nonattainment areas in California.

In Ventura County, the installation and operation of CARB-certified vapor recovery equipment is required and enforced through VCAPCD Rule 70 (''Storage And Transfer Of Gasoline''), which was most recently approved into the SIP on January 31, 2011.[135]

5. Enhanced Ambient Air Monitoring

Section 182(c)(1) of the CAA requires that all ozone nonattainment areas classified as Serious or above implement measures to enhance and improve monitoring for ambient concentrations of ozone, NO_X, and VOC, and to improve monitoring of emissions of NO_X and VOC. The enhanced monitoring network for ozone is referred to as the photochemical assessment monitoring station (PAMS) network. The EPA promulgated final PAMS regulations on February 12, 1993.[136]

On November 10, 1993, CARB submitted to the EPA a SIP revision addressing the PAMS network for six ozone nonattainment areas in California, including Ventura County, to meet the enhanced monitoring requirements of CAA section 182(c)(1) and the PAMS regulations. The EPA determined that the PAMS SIP revision met all applicable requirements for enhanced monitoring and approved the PAMS submittal into the California SIP.[137]

Prior to 2006, the EPA's ambient air monitoring regulations in 40 CFR part 58 (''Ambient Air Quality Surveillance'') set forth specific SIP requirements (see former 40 CFR 52.20). In 2006, the EPA significantly revised and reorganized 40 CFR part 58.[138] Under revised 40 CFR part 58, SIP revisions are no longer required; rather, compliance with EPA monitoring regulations is established through review of required annual monitoring network plans.[139] The 2008 Ozone SRR made no changes to these requirements.[140]

The 2016 Ventura County Ozone SIP does not specifically address the enhanced ambient air monitoring requirement in CAA section 182(c)(1). However, we note that CARB includes the ambient monitoring network within Ventura County in its annual monitoring network plan that is submitted to the EPA, and that we have approved the most recent annual monitoring network plan (''Annual Network Plan Covering Monitoring Operations in 25 California Air Districts (June 2018)'' or ''2018 ANP'') with respect to the Ventura County element.[141] Based on our review and approval of the 2018 ANP with respect to Ventura County and our earlier approval of the PAMS SIP revision, we propose to find that CARB and VCAPCD meet the enhanced monitoring requirements under CAA section 182(c)(1) for Ventura County with respect to the 2008 ozone NAAQS.

IV. Proposed Action

For the reasons discussed in this notice, under CAA section 110(k)(3), the EPA is proposing to approve as a revision to the California SIP the following portions of the 2016 Ventura County Ozone SIP submitted by CARB on April 11, 2017 and December 5, 2018:

- Base year emissions inventory element in the 2016 Ventura County AQMP as meeting the requirements of CAA sections 172(c)(3) and 182(a)(1) and 40 CFR 51.1115 for the 2008 ozone NAAQS;
- Emissions statement element in the 2016 Ventura County AQMP as meeting the requirements of CAA section 182(a)(3)(B) and 40 CFR 51.1102 for the 2008 ozone NAAQS;
- RACM demonstration element in the 2016 Ventura County AQMP as meeting the requirements of CAA section 172(c)(1) and 40 CFR 51.1112(c) for the 2008 ozone NAAQS;
- Attainment demonstration element for the 2008 ozone NAAQS in the 2016 Ventura County AQMP as meeting the requirements of CAA section 182(c)(2)(A) and 40 CFR 51.1108;
- ROP demonstration element in the 2016 Ventura County AQMP as meeting the requirements of CAA 182(b)(1) and 40 CFR 51.1110(a)(2) for the 2008 ozone NAAQS;
- RFP demonstration element in the 2018 SIP Update, as clarified in August 2019,[142] as meeting the requirements of CAA sections 172(c)(2) and 182(c)(2)(B), and 40 CFR 51.1110(a)(2)(ii) for the 2008 ozone NAAQS;
- Motor vehicle emissions budgets in the 2016 Ventura County AQMP for the RFP milestone/attainment year of 2020 (as shown in Table 5) because they are consistent with the RFP and attainment demonstrations for the 2008 ozone NAAQS proposed for approval herein and meet the other criteria in 40 CFR 93.118(e); and
- General conformity budgets of VOC and NO_X (as shown in Table 6) for Naval Base Ventura County, as meeting the requirements of CAA section 176(c) and 40 CFR 93.161.

We are also proposing to find that the:

- Enhanced vehicle inspection and maintenance program in Ventura County meets the requirements of CAA section 182(c)(3) and 40 CFR 51.1102 for the 2008 ozone NAAQS;
- California SIP revision to opt-out of the federal Clean Fuels Fleet Program meets the requirements of CAA sections 182(c)(4)(A) and 246 and 40 CFR 51.1102 for the 2008 ozone NAAQS with respect to Ventura County; and
- Enhanced monitoring in Ventura County meets the requirements of CAA section 182(c)(1) and 40 CFR 51.1102 for the 2008 ozone NAAQS.[143]

With respect to the motor vehicle emissions budgets, we are proposing to limit the duration of the approval of the budgets to last only until the effective date of the EPA's adequacy finding for any subsequently submitted budgets. We are doing so at CARB's request and in light of the benefits of using EMFAC2017-derived budgets prior to our taking final action on the future SIP revision that includes the updated budgets.

In addition, we are proposing, under CAA section 110(k)(4), to approve conditionally the contingency measure element of the 2016 Ventura County Ozone SIP as meeting the requirements

[135] 76 FR 5277 (January 31, 2011). See also, 69 FR 29451 (May 24, 2004) (The EPA's approval of an earlier version of VCAPCD Rule 70 as meeting the requirements of CAA section 182(b)(3)).

[136] 58 FR 8452 (February 12, 1993).

[137] 82 FR 45191 (September 28, 2017).

[138] 71 FR 61236 (October 17, 2006).

[139] 40 CFR 58.2(b) now provides that, ''The requirements pertaining to provisions for an air quality surveillance system in the SIP are contained in this part.''

[140] The 2008 ozone SRR addresses PAMS-related requirements at 80 FR 12264, at 12291 (March 6, 2015).

[141] Letter dated November 26, 2018, from Gwen Yoshimura, Manager, Air Quality Analysis Office, EPA Region IX, to Ravi Ramalingam, Chief, Consumer Products and Air Quality Assessment Branch, Air Quality Planning and Science Division, CARB.

[142] Letter dated August 29, 2019, from Dr. Michael T. Benjamin, Chief, Air Quality Planning and Science Division, CARB, to Amy Zimpfer, Assistant Director, Air Division, EPA Region IX.

[143] Regarding other applicable requirements for the 2008 ozone NAAQS in Ventura County, the EPA has previously approved SIP revisions that address the nonattainment area requirements for implementation of RACT for Ventura County for the 2008 ozone NAAQS. See 80 FR 2016 (January 15, 2015) (approval of Ventura County RACT SIP). With respect to the Nonattainment NSR SIP for Ventura County for the 2008 ozone NAAQS, the EPA proposed approval at 84 FR 20604 (May 10, 2019) and is expected to take final action in the near future.

of CAA sections 172(c)(9) and 182(c)(9) for RFP and attainment contingency measures. Our proposed approval is based on commitments by the District and CARB to supplement the element through submission, as a SIP revision (within one year of the effective date of our final conditional approval action), of a revised District rule or rules that would add new limits or other requirements if an RFP milestone is not met or if Ventura County fails to attain the 2008 ozone NAAQS by the applicable attainment date.[144]

The EPA is soliciting public comments on the issues discussed in this document. We will accept comments from the public on this proposal for the next 30 days and will consider comments before taking final action.

V. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this proposed action merely proposes to approve, or conditionally approve, state plans 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 Clean Air Act; and
- Does not provide the EPA with the discretionary authority to address disproportionate human health or environmental effects with practical, appropriate, and legally permissible methods under Executive Order 12898 (59 FR 7629, February 16, 1994).

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

List of Subjects in 40 CFR Part 52

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

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

Dated: December 5, 2019.

Michael Stoker,

Regional Administrator, Region IX.

[FR Doc. 2019–27545 Filed 12–19–19; 8:45 am]

BILLING CODE 6560–50–P

[144] Letter dated August 16, 2019, from Michael Villegas, Air Pollution Control Officer, VCAPCD, to Richard Corey, Executive Officer, CARB; and letter dated August 30, 2019, from Richard W. Corey, Executive Officer, CARB, to Mike Stoker, Regional Administrator, EPA Region IX.

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R10–OAR–2019–0669; FRL–10003–32–Region 10]

Air Plan Approval; Washington; Wallula Second 10-Year Maintenance Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve a plan for the Wallula area in Washington State that addresses the second 10-year maintenance period for particulate matter with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM_{10}). This plan relies upon the control measures contained in the first 10-year maintenance plan, with revisions to reflect updated permits and agreements, also proposed for approval in this action. Lastly, we are proposing to take final agency action on high wind and wildfire exceptional events associated with the Wallula area.

DATES: Written comments must be received on or before January 21, 2020.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R10–OAR–2019–0669, at *https://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov.* The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Jeff Hunt, EPA Region 10, 1200 Sixth Avenue—Suite 155, Seattle, WA 98101, at (206) 553–0256, or *hunt.jeff@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, it is intended to refer to the EPA. This supplementary information section is arranged as follows:

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I. Background
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E. Contingency Provisions

IV. Proposed Actions
V. Incorporation by Reference
VI. Statutory and Executive Order Reviews

I. Background

The Wallula area lies in eastern Washington near the Oregon border in the southern portion of the Columbia Plateau. The area is comprised of parts of Walla Walla and Benton Counties and a small portion of Sacajawea State Park in Franklin County. It is generally rural and agricultural. Prominent land uses include dryland and irrigated cropland, industrial sites, and natural vegetation. There is one major stationary source located in the Wallula area, Boise Paper Wallula Mill (a division of Packaging Corporation of America), a large pulp and paper mill and associated compost facility and landfill. There is also a large beef cattle feedlot, a beef processing plant, a natural gas compressor station, grain storage silos, and a few other minor sources. The Wallula area is in the lowest and driest section of eastern Washington and receives as little as seven to nine inches of precipitation each year. The surrounding Columbia Plateau is known for prolonged periods of strong winds which carry dust particles for hundreds of miles downwind. Wind erosion is a problem throughout the Columbia Plateau, due to its dry environment, scant vegetation, unpredictable high winds, and soils which contain substantial quantities of PM_{10}.

The Wallula area was designated nonattainment for the 24-hour PM_{10} national ambient air quality standards (NAAQS) and classified as a Moderate area upon enactment of the Clean Air Act Amendments of 1990 (56 FR 56694, November 6, 1991). The Washington Department of Ecology (Ecology) submitted a Moderate area attainment plan for the Wallula area on November 13, 1991, and a Serious area plan on November 30, 2004. The EPA acted on the plans on January 27, 1997, and May 2, 2005, respectively (62 FR 3800 and 83 FR 22597). During the planning process, the EPA determined that the area attained the PM_{10} NAAQS based on 1999 through 2001 air quality monitoring data (67 FR 64815, October 22, 2002).

As discussed in the EPA's finding of attainment and the state's attainment plan submissions, windblown dust during high wind events is a significant contributor to exceedances of the PM_{10} NAAQS in the Wallula area. Under the Clean Air Act, specific exceedances due to natural events, such as unusually high winds, may be discounted or excluded entirely from decisions regarding an area's air quality status in appropriate circumstances. From 1996 to 2007, EPA's Natural Events Policy [1] governed the process by which states could request exclusion of monitored values that exceeded the NAAQS due to ''natural events'' in making attainment determinations. As part of the EPA's finding of attainment for the Wallula area in 2002, the EPA determined that all exceedances that occurred in 1999 through 2001 qualified as high wind natural events under the EPA's Natural Events Policy. (67 FR 64815, October 22, 2002).

Subsequently, Ecology conducted a final review of high wind natural events for the area and provided the EPA information in support of the state's maintenance plan and request to redesignate the Wallula area, submitted on March 29, 2005. Ecology found that there had been nine reported PM_{10} exceedances in the Wallula area since January 1, 1995, and all but one was reasonably attributed to dust raised by unusually high winds.[2] The EPA approved the submitted maintenance plan and redesignation request on August 26, 2005 (70 FR 50212). This maintenance plan covered the first 10-year period and demonstrated, after excluding the high wind natural events under EPA's Natural Events Policy, that the existing control measures approved in the Moderate and Serious attainment plans were adequate to maintain the PM_{10} NAAQS.

II. Requirements of a Maintenance Plan

Section 175A of the Clean Air Act sets forth the elements of a maintenance plan. Under section 175A, a state must submit a plan to demonstrate continued attainment of the applicable NAAQS for at least 10 years after an area is redesignated to attainment. For Wallula, this initial maintenance period was 2005 through 2015. The state must then submit a revised maintenance plan demonstrating that the area will continue to attain for the 10 years following the initial 10-year period. For Wallula, this period is 2015 through 2025. The EPA's Calcagni memorandum contains a list of core provisions the EPA anticipates to be necessary to ensure maintenance of the relevant NAAQS.[3] The memorandum recommends that a maintenance plan address the following provisions: (1) An attainment emissions inventory; (2) a demonstration showing maintenance for 10 years; (3) a commitment to maintain the existing monitoring network; (4) verification of continued attainment; and (5) a contingency plan to prevent or correct future violations of the NAAQS. Washington's SIP submission discusses each of these elements.

III. Analysis of Washington's Submission

A. Attainment Emissions Inventory

Washington's second 10-year maintenance plan for the Wallula area includes a 2014 attainment emissions inventory, which is the most up to date emissions information available as part of the National Emissions Inventory (NEI) process. The EPA has reviewed the procedures used to develop the 2014 attainment emissions inventory and we find them to be reasonable and approvable. The overall source mix and emissions levels are generally consistent with the 2002 attainment emissions inventory contained in the first 10-year maintenance plan. While there has been some increase in emissions activity since 2002, Ecology explained and the EPA verified that much of the difference between the 2002 and 2014 inventories is due to revised emissions inventory methodology. For example, Ecology revised the emissions factor for cattle feedlots by increasing it approximately eightfold, a conservative approach.[4] Based on the most up-to-date emissions inventory information, Ecology calculated the source mix for a typical PM_{10} season day in the maintenance area, which occurs from June through October. The main emissions sources in the area during this season include agricultural tilling and harvesting in aggregate (43%), Simplot Feeders (18%), and Boise White Paper (10%). Other smaller point sources, such as road dust, construction dust, and motor vehicles comprise the remaining emissions source categories.[5]

[1] *See* Memorandum from the EPA's Assistant Administrator for Air and Radiation to EPA Regional Air Directors entitled ''Areas Affected by Natural Events,'' dated May 30, 1996 (EPA's Natural Events Policy), in effect at that time.

[2] The one exceedance not attributed to high winds occurred on July 3, 1997, and was attributed to an unusual and nonrecurring activity involving the transport of multiple loads of composting material near the monitor.

[3] *See* Memorandum from the EPA's Air Quality Management Division Director to EPA Regional Air Directors entitled ''Procedures for Processing Requests to Redesignate Areas to Attainment,'' dated September 4, 1992 (Calcagni memorandum).

[4] Bonifacio, H.M. (2012). Particulate matter emission rates from beef cattle feedlots in Kansas—Reverse dispersion modeling. *Journal of the Air & Waste Management Association, 62(3), 62(3),* pp.350–361.

[5] Onroad motor vehicles are approximately 1% of the overall inventory. As part of the serious area attainment plan approval, the EPA granted Washington's request for an exemption from regional analysis for transportation conformity because motor vehicles were an insignificant source of PM_{10} emissions.

B. Maintenance Demonstration

To demonstrate maintenance, emissions inventories are projected to future dates to assess the influence of changes in growth and controls. These inventories show actual emissions in pounds per season day equal to 6,334 pounds in 2014, and projected inventories of 8,519 pounds in 2020, and 8,599 pounds in 2025. As discussed in the submission, Ecology used a conservative projection methodology including highest actual emissions, potential to emit, and maximum permitted capacity, as appropriate, in developing the 2020 and 2025 projections.[6] These projections would be expected to represent an upper bound of potential, future emissions, explaining the difference between the 2014 actual emissions and possible growth in 2020 and 2025.

Because the 2020 and 2025 projected emissions inventories are greater than the 2014 attainment inventory, Ecology conducted a roll forward analysis to demonstrate that the Wallula area will continue to remain in attainment through the year 2025. To perform the roll forward modeling, Ecology calculated a three-year design concentration using 2012 through 2014 monitoring data.[7] This 2014 design concentration, equaling 112 micrograms per cubic meter (μg/m^3), corresponds to the 2014 attainment emission inventory. Ecology then modeled how the potential emissions growth might impact future PM_{10} design concentrations. The maximum modeled 2025 design concentration, using the most conservative methodology, was 145 μg/m^3, below the level of the 24-hour PM_{10} NAAQS of 150 μg/m^3. For comparison, if a less conservative methodology is used, factoring in potential natural events and using maximum 5-year actual rather than maximum allowable permit limits, the projected 2025 design concentration would be 82 μg/m^3. As shown in Table 20 of the second 10-year plan, this projected 2025 design concentration is generally consistent with recent design concentrations after factoring in the effect of natural events.

The Calcagni memorandum explains that states are expected to maintain implemented control strategies unless such measures are shown to be unnecessary for maintenance or replaced with measures that achieve equivalent reductions. Ecology retained all control measures cited in the first 10-year maintenance plan; however, some changed over time since the EPA's last approval on May 2, 2005 (70 FR 22597). For example, in 2018, Ecology and Simplot Feeders updated the ''Fugitive Dust Control Plan for Simplot Feeders'' originally approved into the SIP in 2005 (70 FR 22597, May 2, 2005). The updated fugitive dust control plan was developed to prevent dust from any fugitive or point sources from crossing the Simplot property line. The updated fugitive dust control plan requires road dust suppression, better staff training, daily observations, and daily adaptive best management practices to make sure potential fugitive dust emissions are controlled. In a related 2018 update, Ecology negotiated an update to the 1995 ''Fugitive Dust Control Guidelines for Beef Cattle Feedlots and Best Management Practices'' with the Washington Cattlemen's Association, last approved into the SIP in 2005 (70 FR 22597, May 2, 2005). Ecology requested that both updated agreements replace the prior versions currently approved in the SIP.

The first 10-year maintenance plan also included site-specific permits and orders for Boise White Paper and Tyson Fresh Meats (formerly IBP). The SIP-approved order for Boise White Paper (Order No. 1614–AQ04), and the dust control plan for the associated landfill, remain unchanged since the EPA's approval in 2005 (70 FR 22597, May 2, 2005). However, the SIP-approved Title V air operating permit for Boise White Paper, which cites the order and dust control plan as a permit condition, has since expired. Ecology requested that the EPA replace the expired 2004 permit in the SIP with the recently-issued 2018 version. The 2018 version retains permit condition Q.1 requiring compliance with the existing order and fugitive dust plan (a copy of the 2018 permit is included in the docket).

In a notice of construction (NOC) approval order, issued by Ecology in 2002 and approved into the SIP in 2005, Tyson Fresh Meats (formerly IBP) requested a PM_{10} emission limitation to remain below the 70 ton per year threshold for a major source in a Serious PM_{10} nonattainment area (02AQER–5074). In 2007, Tyson Fresh Meats submitted a notice of construction application to increase hourly slaughter rates and add two new cookers. In the technical support document (TSD) amending the SIP-approved Order, Ecology determined the emissions increase would be minimal, with an estimated increase of 0.05 pounds per hour and no increase on annual basis. In implementing the new source review provisions of Chapter 173–400 Washington Administrative Code, Ecology determined that the change would not cause or contribute to violations of the NAAQS. Ecology's TSD and the 2007 amended NOC approval order are included in the docket for this action.

In 2014, Ecology consolidated the air permits for Tyson Fresh Meats into one comprehensive permit, including the permit conditions contained in amended Order 02AQER–5074 (a copy of the consolidated 2014 order is included in the docket for this action). This was done in connection with a request from Tyson to remove propane as a backup fuel for the boilers and not using tallow as a fuel for the boilers and dryers. The TSD for the 2007 permit revision states that, with these changes in allowable fuels, potential to emit PM_{10} is reduced to 27.10 tons per year, well below the 70 tons per year emissions limitation established in the 2002 NOC order of approval, such that Tyson is now a true minor source rather than a synthetic minor source for Title V. The limits on particulate matter from amended Order 02AQER–5074 (currently approved in the SIP), however, remain in effect and are included in the 2014 consolidated permit. Ecology submitted, and the EPA is proposing to approve in the SIP, the updated 2014 permit conditions and related monitoring, recordkeeping, and reporting that replace the permit conditions contained in the 2002 NOC order of approval. Because many of the permit conditions contained in the 2014 consolidated permit are unrelated to the original 2002 SIP-approved NOC order of approval or are not required elements for SIP incorporation, a strikeout version of the exact permit conditions proposed for approval is included in the docket for this action.

C. Monitoring Network

Washington's maintenance plan includes a commitment to continue to operate its EPA-approved monitoring network to demonstrate compliance with the PM_{10} NAAQS for the Wallula area. On June 28, 2018, Ecology submitted the 2018 Annual Monitoring Network Plan, which the EPA approved on August 13, 2018. Ecology's network plan and the EPA's approval letter are included in the docket for this action. Any changes to the PM_{10} monitoring network for the Wallula area must be made in accordance with the requirements of 40 CFR part 58 and approved by the EPA as part of the annual monitoring network plan process.

[6] *See* Emissions Inventory Documentation for the Wallula PM_{10} Second 10-Year Maintenance Plan.

[7] See PM_{10} design concentration table look-up method, page 6–3, PM_{10} SIP Development Guideline.

D. Verification of Continued Attainment

The level of the PM_{10} NAAQS is 150 micrograms per cubic meter (μg/m³), 24-hour average concentration. The NAAQS is attained when the expected number of days per calendar year with a 24-hour average concentration above 150 μg/m³ is equal to or less than one. (40 CFR 50.6). Under the approved first 10-year maintenance plan, verification of continued attainment was addressed through operation of an appropriate air quality monitoring network. In developing the second 10-year maintenance plan, Washington evaluated the most recent three years of complete, quality-assured data for the Wallula area (2015 through 2017) to verify continued attainment of the standard.

As previously discussed, the Clean Air Act allows the exclusion of certain event-affected air quality data. This process is currently implemented under the Exceptional Events Rule (codified at 40 CFR 50.1, 50.14, and 51.930). Under the EPA's Exceptional Events Rule process, Ecology flagged six exceedances of the PM_{10} NAAQS during the 2015 through 2017 monitoring period as potential exceptional events. Three of the flagged exceedances were associated with unusually high wind events that entrained dust (August 14, 2015, October 30, 2015, and November 17, 2015). As discussed in Ecology's submission, this entrained dust primarily originated in the Horse Heaven Hills area, located approximately 70 miles from the maintenance area, as well as other Columbia Plateau counties, such as Franklin and Adams Counties. An additional three days in 2017 were flagged as wildfire-influenced data, with numerous active fires occurring throughout Washington, Oregon, and western Canada on those days (September 5 through 7, 2017). The Exceptional Events Rule recommends that states submit exceptional event demonstrations only for exceedances ''flagged'' as due to exceptional events that have regulatory significance. Consistent with this recommendation, Ecology submitted one exceptional event demonstration on November 30, 2017, to request exclusion of the August 14, 2015, high wind event data. On March 20, 2019, Ecology submitted a second exceptional event demonstration to exclude the wildfire influenced data on September 5 through 7, 2017.

The EPA evaluated Ecology's exceptional event demonstrations for August 14, 2015, and September 5 through 7, 2017, with respect to the requirements of the EPA's Exceptional Events Rule. On March 21, 2018, the EPA concurred with Ecology's request to exclude event-influenced data for August 14, 2015. On September 11, 2019, we concurred with Ecology's request to exclude the wildfire event-influenced data for September 5 and 6, 2017. We note that, although Ecology's exceptional event demonstration included September 7, 2017, it was not necessary for the EPA to concur on this day because the area showed attainment of the 24-hour PM_{10} NAAQS with the exclusion of September 5 and 6, 2017, data. The EPA concurrence letters explain how Ecology met the criteria in the Exceptional Events Rule to demonstrate that the August 14, 2015, and September 5 and 6, 2017, exceedances qualify as exceedances attributable to exceptional events. The EPA now proposes to take final agency action on Ecology's request to exclude data from August 14, 2015, and September 5 and 6, 2017. Exclusion of the event-influenced data yields a three-year average of 1.0 expected exceedances for 2015 through 2017, equal to the threshold of 1.0 to demonstrate attainment of the 24-hour PM_{10} NAAQS. For further information, refer to Ecology's exceptional event demonstration packages and the EPA's concurrence and analysis located in the docket for this action.

E. Contingency Provisions

Due to the unique nature of the Wallula area, with nearly all exceedances since 1995 associated with high wind or wildfire events, the first 10-year maintenance plan contingency provisions relied heavily on the ''Columbia Plateau Windblown Dust Natural Events Action Plan'' (NEAP) approved into the SIP in 2005. The NEAP focuses on agricultural sources, primarily outside the maintenance area, encouraging ongoing participation in U.S. Department of Agriculture soil conservation programs. The NEAP remains unchanged in the SIP since the first 10-year maintenance plan. However, to comply with the EPA's revisions to the Exceptional Events Rule, Ecology submitted a mitigation plan to support future evaluation of exceptional events in the Wallula area, supplementing the SIP-approved NEAP. The Exceptional Events Rule notes that mitigation plans are not required to be submitted as part of the SIP but are evaluated as part of the ongoing EPA and state coordination on exceptional events. The current mitigation plan is included in the docket for this action as well as the EPA's November 21, 2019, letter approving Ecology's mitigation plan. In light of the exceptional event considerations discussed above, Ecology is retaining, unchanged the contingency provisions approved in the first 10-year maintenance plan.

IV. Proposed Actions

The EPA is proposing to approve Ecology's second 10-year maintenance plan for the 24-hour PM_{10} Wallula area as satisfying the requirements of section 175A of the Clean Air Act. We are also proposing to take final agency action on Ecology's request to exclude wildfire and high wind event-influenced data from August 14, 2015, and September 5 and 6, 2017. In addition, we are proposing to approve, and incorporate into the SIP at 40 CFR part 52.2470(d), the updated source-specific requirements for Tyson Fresh Meats, Boise White Paper, and Simplot Feeders shown in Table 1, below.

TABLE 1—STATE SOURCE-SPECIFIC REQUIREMENTS PROPOSED FOR APPROVAL

Name of source	Order/Permit No.	State effective date	Explanations
Tyson Fresh Meats, Inc	13AQ–E526	4/16/2014	Except:
	.....		1. Decontamination Cabinets;
	.....		2. Meat Cutting/Packing;
	.....		6. Wastewater Floatation;
	.....		8. Utility Equipment;
	.....		10. Other;
	.....		References to "WAC 173–460–040" in "Determinations";

TABLE 1—STATE SOURCE-SPECIFIC REQUIREMENTS PROPOSED FOR APPROVAL—Continued

Name of source	Order/Permit No.	State effective date	Explanations
	.....		The portion of Approval Condition 2.a which states, ''and consumption of no more than 128 million cubic feet/of natural gas per year. Natural gas consumption records for the dryer shall be maintained for the most recent 24 month period and be available to Ecology for inspection. An increase in natural gas consumption that exceeds the above level may require a Notice of Construction.'';
	.....		Approval Condition 3;
	.....		Approval Condition 4;
	.....		Approval Condition 5;
	.....		Approval Condition 6.e;
	.....		Approval Condition 9.a.ii;
	.....		Approval Condition 9.a.iv;
	.....		Approval Condition 9.a.v;
	.....		Approval Condition 9.a.vi;
	.....		Approval Condition 10.a.ii;
	.....		Approval Condition 10.b;
	.....		Approval Condition 11.a;
	.....		Approval Condition 11.b;
	.....		Approval Condition 11.e;
	.....		Approval Condition 12;
	.....		Approval Condition 15;
	.....		The section titled ''Your Right to Appeal''; and
	.....		The section titled ''Address and Location Information.''
Boise White Paper L.L.C	0003697	4/1/2018	Condition Q.1 only.
Simplot Feeders Limited Partnership	Fugitive Dust Control Plan.	3/1/2018	

In addition, we are proposing to update the list of supplementary documents in 40 CFR part 52.2470(e) to include the 2003 ''Columbia Plateau Windblown Dust Natural Events Action Plan'' and Ecology's 2018 update of the ''Fugitive Dust Control Guidelines for Beef Cattle Feedlots and Best Management Practices.''

Finally, we are proposing to take final agency action on high wind and wildfire exceptional events associated with the Wallula area and determine that the PM_{10} exceedances on the identified dates were due to exceptional events and can be excluded in determining the attainment status of the area.

V. Incorporation by Reference

In this document, the EPA is proposing to include regulatory text in an EPA final rule that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is proposing to incorporate by reference in 40 CFR part 52.2470(d) the updated source-specific requirements shown in section IV at Table 1 of this preamble. The EPA has made, and will continue to make, these materials generally available through *www.regulations.gov* and at the EPA Region X Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

VI. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely proposes to approve 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 this action does not involve technical standards; 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 any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal

governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

List of Subjects in 40 CFR Part 52

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

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

Dated: December 2, 2019.

Chris Hladick,

Regional Administrator, Region 10.

[FR Doc. 2019–27275 Filed 12–19–19; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 271

[EPA–R01–RCRA–2019–0617; FRL–10003–23–Region 1]

Maine: Proposed Authorization of State Hazardous Waste Management Program Revisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Maine has applied to the Environmental Protection Agency (EPA) for final authorization of changes to its hazardous waste program under the Resource Conservation and Recovery Act (RCRA), as amended. EPA has reviewed Maine's application and has determined that these changes satisfy all requirements needed to qualify for final authorization. Therefore, we are proposing to authorize the State's changes. EPA seeks public comment prior to taking final action.

DATES: Comments must be received on or before January 21, 2020.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R01–RCRA–2019–0617, at *https://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *www.regulations.gov.* EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Sharon Leitch, RCRA Waste Management, UST and Pesticides Section; Land, Chemicals and Redevelopment Division; EPA Region 1, 5 Post Office Square, Suite 100 (Mail code 07–1), Boston, MA 02109–3912; telephone number: (617) 918–1647; fax number (617) 918–0647; email address: *leitch.sharon@epa.gov.*

SUPPLEMENTARY INFORMATION:

A. Why are revisions to state programs necessary?

States that have received final authorization from EPA under RCRA section 3006(b), 42 U.S.C. 6926(b), must maintain a hazardous waste program that is equivalent to, consistent with, and no less stringent than the Federal program. As the Federal program changes, states must change their programs and ask EPA to authorize the changes. Changes to state programs may be necessary when Federal or state statutory or regulatory authority is modified or when certain other changes occur. Most commonly, states must change their programs because of changes to EPA's regulations in 40 Code of Federal Regulations (CFR) parts 124, 260 through 268, 270, 273, and 279.

New Federal requirements and prohibitions imposed by Federal regulations that EPA promulgates pursuant to the Hazardous and Solid Waste Amendments of 1984 (HSWA) take effect in authorized states at the same time that they take effect in unauthorized states. Thus, EPA will implement those requirements and prohibitions in Maine, including the issuance of new permits implementing those requirements, until the State is granted authorization to do so.

B. What decisions has EPA made in this rule?

On October 16, 2019, Maine submitted a complete program revision application seeking authorization of changes to its hazardous waste program. EPA concludes that Maine's application to revise its authorized program meets all of the statutory and regulatory requirements established under RCRA, as set forth in RCRA section 3006(b), 42 U.S.C. 6926(b), and 40 CFR part 271. Therefore, EPA proposes to grant Maine final authorization to operate its hazardous waste program with the changes described in the authorization application, and as outlined below in Section F of this document.

Maine has responsibility for permitting treatment, storage, and disposal facilities within its borders (except in Indian country) and for carrying out the aspects of the RCRA program described in its revised program application, subject to the limitations of HSWA, as discussed above.

C. What is the effect of this proposed authorization decision?

If Maine is authorized for the changes described in Maine's authorization application, these changes will become part of the authorized State hazardous waste program and will therefore be federally enforceable. Maine will continue to have primary enforcement authority and responsibility for its State hazardous waste program. EPA would maintain its authorities under RCRA sections 3007, 3008, 3013, and 7003, including its authority to:

- Conduct inspections, and require monitoring, tests, analyses and reports;
- Enforce RCRA requirements, including authorized State program requirements, and suspend or revoke permits; and
- Take enforcement actions regardless of whether the State has taken its own actions.

This action will not impose additional requirements on the regulated community because the regulations for which EPA is proposing to authorize Maine are already effective under state law and are not changed by this proposed action.

D. What happens if EPA receives comments that oppose this action?

If EPA receives comments on this proposed action, we will address all such comments in a later final rule. You may not have another opportunity to comment. If you want to comment on this authorization, you should do so at this time.

E. What has Maine previously been authorized for?

Maine initially received final authorization on May 6, 1988, effective May 20, 1988 (53 FR 16264) to implement the RCRA hazardous waste management program. EPA granted authorization for changes to Maine's program on the following dates: June 24, 1997, effective August 25, 1997 (62 FR

34007); and November 9, 2004, effective January 10, 2005 (69 FR 64861).

F. What changes are we proposing with today's action?

On October 16, 2019, Maine submitted a final complete program revision application, seeking authorization of changes to its hazardous waste management program in accordance with 40 CFR 271.21. Maine is seeking authorization for updated state regulations addressing portions of the federal Land Disposal Restrictions (LDRs); the federal Toxicity Characteristic (TC) rules to also include organics; updates to the Test Methods; additional Waste Listings; the Conditional Exclusion for Solvent Contaminated Wipes; the Universal Waste rule; and changes to Maine's base program for which they had been previously authorized. EPA proposes to determine, subject to receipt of written comments that oppose this action, that Maine's hazardous waste program revisions are equivalent to, consistent with, and no less stringent than the federal program, and therefore satisfy all of the requirements necessary to qualify for final authorization. Therefore, EPA is proposing to authorize Maine for the following program changes:

Description of Federal requirement	**Federal Register** date and page	Analogous state authority [1]
Checklist 57: Removal of Strontium Sulfide from the List of Hazardous Wastes.	53 FR 43881; 10/31/1988	850.3C(4)(e) and 850, Appendix VIII.
Checklist 69: Reportable Quantity Adjustment for F024 & F025.	54 FR 50968; 12/11/1989	850.3C(2)(a), 850, Appendix VII and VIII.
Checklist 72: Modification of F019 Listing	55 FR 5340; 2/14/1990	850.3C(2)(a).
Checklist 73: Testing & Monitoring Activities Technical Correction.	55 FR 8948; 3/9/1990	850.3A(2).
Checklist 74; 74.1: TC Revisions	55 FR 11798; 3/29/1990 and 55 FR 26986; 6/29/1990.	850.3A(4)(xxiii) & (xx); 850.3B(5)(a) & (b); 850.3C; 850, Appendix II, and 852, Appendix I.
Checklist 75: Listing of 1,1-Dimethylhydrazine Production Wastes.	55 FR 18496; 5/2/1990	850.3C(3) and 850, Appendix VII.
Checklist 78: LDR Third-third	55 FR 22520; 6/1/1990	850.3B(1) through (5); 850.3C(2)(a) & (b); 850.3C(4)(c); 850, Appendix VII; and 851.9G.
Checklist 81: Petroleum Refinery Sludge Listings (F037 and F038).	55 FR 46354; 11/2/1990; amended on 12/17/1990, at 55 FR 51707.	850.3C(2); 850.3C(2)(b); and, 850, Appendix VII.
Checklist 83: LDR Third-Third; Technical Amendments.	56 FR 3864; 1/31/1991	850.3A(3)(d)(i); 850.3B(1)(b); 850.3C(2)(a) and (b); 851.9G.
Checklist 86: Removal of Strontium Sulfide from the List of Hazardous Wastes; Technical Amendment.	56 FR 7567; 2/25/1991	850.3C(4)(e) and 850, Appendix VIII.
Checklist 89: Revisions to the Petroleum Refinery Sludge Listings (F037 and F038).	56 FR 21955; 5/13/1991	850.3C(2)(a).
Checklist 95: LDRs for Electric Arc Furnace dust, K061.	56 FR 41164; 8/19/1991	852.14A.
Checklist 102: Second correction; LDR Third-third.	57 FR 8086; 3/6/1992	852.
Checklist 103: Hazardous Debris Case-by-Case Capacity Variance.	57 FR 20766, 5/15/1992	852.
Checklist 106: Lead-Bearing Hazardous Materials Case-by-Case Capacity Variance.	57 FR 28628; 6/26/1992	852.
Checklist 108: TC Revision; Technical Correction.	57 FR 30657; 7/10/1992	850.3A(2) & (4).
Checklist 109: LDR for Newly Listed Waste & Hazardous Debris.	57 FR 37194; 8/18/1992	852.3A & 3D; 852.7B; 852.8B(2); 852.10; 852.11; 852.13; 852.14A & 14C.
Checklist 110: Coke By-product listings	57 FR 37284; 8/18/1992	850.3A(4)(a)(xxiv); 850.3C(3), and 850, Appendix VII.
Checklist 115: Chlorinated Toluenes Production Waste Listing.	57 FR 47376; 10/15/1992	850.3C(3) and 850, Appendix VII.
Checklist 116: Soil Capacity Variance	57 FR 47772; 10/20/1992	852.
Checklist 117B: TC Revision	57 FR 23062; 6/1/1992	850.3A(3)(c), 850.3B(5) and 850, Appendix II.
Checklist 123: Renewal of Soil Capacity Variance.	58 FR 28506; 5/14/1993	852.
Checklist 124: Land Disposal Restrictions for Ignitable and Corrosive Characteristic Wastes Whose Treatment Standards Were Vacated.	58 FR 29860, 5/24/1993	852.5E & 5J; 852.10; 852.11; 852.13; 852.14A.
Checklist 126: Testing & Monitoring Activities	58 FR 46040; 8/31/1993, as amended 9/19/1994; 59 FR 47980.	850.3.A(2); 850.3.A.(3)(a)(ii); 850.3.B(3) & (5); 850, Appendix II & III.
Checklist 128: Wastes from the Use of Chlorophenolic Formulations in Wood Surface Protection.	59 FR 458; 1/4/1994	850.3A(2); and 850, Appendix VIII.
Checklist 132: Wood Surface Protection; Correction.	59 FR 28484; 6/2/1994	850.3A(2).
Checklist 134: Correction of Beryllium Powder (P015) Listing.	59 FR 31551; 6/20/1994	850.3C(4)(e); 850, Appendix VIII; and 852.14.A.
Checklist 136: Removal of the Conditional Exemption for Certain Slag Residues.	59 FR 43496; 8/24/1994	852.14A.

Description of Federal requirement	Federal Register date and page	Analogous state authority [1]
Checklist 137: Universal Treatment Standards and Treatment Standards for Organic Toxicity Characteristic Wastes and Newly Listed Waste.	59 FR 47982; 9/19/1994 and 60 FR 242; 1/3/1995.	850.3A(4)(a)(xiii); 852.3A,3J,5B & 5D; 852.10; 852.11; 852.13; 852.14A; 852, Appendix IV, V & X.
Checklist 139: Testing & Monitoring Activities: Amendment I.	60 FR 3089; 1/13/1995	850.3A.(2).
Checklist 141: Testing & Monitoring Activities: Amendment II.	60 FR 17001; 4/4/1995	850.3A.(2).
Checklist 151: Land Disposal Restrictions Phase III—Decharacterized Wastewaters, Carbamate Wastes, and Spent Potliners.	61 FR 15566; 4/8/1996; 61 FR 19117; 4/30/1996; 61 FR 33680; 6/28/1996; 61 FR 36419; 7/10/1996; 61 FR 43924; 8/26/1996; and 62 FR 7502; 2/19/1997.	852.5D.
Checklist 155: Land Disposal Restrictions Phase III— Emergency Extension of the K088 Capacity Variance.	62 FR 1992; 1/14/1997	852.13.
Checklist 157: Land Disposal Restrictions Phase IV— Treatment Standards for Wood Preserving Wastes, Paperwork Reduction and Streamlining, Exemptions From RCRA for Certain Processed Materials; and Miscellaneous Hazardous Waste Provisions.	62 FR 25998; 5/12/1997	850.3A(4)(a)(xxii) & (xvi); 852.5B&D; 852.7A(2)(a)&(d); 852.10; and 852.11.
Checklist 158: Testing & Monitoring Activities: Amendment III.	62 FR 32452; 6/13/1997	850.3A.(2).
Checklist 160: Extension of the K088 Capacity Variance.	62 FR 37694; 7/14/1997	852.13.
Checklist 161: Emergency Revision of the Carbamate Land Disposal Restrictions.	62 FR 45568; 8/28/1997	852.14A.
Checklist 162: Clarification of Standards for Hazardous Waste LDR Treatment Variances.	62 FR 64504; 12/5/97	852.14B.
Checklist 167A: Land Disposal Restrictions Phase IV—Treatment Standards for Metal Wastes and Mineral Processing Wastes.	63 FR 28556; 5/26/98	852.14A.
Checklist 167B and Disposal Restrictions Phase IV—Hazardous Soils Treatment Standards and Exclusions.	63 FR 28556; 5/26/98	852.14B.
Checklist 167C—Land Disposal Restrictions Phase IV—Corrections.	63 FR 28556; 5/26/98 as amended at 63 FR 31266; 6/8/98.	852.14A.
Checklist 170—Land Disposal Restrictions Phase IV—Zinc Micronutrient Fertilizers, Amendment.	63 FR 28556; 5/26/98 as amended at 63 FR 31266; 6/8/98.	852.14A.
Checklist 171—Emergency Revision of the Land Disposal Restrictions Treatment Standards for Listed Hazardous Wastes from Carbamate Production.	63 FR 47410; 9/4/98	852.14A.
Checklist 172 Land Disposal Restrictions Phase IV—Extension of Compliance Date for Characteristic Slags.	63 FR 48124; 9/9/98	852.13.
Checklist 173—Land Disposal Restrictions; Treatment Standards for Spent Potliners from Primary Aluminum Reduction (K088); Final Rule.	63 FR 51254; 9/24/98	852.13.
Checklist 180: Revised Test Procedures; Oil & Grease.	64 FR 26315; 5/14/1999	850.3.A(2).
Checklist 190: Land Disposal Restrictions Phase IV—Deferral for PCBs in Soil.	65 FR 81373; 12/26/00	852.13 and 852.14.
Checklist 192B: Land Disposal Restrictions Correction.	66 FR 27266, 5/16/01	852. Appendix VII.
Checklist 193: Change of EPA Mailing Address	66 FR 34374; 6/28/2001	850.3.A(2).
Checklist 201: Treatment Variance for Radioactively Contaminated Batteries.	67 FR 62618; 10/7/02	852.14A.
Checklist 229: Conditional Exclusions for Solvent Contaminated Wipes.	78 FR 46448; 7/31/2013	850.3.A.(4)(c).

[1] The Maine provisions are from the Maine Hazardous Waste Management Rules, 06–096 C.M.R chs. 850–858, effective June 11, 2018.

Because Maine has not adopted certain waste listings that were promulgated under the authority of the Hazardous and Solid Waste Amendments (HSWA), we are not authorizing Maine for Land Disposal Restrictions related to these wastes at this time. As such, EPA will retain authority over the following hazardous waste listings (identified by rule revision checklist number) until the State adopts and is granted authorization in a future rulemaking: 82, Wood Preserving Listings (55 FR 50450, 12/6/1990); 140, Carbamate Production Wastes (60 FR 7824, 2/9/1995, as amended at 60 FR 19165, 4/17/1995, and at 60 FR 25619, 5/12/1995); 169, Petroleum Refining Process Wastes (63 FR 42110, 8/6/1998); 189, Chlorinated Aliphatics Wastes (65 FR 67068, 11/8/

2000); and 195, Inorganic Chemical Manufacturing Wastes (66 FR 58258, 11/20/2001; 67 FR 17119, 4/9/2002). In addition, since the state has not adopted the air emission rules at 40 CFR part 264 and 265 (subparts AA and BB), and these provisions were also promulgated under HSWA authority, EPA will retain authority for these rules and will not be authorizing Maine for the related LDR revisions.

In addition to the regulations listed above, there are various previously authorized State program regulations to which the State has made changes. The EPA is also authorizing these changes. Note, the Federal requirements are identified by reference to a Federal regulation and are followed by the corresponding State regulatory analogs. The changes are as follows: Federal: Materials that are not solid wastes when recycled, 40 CFR 261.2(e)(1)(ii)—State: Added 850.3.A(3)(a)(xix), recycled isopropyl alcohol as an excluded hazardous waste when it is used or reused as an effective substitute for commercial products; Federal: 40 CFR part 279—State: Used cutting oil exclusion, 850.3A(4)(a); Federal: 40 CFR part 262 generator container inspection requirements—State: 851.13.D(1) reduced the requirement for daily inspections at central accumulation areas to weekly inspections.

G. Where are the revised State rules different from the Federal rules?

When revised state rules differ from the Federal rules in the RCRA state authorization process, EPA determines whether the state rules are equivalent to, more stringent than, or broader in scope than the federal program. Pursuant to Section 3009 of RCRA, 42 U.S.C. 6929, state programs may contain requirements that are more stringent than the federal regulations. Such more stringent requirements can be federally authorized and, once authorized, become federally enforceable. Although the statute does not prevent states from adopting regulations that are broader in scope than the federal program, states cannot receive federal authorization for such regulations, and they are not federally enforceable.

EPA considers the following State requirements to be more stringent than the Federal requirements: (a) Maine does not have the exclusion for K061 waste, electric arc furnace dust; (b) the use of underground injection as a means of land disposal is prohibited in Maine, therefore Maine did not adopt any provisions allowing such underground injection; (c) Maine does not have equivalent provisions for 40 CFR part 266, therefore Maine did not adopt any provisions relating to the federal rule; (d) Maine did not adopt the optional changes at 40 CFR 260.30–33; (e) Maine did not adopt the provisions at 40 CFR 268.1(c)(4), Maine requires additional conditions for disposal in a Clean Water Act (CWA) unit; (f) Maine requires a Bureau of Environmental Protection (BEP) rulemaking for any variance from specified treatment technologies issued by EPA; (g) Maine did not adopt any of the provisions for containment buildings; (h) Maine did not adopt any of the revisions to 40 CFR 270.42 for permit modifications, Maine's permit modification procedures are more stringent than the federal ones; and, (i) Maine has reduced the daily inspection requirements for satellite accumulation areas to weekly inspections.

Maine also has some regulations that differ from, but have been determined to be equivalent to, the federal regulations. Specifically, Maine's exclusion for solvent contaminated wipes incorporates the federal solid waste exclusion requirements into the State's exclusion from hazardous waste requirements, therefore the resulting requirements are the same. In addition, Maine has added postconsumer architectural paint waste to its Universal Waste rules in chapter 858. We are authorizing this as being equivalent to the requirements of 40 CFR part 273 Subpart G since postconsumer architectural paint is an appropriate universal waste and that the rules allow the States the flexibility to add additional wastes to their list of universal wastes. Therefore, EPA is reauthorizing the existing universal waste regulations as they are applied to the paint wastes.

These requirements would become part of Maine's authorized program and would be federally enforceable.

EPA also considers the following State requirement as going beyond the scope of the Federal program: Maine has not adopted the mixture and derived from rule revisions (see 66 FR 27266, 5/16/2001) except that Maine has adopted, at 850.3.C(4)(c), an exemption for medicinal nitroglycerine equivalent to the EPA exemption. The waste mixtures and derived from wastes that are excluded from Federal regulation by EPA continue to be regulated as wastes in Maine, except for medicinal nitroglycerine. The State exemption is a broader-in scope requirement.

Broader-in-scope requirements do not become part of the authorized program and EPA cannot enforce them. Although regulated entities must comply with these requirements in accordance with State law, they are not Federal RCRA requirements.

EPA cannot delegate certain Federal requirements associated with the land disposal restrictions at 40 CFR 286.5, 268.40(b), 268.42(b) and 286.44(a)–(g). Although Maine has adopted these requirements by reference at 852.8A, 852.14A and 852.14B, EPA would continue to implement those requirements.

H. Who handles permits after the final authorization takes effect?

When the final authorization takes effect, Maine will issue permits for all the provisions for which it is authorized and will administer the permits it issues. EPA will continue to implement and issue permits for HSWA requirements for which Maine is not yet authorized. EPA has the authority to enforce state-issued permits after the State is authorized.

I. How does today's action affect Indian country (18 U.S.C. 1151) in Maine?

Maine has not applied for and is not authorized to carry out its hazardous waste program in Indian country within the State, which includes the land of the Houlton Band of Maliseet Indians; the Aroostook Band of Micmacs; the Passamaquoddy Tribe at Pleasant Point and Indian Township; and the Penobscot Nation. Therefore, this action has no effect on Indian country. EPA retains jurisdiction over Indian country and will continue to implement and administer the RCRA program on these lands.

J. What is codification and will EPA codify Maine's hazardous waste program as proposed in this rule?

Codification is the process of placing citations and references to the State's statutes and regulations that comprise the State's authorized hazardous waste program into the Code of Federal Regulations. EPA does this by adding those citations and references to the authorized State rules in 40 CFR part 272. EPA is not proposing to codify the authorization of Maine's changes at this time. However, EPA reserves the ability to amend 40 CFR part 272, subpart U for the authorization of Maine's program at a later date.

K. Statutory and Executive Order Reviews

The Office of Management and Budget (OMB) has exempted this action from the requirements of Executive Order 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011). This action proposes to authorize State requirements for the purpose of RCRA section 3006 and imposes no additional requirements beyond those

imposed by State law. Therefore, this action is not subject to review by OMB. This action is not an Executive Order 13771 (82 FR 9339, February 3, 2017) regulatory action because actions such as today's proposed authorization of Maine's revised hazardous waste program under RCRA are exempted under Executive Order 12866. Accordingly, I certify that this action will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this action proposes to authorize pre-existing requirements under State law and does not impose any additional enforceable duty beyond that required by State law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538). For the same reason, this action also does not significantly or uniquely affect the communities of tribal governments, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it merely proposes to authorize State requirements as part of the State RCRA hazardous waste program without altering the relationship or the distribution of power and responsibilities established by RCRA. This action also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant and it does not make decisions based on environmental health or safety risks. This action is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

Under RCRA section 3006(b), EPA grants a state's application for authorization as long as the state meets the criteria required by RCRA. It would thus be inconsistent with applicable law for EPA, when it reviews a state authorization application, to require the use of any particular voluntary consensus standard in place of another standard that otherwise satisfies the requirements of RCRA. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in proposing this rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct. EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1988) by examining the takings implications of this action in accordance with the ''Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings'' issued under the executive order. This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). ''Burden'' is defined at 5 CFR 1320.3(b). Executive Order 12898 (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States. Because this action proposes authorization of pre-existing State rules which are at least equivalent to, and no less stringent than existing federal requirements, and imposes no additional requirements beyond those imposed by State law, and there are no anticipated significant adverse human health or environmental effects, this proposed rule is not subject to Executive Order 12898.

List of Subjects in 40 CFR Part 271

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous waste, Hazardous waste transportation, Indian lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements.

Authority: This action is issued under the authority of sections 2002(a), 3006, and 7004(b) of the Solid Waste Disposal Act as amended, 42 U.S.C. 6912(a), 6926, and 6974(b).

Dated: November 12, 2019.

Dennis Deziel,

Regional Administrator, Region 1.

[FR Doc. 2019–27273 Filed 12–19–19; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

42 CFR Part 121

RIN 0906–AB23

Removing Financial Disincentives to Living Organ Donation

AGENCY: Health Resources and Services Administration (HRSA).

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Health and Human Services (HHS) proposes to amend the regulations implementing the National Organ Transplant Act of 1984, as amended (NOTA), to remove financial barriers to organ donation by expanding the scope of reimbursable expenses incurred by living organ donors to include lost wages and child-care and elder-care expenses incurred by a primary care giver. HHS is committed to reducing the number of individuals on the organ transplant waiting list by increasing the number of organs available for transplant. This proposed rule implements Section 8 of the Executive Order (E.O.) on Advancing American Kidney Health, issued on July 10, 2019, which directs HHS to propose a regulation allowing living organ donors to be reimbursed for related lost wages, child-care expenses, and elder-care expenses through the Reimbursement of Travel and Subsistence Expenses Incurred toward Living Organ Donation program.

DATES: Written comments and related material to this proposed rule must be received to the online docket via *www.regulations.gov,* or to the mail address listed in the **ADDRESSES** section below, on or before February 18, 2020.

ADDRESSES: You may submit comments on this proposed rule identified by HHS Docket No. HRSA–2019–0001, by any one of the following methods:

- *Federal eRulemaking Portal (preferred): www.regulations.gov.* Follow the website instructions for submitting comments.
- *Mail:* Alford Danzy, Regulations Officer, Executive Secretariat, Health Resources and Services Administration, 5600 Fishers Lane, Rockville, Room 13N82, MD 20857. To ensure proper handling, please reference HHS Docket No. HRSA–2019–0001 in your correspondence. Mail must be postmarked by the comment submission deadline.

FOR FURTHER INFORMATION CONTACT: Frank Holloman, Director, Division of Transplantation, Healthcare Systems Bureau, HRSA, 5600 Fishers Lane, Room 08W63, Rockville, MD 20857; by

email at *donation@hrsa.gov;* or by telephone (301) 443–7577.

SUPPLEMENTARY INFORMATION:

I. Public Participation

All interested parties are invited to participate in this rulemaking by submitting written views, comments and arguments on all aspects of this proposed rule, as well as additional data that should be considered. HHS also invites comments that relate to the economic, legal, environmental, or federalism effects that might result from this proposed rule. Comments that will provide the most assistance to HRSA in implementing these changes will reference a specific portion of the proposed rule, explain the reason for any recommended change, and include data, information, or authority that supports such recommended change.

Instructions: If you submit a comment, you must include the agency name and the HHS Docket No. HRSA–2019–0001 for this rulemaking. 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 public comment submission you make to HHS. HHS 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.*

Docket: For access to the docket and to read background documents or comments received, go to *http://regulations.gov,* referencing HHS Docket No. HRSA–2019–0001. You may also sign up for email alerts on the online docket to be notified when comments are posted or a final rule is published.

II. Background and Purpose

As of January 2019, more than 113,000 men, women, and children were on the national organ transplant waiting list. Every 10 minutes another person is added to the waiting list, and approximately 20 people die every day while waiting for a transplant.[1] The current approach to acquiring organs for transplantation relies on the altruism of deceased donors and families and the voluntarism and altruism of living organ donors. Living organ donation is an important option for thousands of men, women, and children on the national transplant waiting list. Transplants using organs from living donors accounted for 19 percent (6,849) of the total (36,528) transplants performed in 2018.[2] Transplants involving organs from deceased donors, who can provide multiple organs, comprised the other 81 percent (29,680) of the 2018 total.[3]

Living organ donation offers a viable transplant option, primarily for kidney and liver transplant candidates, and helps to reduce the overall number of individuals on the deceased donor organ waiting list, improving the transplantation system. The President's Executive Order on Advancing American Kidney Health emphasized that supporting living organ donors can help address the current demand for kidney transplants. That Executive Order directed the HHS Secretary to propose a regulation that would expand the definition of allowable costs that can be reimbursed under HRSA's current Reimbursement of Travel and Subsistence Expenses Incurred toward Living Organ Donation program. This NPRM aligns with the aforementioned Executive Order, which also included language to specifically allow for the reimbursement of lost wages along with child-care and elder-care expenses.

Living organ donation also delivers a number of other benefits for the recipient. The living organ donor transplant recipient can often receive a better quality organ in a shorter time period, which often results in lower rates of graft failure and improved survival rates for organ recipients.[4] In general, recipients of kidney transplants from living organ donors have better clinical outcomes than those who continue on dialysis or receive a deceased donor kidney transplant.[5] Living organ donation also provides significant cost savings over the course of a recipient's lifetime. In the first five years alone following their transplants, projected return on investment (ROI) for living donor financial assistance, relative to dialysis versus transplant costs, has been shown to provide 5.1-fold ROI in year 1 rising up to 28.2-fold ROI in year 5, and produces $256.4 million in savings against patients having remained on dialysis.[6] Living organ donations also deliver intangible benefits, such as the positive feelings that can come with saving or improving the life of another individual. All such benefits must be weighed against the donor risks, which include surgical and anesthesia-related complications and infections as well as the uncertainty of the long-term health effects on donors following living organ donation, which are currently being studied.

According to the 2017 U.S. Scientific Registry of Transplant Recipients (SRTR) Annual Data Report, between 4,400 and 5,000 adults awaiting kidneys are removed from the national transplant waiting list every year because they have died, and an additional 4,000 to 4,500 are removed because they have become too sick to receive a transplant.[7] As of 2016, there were over 500,000 individuals receiving dialysis treatment, and over 200,000 lived with a kidney transplant.[8] To date, approximately 96,000 of these individuals are on the national waiting list awaiting an available kidney.[9] As such, the agency believes regulatory changes designed to increase living organ donation, by removing financial disincentives for living organ donors, such as those proposed in this rule, could mitigate some of these tragic outcomes. The agency further believes that this regulatory language, if finalized as proposed, will encourage and allow for more potential living organ donors to proceed to donation.

A. HRSA's Reimbursement of Travel and Subsistence Expenses Incurred Toward Living Organ Donation Program

Congress provided specific authority under section 377 of the Public Health Service (PHS) Act, as amended, 42 U.S.C. 274f,[10] to the Secretary of Health and Human Services (the Secretary) for reimbursement of travel and subsistence expenses, which encompasses costs for travel to medical and clinical appointments, lodging, and meals, incurred by eligible individuals making living donations of their organs, and

[1] Information from *https://www.organdonor.gov/statistics-stories/statistics.html#glance* and accessed on August 26, 2019.

[2] Data from *optn.transplant.hrsa.gov* and OPTN/SRTR Annual Report.

[3] Data from *optn.transplant.hrsa.gov* and OPTN/SRTR Annual Report.

[4] Data from *https://srtr.transplant.hrsa.gov/annual_reports/2017/Kidney.aspx.*

[5] Data from *https://srtr.transplant.hrsa.gov/annual_reports/2017/Kidney.aspx.*

[6] Mathur AK et al. Return on investment for financial assistance for living kidney donors in the United States. *Clinical Transplant.* 2018;32:e13277. *https://doi.org/10.1111/ctr.13277.*

[7] Data obtained from *https://srtr.transplant.hrsa.gov/annual_reports/2017/Kidney.aspx#KI_5_activity_adult_waiting.*

[8] Data obtained from *https://www.kidney.org/news/newsroom/factsheets/KidneyDiseaseBasics.*

[9] Data obtained from *https://optn.transplant.hrsa.gov/data/* and accessed on September 23, 2019.

[10] Information obtained from *https://www.govinfo.gov/content/pkg/PLAW-108publ216/pdf/PLAW-108publ216.pdf.*

other individuals accompanying the living organ donors.

Within the same section of the PHS Act, Congress also authorized the Secretary to reimburse ''incidental non-medical expenses'' incurred by living organ donors under 42 U.S.C. 274f(a)(2), if the Secretary determines by regulation that reimbursements for such expenses is appropriate.

The National Living Donor Assistance Center (NLDAC) is the living donor reimbursement program (*https://www.livingdonorassistance.org/home/default.aspx*) funded by HRSA's Reimbursement of Travel and Subsistence Expenses Incurred toward Living Organ Donation grant's program. Pursuant to the authority provided under section 377 of the PHS Act, as amended, in 2006 HRSA initially awarded a cooperative agreement to the Regents of the University of Michigan, which partnered with the American Society of Transplant Surgeons to establish the NLDAC in order to operate a program to provide this type of reimbursement. In May 2016, the cooperative agreement transferred to the University of Arizona and in 2019, a new award was granted to the University of Arizona. The program's purpose is to help remove financial disincentives for living organ donations. In adherence to the authority outlined in the PHS Act, the Program Guidelines for NLDAC provide that ''qualifying expenses'' include those incurred by the donor and/or his/her accompanying person(s) as part of: (1) Donor evaluation and/or (2) hospitalization for the living donor surgical procedure, and/or (3) medical or surgical follow-up, clinic visits, or hospitalization within 2 calendar years following the living donation procedure.[11] It is important to note that not all applicants or recipients of reimbursements will go on to donate an organ. Many factors may prevent an intended and willing donor from proceeding with the donation. Such circumstances include present health status of the intended donor or recipient that would prevent the transplant or donation from proceeding, perceived long-term risks to the intended donor, or unforeseen events outside the intended donor's control.

The criteria for reimbursement are based on the incomes of both the recipient and potential living organ donor and include only the aforementioned qualifying expenses. As such, NLDAC currently does not reimburse other expenses incurred by the donor, such as lost wages or child-care and elder-care expenses. Under federal law, the NLDAC cannot reimburse any living organ donor for travel and other qualifying expenses if the donor can be reimbursed for these expenses from any of the following sources: (1) Any state compensation program, an insurance policy, or any federal or state health benefits program; (2) an entity that provides health services on a prepaid basis; or (3) the recipient of the organ. HRSA notes that some living organ donors may receive assistance from other sources, such as private insurers' programs; however, HRSA's reimbursement program specifically aims to assist lower-income donors who lack other forms of financial support. The Program was designed to be the payer of last resort and does not provide funds as a gift or reward to individuals for being a donor.

As intended by HRSA and in compliance with the authorizing legislation, NLDAC prioritizes lower-income donors who are highly unlikely to secure funds for non-medical donation-related expenses from any other sources, and excluded donors when the recipients could reasonably be expected to pay for such expenses. From September 1, 2014, to January 31, 2019, NLDAC received and processed over 3,300 applications, approving nearly 2,900 (87.5 percent). Over that 5-year period, the median household income of NLDAC donors and recipients was $35,229 and $27,519, respectively. The average NLDAC reimbursement in fiscal year 2018 was $1,934 per donor among 1,055 donor applications.

Currently, the median household incomes of NLDAC donors and recipients both fall below the 40th percentile of American households.[12] The strongest evidence that NLDAC is meeting the needs of donors facing financial barriers to donation is demonstrated by data supplied by the current grantee showing that the median household income among NLDAC donors in fiscal year 2018 was $35,463, which is significantly lower than that for other U.S. donors $46,870.

If these changes are finalized as proposed, based on preliminary information provided by the grantee, the agency projects a four to six-fold increase in the number of applicants to the NLDAC. The agency also projects that there would be a subsequent increase in the number of transplants facilitated by NLDAC, commensurate with appropriated funding levels and recipient eligibility guidelines.

The Secretary has not previously determined by regulation that reimbursement for any categories of ''incidental non-medical expenses'' incurred by living organ donors toward their living organ donations may appropriately be provided. If these regulatory changes become final, the agency would amend the Program's Guidelines to reflect inclusion of the specified additional expenses determined to be appropriate for reimbursement.

B. Executive Order 13879: Advancing American Kidney Health

In the E.O on Advancing American Kidney Health, issued on July 10, 2019, the President directed HHS to propose a regulation to allow living donors to be reimbursed for related lost wages, child-care expenses, and elder-care expenses through the Reimbursement of Travel and Subsistence Expenses Incurred toward Living Organ Donation program authorized by 42 U.S.C. 274f. This proposed rule fulfills the President's mandate.

The E.O. further directed HHS to propose a raise to the limit on the income of living donors eligible for reimbursement under the program. The limit on donor income is set through the reimbursement program's Eligibility Guidelines. HRSA is proposing a revision to the Eligibility Guidelines and is considering increasing the upper threshold for living organ donor and organ recipient household income. HRSA will seek public comment on this planned revision to the Eligibility Guidelines through a separately published **Federal Register** notice. Therefore, this proposed rule does not address that aspect of the Executive Order. HRSA will further revise the Eligibility Guidelines to reflect any changes to the reimbursement program made through this rulemaking process.

C. Advisory Committee on Organ Transplantation Recommendations

Section 121.12 of the OPTN Final Rule established the Advisory Committee on Organ Transplantation (ACOT). ACOT advises and provides recommendations to the Secretary through HRSA on:

- All aspects of organ donation, procurement, allocation, and transplantation, and on such other matters that the Secretary determines;
- federal efforts to maximize the number of deceased donor organs made available for transplantation and to support the safety of living organ donation;

[11] NLDAC program guidelines are available at *https://www.govinfo.gov/content/pkg/FR-2009-06-19/pdf/E9-14425.pdf.*

[12] According to the 2013–2017 U.S. Census Bureau American Community Survey 5-Year Estimates, the median household income is $57,652. Data is available at *https://www.census.gov/programs-surveys/acs/.*

• the latest advances in the science of transplantation; and,

• at the request of the Secretary, significant proposed OPTN policies submitted for the Secretary's approval to recommend whether they should be made enforceable.

In May 2019, ACOT voted to provide recommendations to the Secretary which, if adopted, would increase access to organs from living organ donors by providing living donors with additional support and resources and by removing disincentives that may have prevented potential donors from donating. Two of these recommendations are:

• Encourage a permanent mechanism for lost wages reimbursement for non-directed living donors in conjunction with the travel and subsistence costs.

• Amend current guidelines to improve reimbursement so that it includes reimbursement for living donors' child-care and elder-care expenses in addition to travel and subsistence costs.

D. Section 301 of NOTA

Reimbursement payments received via NLDAC must not violate section 301 of NOTA, which makes it ''unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce,'' as described in 42 U.S.C. 274e(a). Thus, section 301 of NOTA outlaws the purchase and sale of organs. Certain expenses are specifically excluded from the scope of valuable consideration, including ''expenses of travel, housing, and lost wages incurred by the donor of a human organ in connection with the donation of the organ.'' 42 U.S.C. 274e(c)(2). Section 301 of NOTA does not expressly say whether child-care or elder-care expenses incurred by a donor in connection with the donation constitute prohibited ''valuable consideration.'' HHS has determined, and the U.S. Department of Justice, Office of Legal Counsel, concurred, that the reimbursement of child-care and elder-care expenses as described here are not valuable consideration under section 301 of NOTA. Therefore, this prohibition does not pose a barrier to the Secretary determining by regulation that the reimbursement of such expenses is appropriate under the authority provided by 42 U.S.C. 274f(a)(2).

III. Discussion of Proposed Rule

Abstract research data showed that, when asked, 75.6 percent of living donors who received NLDAC funds stated that they would not have been able to donate a kidney without the financial assistance provided by the program.[13] In line with this finding, the Agency believes that there are many potential living organ donors who would like to donate an organ to a family member or friend, but cannot afford the loss of income incurred during the required weeks out of work needed for the transplant surgery and recovery time. The extended recovery time can also adversely impact potential donors who are the primary caregivers for children and/or elderly family members. Potential donors can face challenges paying for indirect expenses related to transplantation not covered by insurance. Overall, the costs of the process can be a burden for donors and recipients; for some, these costs make living organ donation unlikely or even impossible.

HRSA's reimbursement program, which is operated through NLDAC, does not currently reimburse lost wages or child-care or elder-care expenses. As previously discussed, section 301 of NOTA is not a barrier to the Secretary determining, by regulation, that such expenses may be reimbursed. Accordingly, HRSA is proposing to remove barriers and disincentives to living organ donation by amending the OPTN Final Rule to formally add lost wages child-care and elder-care expenses incurred by primary caregivers as reimbursable expenses for living organ donors. This rule, if finalized as proposed, will constitute the Secretary's determination by regulation that reimbursement may be appropriately provided for lost wages, and child-care and elder-care expenses incurred by primary caregivers who make living donations of their organs, as authorized by section 377(a)(2) of the PHS Act. HRSA proposes adding a new regulatory section at § 121.14 to list the categories of ''incidental non-medical expenses'' that the Secretary has determined are appropriate for reimbursement.

The other criteria of HRSA's reimbursement program, as provided in the program's Eligibility Guidelines, remain applicable and will still need to be met for reimbursement to be provided to living donors and other individuals evaluated for living organ donation for lost wages and child-care and elder-care expenses incurred by primary caregivers while making donations of their organs. Once the final rule is published, HRSA will revise the Eligibility Guidelines to specifically address reimbursement criteria for these reimbursable expenses.

A. Lost Wages

Many potential living organ donors may be willing and available to donate an organ to a family member, friend, or an unknown recipient, but would be unable to afford the loss in income while out of work during the transplant process, which includes the pre-transplant evaluation, surgery, subsequent recovery time, and follow-up appointments. This proposed rule would remove this potential barrier to living organ donations. In amending the OPTN Final Rule, HRSA proposes determining lost wages as an appropriate reimbursable expense for living organ donors, and adding lost wages as a category of reimbursable incidental non-medical expenses at § 121.14(a)(1).

B. Child-Care Expenses and Elder-Care Expenses

Included among the many costs associated with living organ donation are, for many individuals, the costs of child-care and elder-care. Such costs can be incurred throughout the organ donation process, from the transplant pre-evaluation through the hospital stay, during the recovery period, and while the living donor attends necessary follow-up medical appointments. This proposed rule would remove financial barriers to living organ donation by expanding allowable reimbursements to include child-care and elder-care expenses. Through this proposed rule, HRSA proposes determining that child-care and elder-care expenses incurred by primary caregivers are appropriate reimbursable expenses for living organ donors, and adding child-care expenses at § 121.14(a)(3) and elder-care expenses at § 121.14(a)(4) as categories of reimbursable incidental non-medical expenses.

Additional Financial Barriers to Organ Donation

Similar to the consideration of the wages lost by a potential living organ donor, HRSA is concerned about other financial barriers to organ donation, including but not limited to challenges related to employer-provided medical insurance benefits while out of work during the transplant process, including pre-transplant donor evaluation, donor surgery, and post-surgery recovery. These challenges could include ''foregone medical insurance benefits,'' defined as the loss of a wage supplement for medical insurance premiums provided by an employer.

[13] Merion RM et al. Analysis of dialysis cost and median waiting time on return on investment (ROI) of the US National Living Donor Assistance Center (NLDAC) program [abstract]. *Transplantation.* 2016;100:S310.

HRSA specifically seeks public comment on this descriptor and any literature or evidence on additional financial barriers to organ donation, including whether foregone medical insurance benefits pose a significant barrier to organ donation. While HRSA is not proposing that foregone medical insurance benefits are an appropriate reimbursable expense for living organ donors in this rulemaking, we are interested in public comment as to whether, in a future rulemaking, we should consider any additional benefits as categories of reimbursable incidental non-medical expenses.

IV. Statutory and Regulatory Requirements

A. Executive Orders 12866, 13563, and 13771: Regulatory Planning and Review

HHS has examined the effects of this proposed rule as required by E.O. 12866 on Regulatory Planning and Review (September 30, 1993), E.O. 13563 on Improving Regulation and Regulatory Review (January 8, 2011), the Regulatory Flexibility Act (September 19, 1980, Pub. L. 96–354), the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), E.O. 13132 on Federalism (August 4, 1999), and E.O. 13771 on Reducing Regulation and Controlling Regulatory Costs (January 30, 2017).

E.O. 12866 and E.O. 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). E.O. 13563 supplements and reaffirms the principles, structures, and definitions governing regulatory review as established in E.O. 12866, which emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

Section 3(f) of E.O. 12866 defines a ''significant regulatory action'' as an action that is likely to result in a rule: (1) Having an annual effect on the economy of $100 million or more in any one year, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities (also referred to as ''economically significant''); (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. A regulatory impact analysis must be prepared for major rules with economically significant effects ($100 million or more in any 1 year), and a ''significant'' regulatory action is subject to review by the Office of Management and Budget (OMB). This proposed rule has been determined to be a significant regulatory action. Accordingly, the proposed rule has been reviewed by OMB.

E.O. 13771 (January 30, 2017) requires that the costs associated with significant new regulations ''to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations.'' The designation of this rule, if finalized, will be informed by public comments received; however, if finalized as proposed, this rule would be neither regulatory nor deregulatory for purposes of E.O. 13771. There are no additional costs; the proposed rule, if finalized, will only change how HRSA expends the appropriated funds.

Summary of Impacts

Research into similar legislative changes and changes to financial incentives have demonstrated increases in organ donations; thus, the agency estimates that these proposed regulatory changes will increase the number of living organ transplants. The agency expects this increase for two primary reasons. Studies have shown that reimbursement measures have increased organ donations anywhere from 14 percent to 65 percent, depending on the particular circumstances of the study, and secondly, donor income also appears to play a role in living organ donor transplant rates.

While specific details vary, the country of Israel's move toward reimbursing lost wages and providing other benefits yielded a 65 percent increase in kidney transplants from living donors.[14] In the United States, paying donation-related travel costs through NLDAC increased the number of living donor kidney transplants by approximately 14 percent,[15] with a separate survey of NLDAC donors revealing that 75 percent of donors would not have donated without reimbursement.[16] In addition, tax incentive legislation in New York increased living kidney donations to non-family members by 52 percent.[17] Finally, a study looking at longitudinal trends found that income was strongly associated with donation, with higher rates of donation observed in higher income populations and donation rates declining among the lowest earners after the last recession.[18]

Currently, the United States averages approximately 6,500 living organ donations per year. Determining how many of these, or any additional, living organ donors will be eligible for the proposed financial incentives involves the interplay of a number of factors, as does calculating the cost of these incentives.

First, not all living donors will be eligible for these reimbursements. As previously stated, the E.O. on Advancing American Kidney Health also directed HHS to propose raising the limit on the income of living donors eligible to be reimbursed under the program. The income eligibility threshold is the first criterion in determining whether a potential donor is eligible to receive reimbursement of expenses incurred. Additionally, as previously outlined, NLDAC is to be used as the payer of last resort and cannot reimburse qualifying expenses if the living organ donor can be reimbursed for these expenses through other means.

Second, not all program-eligible living organ donors will incur expenses relating to each one of the new categories of reimbursements (lost wages, child-care, elder-care) offered through the regulatory change. Each donor's circumstances differ; some might request reimbursement for all three types of added reimbursable expenses, some for one or two, and some for none at all.

Third, donors' specific circumstances will determine the reimbursable amounts. Individual wages differ, as do the type, level, and amount of child-care and/or elder-care required to

[14] Lavee, J., Ashkenazi, T., Stoler, A., Cohen, J., & Beyar, R. (2012). Preliminary Marked Increase in the National Organ Donation Rate in Israel Following Implementation of a New Organ Transplantation Law. *American Journal of Transplantation*,13 (3), 780–785, 2012. doi:10.1111/ajt.12001.

[15] Schnier, K.E., Merion, R.M., Turgeon, N., & Howard, D. (2018). Subsidizing altruism in living organ donation. *Economic Inquiry, 56*(1), 398–423.

[16] Merion RM et al. Analysis of dialysis cost and median waiting time on return on investment (ROI) of the US National Living Donor Assistance Center (NLDAC) program [abstract]. *Transplantation.* 2016;100:S310.

[17] Bilgel, F., & Galle, B. (2015). Financial incentives for kidney donation: A comparative case study using synthetic controls. *Journal of Health Economics.* 43, 103–117.

[18] Gill, J., Dong, J., Rose, C., Johnston, O., Landsberg, D., & Gill, J. (2013). The effect of race and income on living kidney donation in the United States. *Journal of the American Society of Nephrology.* 24(11), 1872–1879.

compensate those donors who are caregivers.

Fourth, while living organ donors typically face a 4–6 week post-surgical recovery time, individual recovery times will vary. Surgical complications or personal health issues might slow that process, and the physical demands of the donor's work (*i.e.,* strenuous versus sedentary) might dictate how quickly she or he can return to work.

Given these individual differences, HRSA is using median weekly figures for each expense to estimate the expected costs per individual of these regulatory changes. Please note that the lost wages category correlates to a typical 40-hour work week, while child-care and elder-care are extrapolated out to a full 7-day week, on the presumption that caregivers will require assistance caring for children and the elderly on the weekends as well.

- Wages: $28 per hour [19] for 40 hours per week is a weekly average wage of $1,120 per week or $4,480–$6,720 over 4–6 weeks.
- Child-care: At $420 per full week [20] child-care will cost $1,680–$2,520 over 4–6 weeks.
- Elder-care: At $504 per full week [21] elder-care will cost $2,016–$3,024 over 4–6 weeks.

Funding for this program is a fixed amount that is determined through annual federal discretionary appropriations. These regulatory changes will result in expanded coverage and a potential increase in user demand of the living organ donor reimbursement program. Expanding the list of eligible expenses could increase the average reimbursement. The number of individuals receiving reimbursement and/or the amount of reimbursements per individual in any given fiscal year will be dependent upon annual appropriations. Therefore, increases in the average reimbursement without increases in appropriations could result in fewer individuals being served by the program. Based on the uncertainty of annual appropriation levels for the program, HRSA is considering a range of methods to ensure the ongoing viability of this program, such as a reimbursement cap.

In relation to caps on reimbursements, under current program guidelines, NLDAC limits donors to a maximum of $6,000 for reimbursement of solely travel and subsistence; a correlating demonstration project, on lost wages, limits reimbursement of solely lost wages to a maximum of $5,000; donors receiving reimbursements from both programs are capped at receiving a combined maximum of $8,000. In fiscal year 2018, the average NLDAC reimbursement was $1,934 per donor, which is lower than the current cap level. HRSA may adjust the cap to account for lost wages, child-care, and elder-care. HRSA acknowledges that this cap may not cover the entirety of reimbursable expenses incurred by some donors; however, this assistance does align with one of the major goals of the reimbursement program: To reduce financial disincentives and disparities, not to necessarily make donors whole financially.

While expanding the list of expenses eligible for reimbursement for living organ donors will increase the average amount of reimbursement, the federal government can expect to save overall due to an increase in additional organ transplants performed and the aversion of dialysis. The costs/savings incurred by kidney transplantation vary by donor type. One study using Medicare claims data [22] estimated End-Stage Renal Disease (ESRD) expenditures to be $292,117 over 10 years per beneficiary on dialysis. Living donor kidney transplants (LDKT) was cost-saving at 10 years, reducing expected medical expenditures for ESRD treatment by 13 percent ($259,119) compared to maintenance dialysis.

The approximately $33,000 in Medicare savings per beneficiary over 10 years for LDKT compared to maintenance dialysis is likely a lower bound, since living donation would help reduce the number of beneficiaries under the age of 65 who would be eligible for Medicare enrollment. The lower bound conditional savings can be adjusted to account for additional savings through reduced Medicare enrollment by considering the share of potential new live donations across three main scenarios.

The LDKT expected cost of $259,119 over 10 years per beneficiary projected by Axelrod et al. (2018) assumes Medicare primary payer status. For roughly 25 percent of LDKTs, Medicare is assumed as the primary payer regardless of transplant success; therefore, the projected spending need not be adjusted. For the next 25 percent of LDKTs, the assumption was that the beneficiary is on dialysis and Medicare is the primary payer, but they would eventually no longer need dialysis and/or leave Medicare enrollment if they had a transplant, and are not otherwise eligible for Medicare due to age or disability. Therefore, the expected Medicare spending for these cases was adjusted downward by 33 percent. This projected a savings of approximately $119,000 over 10 years relative to the baseline spending projection of $292,117 over 10 years for beneficiaries on dialysis. For the remaining 50 percent of LDKTs—it was assumed that Medicare is not the primary payer when the transplant occurs. In this case, it was assumed that Medicare spending is nominal relative to baseline spending of $292,117 over 10 years for beneficiaries on dialysis, and amounts were adjusted downward by 33 percent (that is, for these beneficiaries, Medicare would have become the primary payer 30 months to become a Medicare primary payer enrollee absent the transplant), which projected a savings of approximately $195,000 over 10 years. The projected weighted average federal budgetary savings to the Medicare program for LDKT is $136,000 over 10 years per beneficiary.

Therefore, a hypothetical 20 percent increase in the rate of LDKT in model markets in a single year, representing about 500 new kidney transplants mainly from relatives of recipients, would produce approximately $68 million in federal budgetary savings to the Medicare program over 10 years (and multiples thereof for each successive year if the living donor kidney transplant rate was thusly elevated). Overall, having more end stage renal disease (ESRD) individuals receiving transplants will ultimately decrease Medicare expenditures.[23]

A. Initial Regulatory Flexibility Analysis

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) and the Small Business Regulatory Enforcement and Fairness Act of 1996, which amended the RFA, require HHS to analyze options for regulatory relief of small businesses. If a rule has a significant economic effect on a substantial number of small entities, the Secretary must specifically consider the economic effect of the rule on small entities and

[19] Information from the U.S. Bureau of Labor Statistics and available at *https://www.bls.gov/news.release/empsit.nr0.htm.*

[20] National Center for Education Statistics and available at *https://nces.ed.gov/programs/digest/d18/tables/dt18_202.30c.asp.*

[21] Paying for senior care, *https://www.payingforseniorcare.com/longtermcare/costs.html#Non-Medical-Home-Care.*

[22] Axelrod DA, Schnitzler MA, Xiao H, et al. An economic assessment of contemporary kidney transplant practice. *Am J Transplant.* 2018;18:1168–1176. *https://doi.org/10.1111/ajt.14702.*

[23] Obtained from proposed rule CMS–5527–P *Specialty Care Models to Improve Quality of Care and Reduce Expenditures* posted on July 18, 2019, and information available at *https://www.federalregister.gov/documents/2019/07/18/2019-14902/medicare-program-specialty-care-models-to-improve-quality-of-care-and-reduce-expenditures.*

analyze regulatory options that could lessen the impact of the rule. HHS will use an RFA threshold of at least a 3 percent impact on at least 5 percent of small entities. HHS has determined, and the Secretary certifies, that this proposed rule will not have a significant impact on the operations of a substantial number of small manufacturers; therefore, we are not preparing an analysis of impact for the purposes of the RFA.

B. Unfunded Mandates Reform Act

Section 202(a) of the Unfunded Mandates Reform Act of 1995 requires that agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing ''any rule that includes any federal mandate that may result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year.'' In 2019, that threshold is $154 million. HHS does not expect this proposed rule to exceed the threshold.

C. Executive Order 13132—Federalism

HHS has reviewed this proposed rule in accordance with E.O. 13132 regarding federalism and has determined that it does not have ''federalism implications.'' This proposed rule would not ''have substantial direct effects on the States, or on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

D. Collection of Information

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) (PRA) requires that OMB approve all collections of information by a federal agency from the public before they can be implemented. This proposed rule is projected to have no impact on current reporting and recordkeeping burden, as the amendments proposed in this rule will not impose any data collection requirements under the PRA.

List of Subjects in 42 CFR Part 121

Health care, Hospitals, Transplant Centers, Organ Transplantation Reporting and recordkeeping requirements.

Accordingly, by the authority vested in me as the Secretary of Health and Human Services, and for the reasons set forth in the preamble, 42 Code of Federal Regulations Part 121 is proposed to be amended as follows:

PART 121—ORGAN PROCUREMENT AND TRANSPLANTATION NETWORK

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

Authority: Sections 215, 371–77, and 377E of the PHS Act (42 U.S.C. 216, 273–274d, 274f–5); sections 1102, 1106, 1138 and 1871 of the Social Security Act (42 U.S.C. 1302, 1306, 1320b–8, and 1395hh); section 301 of the National Organ Transplant Act, as amended (42 U.S.C. 274e); and E.O. 13879, 84 FR 33817.

■ 2. Revise § 121.1 to read as follows:

§ 121.1 Applicability.

(a) The provisions of this part, with the exception of §§ 121.13 and 121.14, apply to the operation of the Organ Procurement and Transplantation Network (OPTN) and to the Scientific Registry.

(b) The provisions of § 121.13 apply to the prohibition set forth in section 301 of the National Organ Transplant Act, as amended.

(c) The provisions of § 121.14 apply to the reimbursement of specified incidental non-medical expenses incurred toward living organ donation under section 377 of the Public Health Service Act, as amended.

(d) In accordance with section 1138 of the Social Security Act, hospitals in which organ transplants are performed and which participate in the programs under titles XVIII or XIX of the Social Security Act, and organ procurement organizations designated under section 1138(b) of the Social Security Act, are subject to the requirements of this part.

■ 3. Add § 121.14 to read as follows:

§ 121.14 Reimbursement for Living Organ Donors: Incidental Non-Medical Expenses.

(a) The following incidental non-medical expenses incurred by donating individuals toward making living donations of their organs may be reimbursed:

(1) Lost wages;

(2) Child-care expenses; and

(3) Elder-care expenses.

(b) [Reserved]

Dated: December 16, 2019.

Thomas J. Engels,

Administrator, Health Resources and Services Administration.

Approved: December 16, 2019.

Alex M. Azar II,

Secretary, Department of Health and Human Services.

[FR Doc. 2019–27532 Filed 12–17–19; 4:15 pm]

BILLING CODE 4165–15–P

Notices

Federal Register

Vol. 84, No. 245

Friday, December 20, 2019

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

DEPARTMENT OF AGRICULTURE

Forest Service

Uinta-Wasatch-Cache National Forest, Evanston-Mountain View Ranger District; Utah; West Fork Smiths Fork Colorado River Cutthroat Trout Enhancement

AGENCY: Forest Service, USDA.

ACTION: Withdrawal of notice of intent to prepare an environmental impact statement.

SUMMARY: The Evanston-Mountain View Ranger District of the Uinta-Wasatch-Cache National Forest (Forest) is withdrawing the Notice of Intent (NOI) to prepare an Environmental Impact Statement (EIS) for the West Fork Smiths Fork Colorado River Cutthroat Trout Enhancement project. The original NOI was published in the **Federal Register** on August 25, 2017. No significant issues were identified during the scoping period or any other opportunity to comment. Upon further evaluation, the responsible official has determined that the proposed action fits within an identified categorical exclusion (CE); there are no extraordinary circumstances; and the action would not have significant effects to the human environment. As a result, the Forest is withdrawing its intent to prepare an EIS and is now preparing a CE. All comments previously received regarding this project will be retained and considered in the development of the CE.

FOR FURTHER INFORMATION CONTACT: Questions concerning withdrawal of the NOI should be addressed to Paul Chase, Fisheries Biologist, at the following address: Logan Ranger District, Uinta-Wasatch-Cache National Forest, 1500 E Highway 89, Logan, UT 84321; via phone at 435–755–3692; or via email at *paul.chase@usda.gov.* Individuals and organizations that previously submitted comments on this project will remain on the project mailing list.

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday.

Dated: November 18, 2019.

Richard A. Cooksey,

Acting Associate Deputy Chief, National Forest System.

[FR Doc. 2019–27439 Filed 12–19–19; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF COMMERCE

Census Bureau

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

Agency: U.S. Census Bureau.

Title: Collection of State Administrative Records Data.

OMB Control Number: 0607–0995.

Form Number(s): Information will be collected in the form of a data transfer to the Census Bureau. No form will be used.

Type of Request: Regular.

Number of Respondents: 50 states, and the District of Columbia.

Average Hours per Response: 75 hours.

Burden Hours: 3,825 hours.

Needs and Uses: The State administrative records will be integrated and linked with Census Bureau data from surveys and censuses and used to augment or replace Census operations, improve the Census Bureau's Title 13, U.S. Code (U.S.C) authorized censuses and surveys and methods of collecting program participation data, and conduct research to improve record linking methods.

The Census Bureau may provide tabulated data of linked administrative, survey, and census data to state data sharing partners. Tabulated data are subject to disclosure avoidance review prior to release. Data sharing and analysis of linked files are solely for statistical purposes, not for program enforcement. All State administrative records data are and will remain confidential, whether in their original form or when comingled or linked with survey and census data.

Affected Public: State governments.

Frequency: Initial data extract delivery followed by an annual data extract delivery through the duration of the terms of the agreement.

Respondent's Obligation: None. The data is being requested.

Legal Authority: The authority for the Census Bureau to enter into these agreements is 13 U.S.C. 6, which permits the Census Bureau to access, by purchase or otherwise, information to assist the Census Bureau in the performance of duties under Title 13, United States Code. Other specific citations may apply per the data sharing partner.

This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *OIRA_Submission@omb.eop.gov* or fax to (202) 395–5806.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2019–27477 Filed 12–19–19; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–559–808, A–469–819]

Acetone From Singapore and Spain: Antidumping Duty Orders

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: Based on affirmative final determinations by the Department of Commerce (Commerce) and the International Trade Commission (ITC), Commerce is issuing antidumping duty orders on acetone from Singapore and Spain.

DATES: Applicable December 20, 2019.

FOR FURTHER INFORMATION CONTACT: Joshua DeMoss at (202) 482–3362

(Singapore) or Preston Cox at (202) 482–5041 (Spain), AD/CVD Operations, Office VI, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Background

In accordance with sections 735(d) and 777(i)(1) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.210(c), on October 21, 2019, Commerce published its affirmative final determinations in the less-than-fair-value (LTFV) investigations of acetone from Singapore and Spain.[1] On December 5, 2019, the ITC notified Commerce of its final affirmative determinations that an industry in the United States is materially injured within the meaning of section 735(b)(1)(A)(i) of the Act, by reason of the LTFV imports of acetone from Singapore and Spain.[2] The ITC published its final determinations on December 10, 2019.[3]

Scope of the Orders

The merchandise covered by these orders is acetone from Singapore and Spain. For a complete description of the scope of the orders, *see* the Appendix to this notice.

Antidumping Duty Orders

On December 5, 2019, in accordance with sections 735(b)(1)(A)(i) and 735(d) of the Act, the ITC notified Commerce of its final determinations that an industry in the United States is materially injured by reason of imports of acetone from Singapore and Spain.[4] Therefore, in accordance with sections 735(c)(2) and 736 of the Act, Commerce is issuing these antidumping duty orders. Because the ITC determined that imports of acetone from Singapore and Spain are materially injuring a U.S. industry, unliquidated entries of such merchandise from Singapore and Spain, which are entered or withdrawn from warehouse for consumption, are subject to the assessment of antidumping duties.

As a result of the ITC's final affirmative determinations, in accordance with section 736(a)(1) of the Act, Commerce will direct U.S. Customs and Border Protection (CBP) to assess, upon further instruction by Commerce, antidumping duties equal to the amount by which the normal value of the merchandise exceeds the export price or constructed export price of the merchandise, for all relevant entries of acetone from Singapore and Spain. Antidumping duties will be assessed on unliquidated entries of acetone from Singapore and Spain entered, or withdrawn from warehouse, for consumption on or after August 31, 2018, the date of publication of the *Preliminary Determinations,*[5] but will not include entries occurring after the expiration of the provisional measures period and before publication in the **Federal Register** of the ITC's injury determination, as further described below.

Suspension of Liquidation

In accordance with section 736 of the Act, Commerce will instruct CBP to reinstitute the suspension of liquidation of subject merchandise (*i.e.,* acetone from Singapore and Spain), effective on the date of publication of the ITC final determinations in the **Federal Register**, and to assess, upon further instruction by Commerce pursuant to section 736(a)(1) of the Act, antidumping duties for each entry of the subject merchandise equal to the amount by which the normal value of the merchandise exceeds the export price or constructed export price of the merchandise, adjusted by the amount of export subsidies, where appropriate. We intend to instruct CBP to require, at the same time as importers would normally deposit estimated import duties on this merchandise, cash deposits for each entry of subject merchandise equal to the estimated weighted-average dumping margins listed below. These instructions suspending liquidation will remain in effect until further notice. The all-others rates apply to all other producers or exporters not specifically listed.

Estimated Weighted-Average Dumping Margins

The estimated weighted-average dumping margins for each antidumping duty order are as follows:

Exporter/producer	Weighted-average dumping margin (percent)
Singapore	
Mitsui Phenols Singapore Pte. Ltd	131.75
All Others	66.42
Spain	
CEPSA Quimica, S.A	171.81
All Others	137.39

Provisional Measures

Section 733(d) of the Act states that suspension of liquidation pursuant to an affirmative preliminary determination may not remain in effect for more than four months, except that Commerce may extend the four-month period to no more than six months at the request of exporters representing a significant proportion of exports of the subject merchandise. Commerce's *Preliminary Determinations* were published on August 5, 2019.[6] Commerce's *Final Determinations* were not extended and were published on October 21, 2019.[7] As such, the four-month period beginning on the date of publication of the *Preliminary Determinations* ended on December 3, 2019.

Therefore, in accordance with section 733(d) of the Act, Commerce instructed CBP to terminate the suspension of liquidation, and to liquidate, without regard to antidumping duties, unliquidated entries of acetone from Singapore and Spain entered or withdrawn from warehouse for consumption after December 3, 2019, the date on which the provisional measures expired, through the day preceding the date of publication of the ITC's final affirmative injury determinations in the **Federal Register**. Suspension of liquidation will resume on the date of publication of the ITC's final affirmative injury determinations in the **Federal Register**.

Notification to Interested Parties

This notice constitutes the antidumping duty orders with respect to acetone from Singapore and Spain pursuant to section 736(a) of the Act. Interested parties can find a list of antidumping duty orders currently in effect at *http://enforcement.trade.gov/stats/iastats1.html.*

These orders are published in accordance with section 736(a) of the Act and 19 CFR 351.211(b).

[1] *See Acetone from Singapore: Final Determination of Sales at Less Than Fair Value,* 84 FR 56171 (October 21, 2019); *see also Acetone from Spain: Final Determination of Sales at Less Than Fair Value, and Final Determination of No Shipments,* 84 FR 56166 (October 21, 2019) (collectively, *Final Determinations*).

[2] *See* ITC's Letter dated December 5, 2019 (ITC Notification Letter).

[3] *See Acetone from Singapore and Spain; Determinations,* 84 FR 67476 (December 10, 2019).

[4] *See* ITC Notification Letter.

[5] *See Acetone from Singapore: Preliminary Affirmative Determination of Sales at Less Than Fair Value,* 84 FR 38005 (August 5, 2019); *Acetone from Spain: Preliminary Affirmative Determination of Sales at Less Than Fair Value, and Preliminary Determination of No Shipments,* 84 FR 37990 (August 5, 2019) (collectively, *Preliminary Determinations*).

[6] *See Preliminary Determinations.*

[7] *See Final Determinations.*

Dated: December 16, 2019.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix—Scope of the Orders

The merchandise covered by these orders is all grades of liquid or aqueous acetone. Acetone is also known under the International Union of Pure and Applied Chemistry (IUPAC) name propan-2-one. In addition to the IUPAC name, acetone is also referred to as ß-ketopropane (or beta-ketopropane), ketone propane, methyl ketone, dimethyl ketone, DMK, dimethyl carbonyl, propanone, 2-propanone, dimethyl formaldehyde, pyroacetic acid, pyroacetic ether, and pyroacetic spirit. Acetone is an isomer of the chemical formula C_3H_6O, with a specific molecular formula of CH_3COCH_3 or $(CH_3)_2CO$.

The scope covers both pure acetone (with or without impurities) and acetone that is combined or mixed with other products, including, but not limited to, isopropyl alcohol, benzene, diethyl ether, methanol, chloroform, and ethanol. Acetone that has been combined with other products is included within the scope, regardless of whether the combining occurs in third countries.

The scope also includes acetone that is commingled with acetone from sources not subject to this investigation.

For combined and commingled products, only the acetone component is covered by the scope of this investigation. However, when acetone is combined with acetone components from sources not subject to this investigation, those third country acetone components may still be subject to other acetone investigations.

Notwithstanding the foregoing language, an acetone combination or mixture that is transformed through a chemical reaction into another product, such that, for example, the acetone can no longer be separated from the other products through a distillation process (*e.g.,* methyl methacrylate (MMA) or Bisphenol A (BPA)), is excluded from this investigation.

A combination or mixture is excluded from these investigations if the total acetone component (regardless of the source or sources) comprises less than 5 percent of the combination or mixture, on a dry weight basis.

The Chemical Abstracts Service (CAS) registry number for acetone is 67–64–1.

The merchandise covered by this investigation is currently classifiable under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 2914.11.1000 and 2914.11.5000. Combinations or mixtures of acetone may enter under subheadings in Chapter 38 of the HTSUS, including, but not limited to, those under heading 3814.00.1000, 3814.00.2000, 3814.00.5010, and 3814.00.5090. The list of items found under these HTSUS subheadings is non-exhaustive. Although these HTSUS subheadings and CAS registry number are provided for convenience and customs purposes, the written description of the scope of this investigation is dispositive.

[FR Doc. 2019–27533 Filed 12–19–19; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Limitation of Duty-Free Imports of Apparel Articles Assembled in Haiti Under the Caribbean Basin Economic Recovery Act (CBERA), as Amended by the Haitian Hemispheric Opportunity Through Partnership Encouragement Act (HOPE)

AGENCY: International Trade Administration, Department of Commerce.

ACTION: Notification of Annual Quantitative Limit on Imports of Certain Apparel from Haiti.

SUMMARY: CBERA, as amended, provides duty-free treatment for certain apparel articles imported directly from Haiti. One of the preferences is known as the ''value-added'' provision, which requires that apparel meet a minimum threshold percentage of value added in Haiti, the United States, and/or certain beneficiary countries. The provision is subject to a quantitative limitation, which is calculated as a percentage of total apparel imports into the United States for each 12-month annual period. For the annual period from December 20, 2019 through December 19, 2020, the quantity of imports eligible for preferential treatment under the value-added provision is 376,935,586 square meters equivalent.

DATES: The new limitation takes effect on December 20, 2019.

FOR FURTHER INFORMATION CONTACT: Laurie Mease, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–2043.

SUPPLEMENTARY INFORMATION:

Authority: Section 213A of the Caribbean Basin Economic Recovery Act (19 U.S.C. 2703a) (''CBERA''), as amended; and as implemented by Presidential Proc. No. 8114, 72 FR 13655 (March 22, 2007), and No. 8596, 75 FR 68153 (November 4, 2010).

Background: Section 213A(b)(1)(B) of CBERA, as amended (19 U.S.C. 2703a(b)(1)(B)), outlines the requirements for certain apparel articles imported directly from Haiti to qualify for duty-free treatment under a ''value-added'' provision. In order to qualify for duty-free treatment, apparel articles must be wholly assembled, or knit-to-shape, in Haiti from any combination of fabrics, fabric components, components knit-to-shape, and yarns, as long as the sum of the cost or value of materials produced in Haiti or one or more beneficiary countries, as described in CBERA, as amended, or any combination thereof, plus the direct costs of processing operations performed in Haiti or one or more beneficiary countries, as described in CBERA, as amended, or any combination thereof, is not less than an applicable percentage of the declared customs value of such apparel articles. Pursuant to CBERA, as amended, the applicable percentage for the period December 20, 2019 through December 19, 2020, is 60 percent.

For every twelve-month period following the effective date of CBERA, as amended, duty-free treatment under the value-added provision is subject to a quantitative limitation. CBERA, as amended, provides that the quantitative limitation will be recalculated for each subsequent 12-month period. Section 213A(b)(1)(C) of CBERA, as amended (19 U.S.C. 2703a(b)(1)(C)), requires that, for the twelve-month period beginning on December 20, 2019, the quantitative limitation for qualifying apparel imported from Haiti under the value-added provision will be an amount equivalent to 1.25 percent of the aggregate square meter equivalent of all apparel articles imported into the United States in the most recent 12-month period for which data are available.

The aggregate square meters equivalent of all apparel articles imported into the United States is derived from the set of Harmonized System lines listed in the Annex to the World Trade Organization Agreement on Textiles and Clothing (''ATC''), and the conversion factors for units of measure into square meter equivalents used by the United States in implementing the ATC. For purposes of this notice, the most recent 12-month period for which data are available as of December 20, 2019 is the 12-month period ending on October 31, 2019.

Therefore, for the one-year period beginning on December 20, 2019 and extending through December 19, 2020, the quantity of imports eligible for preferential treatment under the value-added provision is 376,935,586 square meters equivalent. Apparel articles entered in excess of these quantities will

be subject to otherwise applicable tariffs.

Lloyd Wood,

Deputy Assistant Secretary for Textiles, Consumer Goods, and Materials.

[FR Doc. 2019–27503 Filed 12–19–19; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–475–818]

Certain Pasta From Italy: Notice of Partial Rescission of Antidumping Duty Administrative Review

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

DATES: Applicable December 20, 2019.

FOR FURTHER INFORMATION CONTACT: Jonathan Hall-Eastman or Joy Zhang, AD/CVD Operations, Office III, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–1468 or (202) 482–1168, respectively.

SUPPLEMENTARY INFORMATION:

Background

On July 1, 2019, the Department of Commerce (Commerce) published a notice of opportunity to request an administrative review of the antidumping duty order on certain pasta from Italy.[1] Pursuant to requests from interested parties, and in accordance with section 751(a) of the Tariff Act of 1930, amended (the Act), Commerce published in the **Federal Register** the notice of initiation of an antidumping duty administrative review with respect to the following companies covering the period July 1, 2018, through June 30, 2019:

Aldino S.r.l. (Aldino), F. Divella S.p.A. (F. Divella), Ghigi 1870 S.p.A. (Ghigi), Industria Alimentare Colavita S.p.A. (Indalco), La Molisana S.p.A. (La Molisana), Liguori Pastificio dal 1820 S.p.A. (Liguori Pastificio), Newlat Food S.p.A. (Newlat Food), Pastificio Fratelli DeLuca S.r.l. (Pastificio Fratelli), Pasta Lensi, S.r.l. (Pasta Lensi), Pasta Zara S.p.A. (Pasta Zara), Pasta Berruto S.p.A. (Pasta Berruto), Pastificio Di Martino Gaetano & Flli S.p.A. (Pastificio Di Martino), Pastificio Rey S.r.L. (Pastificio Rey), Rummo S.p.A. (Rummo), San Remo Macaroni Company (San Remo Macaroni), Tesa SrL (Tesa), and Valdigrano di Flavio Pagani S.r.L. (Valdigrano di Flavio).[2]

On September 13, 2019, Pasta Lensi timely withdrew its request for a review.[3] On October 29, 2019, Indalco timely withdrew its request for a review.[4] On December 6, 2019, Aldino timely withdrew its request for a review.[5] No other party requested an administrative review of these companies.

Partial Rescission of the 2018–2019 Administrative Review

Pursuant to 19 CFR 351.213(d)(1), Commerce will rescind an administrative review, in whole or in part, if the parties that requested a review withdraw the request within 90 days of the date of publication of the notice of initiation of the requested review. All of the aforementioned withdrawal requests were timely submitted and no other interested party requested an administrative review of these particular companies. Therefore, in accordance with 19 CFR 351.213(d)(1), and consistent with our practice,[6] we are rescinding this review of the antidumping duty order on certain pasta from Italy, in part, with respect to Aldino, Indalco, and Pasta Lensi.

The review will continue with respect to the following companies: F. Divella, Ghigi/Zara,[7] La Molisana, Liguori Pastificio, Newlat Food, Pastificio Fratelli, Pasta Berruto, Pastificio Di Martino, Pastificio Rey, Rummo, San Remo Macaroni, Tesa, and Valdigrano di Flavio.

Assessment

Commerce will instruct Customs and Border Protection (CBP) to assess antidumping duties on all appropriate entries. For the companies for which this review is rescinded, Aldino, Indalco, and Pasta Lensi, antidumping duties shall be assessed at rates equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, during the period July 1, 2018, through June 30, 2019, in accordance with 19 CFR 351.212(c)(1)(i).

Commerce intends to issue appropriate assessment instructions directly to CBP 15 days after publication of this notice.

Notification to Importers

This notice serves as a reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping and/or countervailing 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 and/or countervailing duties occurred and the subsequent assessment of doubled antidumping duties.

Notification Regarding Administrative Protective Order

This notice serves as a final reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under an APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/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 violation which is subject to sanction.

This notice is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.213(d)(4).

Dated: December 16, 2019.

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2019–27536 Filed 12–19–19; 8:45 am]

BILLING CODE 3510–DS–P

[1] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review,* 84 FR 31295 (July 1, 2019).

[2] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 84 FR 47244 (September 9, 2019) (*Initiation Notice*).

[3] *See* Pasta Lensi's Letter, ''Pasta from Italy: Withdrawal of Request for Administrative Review,'' dated September 13, 2019.

[4] *See* Indalco's Letter, ''Certain Pasta From Italy: Withdrawal of Request for Antidumping Administrative Review of Indalco S.p.A.,'' dated October 29, 2019.

[5] *See* Aldino's Letter, ''Pasta From Italy; Withdrawal of Request for Administrative Review,'' dated December 6, 2019.

[6] *See, e.g., Certain Lined Paper Products from India: Notice of Partial Rescission of Antidumping Duty Administrative Review and Extension of Time Limit for the Preliminary Results of Antidumping Duty Administrative Review,* 74 FR 21781 (May 11, 2009); *see also Carbon Steel Butt-Weld Pipe Fittings from Thailand: Rescission of Antidumping Duty Administrative Review,* 74 FR 7218 (February 13, 2009).

[7] We have collapsed Ghigi 1870 S.p.A. and Pasta Zara S.p.A. (collectively Ghigi/Zara) since the 2015–2016 administrative review. *See Certain Pasta From Italy: Final Results of Antidumping Duty Administrative Review; 2015–2016,* 82 FR 57428 (December 5, 2017); *see also Certain Pasta From Italy: Final Results of Antidumping Duty Administrative Review; 2016–2017,* 83 FR 63627 (December 11, 2018).

DEPARTMENT OF COMMERCE

International Trade Administration

[A–523–812]

Circular Welded Carbon-Quality Steel Pipe From the Sultanate of Oman: Preliminary Results of Antidumping Duty Administrative Review; 2017–2018

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) preliminarily finds that circular welded carbon-quality steel pipe (CWP) from the Sultanate of Oman (Oman) has been sold in the United States at prices below normal value (NV) during the period of review (POR), December 1, 2017 through November 30, 2018. We invite interested parties to comment on these preliminary results.

DATES: Applicable December 20, 2019.

FOR FURTHER INFORMATION CONTACT: Dennis McClure or Robert Palmer, 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) 482–5973 or (202) 482–9068, respectively.

SUPPLEMENTARY INFORMATION:

Background

On March 14, 2019, Commerce initiated the antidumping duty administrative review on circular welded carbon-quality steel pipe from the Sultanate of Oman.[1] This review covers one producer/exporter of the subject merchandise, Al Jazeera Steel Products Co. SAOG (Al Jazeera). For a detailed description of the events that followed the initiation of this review, *see* the Preliminary Decision Memorandum.[2]

Scope of the Order

The merchandise subject to the *Order*[3] is CWP from Oman. A full description of the scope of the *Order* is contained in the Preliminary Decision Memorandum.

Methodology

Commerce is conducting this review in accordance with section 751(a)(1)(B) and (a)(2) of the Tariff Act of 1930, as amended (the Act). Export price was calculated in accordance with section 772 of the Act. NV was 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 as an appendix to this notice. One of the issues raised in the course of this review was the treatment of duties paid pursuant to section 232 of the Trade Expansion Act of 1962, as amended.[4] As explained in the Preliminary Decision Memorandum, we have adjusted export prices to reflect the payment of those duties, in accordance with section 772(c)(2)(A) of the Act.[5]

In addition, the domestic interested parties[6] have alleged the existence of a particular market situation (PMS) in Oman with respect to the price of the input, hot rolled coil, pursuant to section 773(e) of the Act.[7] We have preliminarily determined that there is no PMS.[8]

The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *http://access.trade.gov,* and to all parties in the Central Records Unit, Room B8024 of the main Commerce building. In addition, a complete version of the Preliminary Decision Memorandum can be accessed at *http://enforcement.trade.gov/frn/index.html.* The signed and electronic versions of the Preliminary Decision Memorandum are identical in content.

Preliminary Results of the Review

We preliminarily determine that, for the period of December 1, 2017 through November 30, 2018, the following weighted-average dumping margin exists:

Exporter/producer	Weighted-average dumping margin (percent)
Al Jazeera Steel Products Co. SAOG	1.04

Disclosure, Public Comment, and Opportunity To Request a Hearing

We intend to disclose the calculations performed for these preliminary results of review to interested parties within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b). Interested parties may submit case briefs to Commerce no later than 30 days after the date of publication of this notice.[9] 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.[10] Pursuant to 19 CFR 351.309(c)(2) and (d)(2), 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.[11] Case and rebuttal briefs should be filed using ACCESS.[12]

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 ACCESS by 5 p.m. Eastern Standard 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; (3) whether any participant is a foreign national; and (4) a list of issues parties intend to discuss. Issues raised in the hearing will be limited to those raised in the respective case and rebuttal briefs. If a request for a hearing is made, Commerce intends to hold the hearing at the U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230, at a time and date to be determined.[13] Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date.

We intend to issue the final results of this administrative review, including

[1] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 84 FR 9297 (March 14, 2019).

[2] *See* Memorandum, ''Decision Memorandum for the Preliminary Results of Antidumping Duty Administrative Review: Circular Welded Carbon-Quality Steel Pipe from the Sultanate of Oman; 2017–2018,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[3] *See Circular Welded Carbon-Quality Steel Pipe From the Sultanate of Oman, Pakistan, and the United Arab Emirates: Amended Final Affirmative Antidumping Duty Determination and Antidumping Duty Orders,* 81 FR 91906 (December 19, 2016) (*Order*).

[4] *See* 19 U.S.C. 1862.

[5] *See* Preliminary Decision Memorandum at 17–19.

[6] The domestic interested parties are Independence Tube Corporation, a Nucor company, and Southland Tube, Incorporated, a Nucor company.

[7] *See* Domestic Interested Parties' Letter, ''Certain Circular Welded Carbon-Quality Steel Pipe from the Sultanate of Oman: Particular Market Situation Allegation and Supporting Information,'' dated June 19, 2019.

[8] *See* Preliminary Decision Memorandum at 6–13.

[9] *See* 19 CFR 351.309(c)(1)(ii).

[10] *See* 19 CFR 351.309(d).

[11] *See* 19 CFR 351.309(c)(2) and (d)(2).

[12] *See* 19 CFR 351.303.

[13] *See* 19 CFR 351.310(c).

the results of its analysis of issues raised in any written briefs, not later than 120 days after the date of publication of this notice, unless the deadline is extended.[14]

Assessment Rates

Upon issuance of the final results, Commerce shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries covered by this review.[15]

Pursuant to 19 CFR 351.212(b)(1), as Al Jazeera reported the entered value for its U.S. sales, we calculated importer-specific *ad valorem* duty assessment rates based on the ratio of the total amount of dumping calculated for the examined sales to the total entered value of the sales.[16] Where the respondent's weighted-average dumping margin is zero or *de minimis* within the meaning of 19 CFR 351.106(c)(1), or an importer-specific rate is zero or *de minimis,* we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.

The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results of this review and for future deposits of estimated duties, where applicable.

In accordance with our ''automatic assessment'' practice, for entries of subject merchandise during the POR produced by Al Jazeera for which it did not know its merchandise was destined for the United States, we will instruct CBP to liquidate unreviewed entries at the all-others rate.[17]

We intend to issue liquidation instructions to CBP 15 days after publication of the final results of this review.

Cash Deposit Requirements

The following deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) The cash deposit rate for Al Jazeera will be the rate established in the final results of this review; (2) for previously reviewed or investigated companies not participating in this review, the cash deposit rate will continue to be the company-specific rate published for the most recently-completed segment of this proceeding in which the company was reviewed; (3) if the exporter is not a firm covered in this review, a prior review, or the less-than-fair value (LTFV) investigation, but the manufacturer is, then the cash deposit rate will be the rate established for the most recently-completed segment of this proceeding for the manufacturer of subject merchandise; and (4) the cash deposit rate for all other manufacturers or exporters will continue to be 7.36 percent, the all-others rate established in the LTFV investigation.[18] 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 doubled antidumping duties.

Notification to Interested Parties

The preliminary results of this review are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.221(b)(4).

Dated: December 16, 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. Allegation of a Particular Market Situation
V. Discussion of the Methodology
VI. Currency Conversion
VII. Recommendation

[FR Doc. 2019–27534 Filed 12–19–19; 8:45 am]

BILLING CODE 3510–DS–P

[14] *See* section 751(a)(3)(A) of the Act; and 19 CFR 351.213(h).

[15] *See* 19 CFR 351.212(b).

[16] In these preliminary results, we 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).

[17] For a full discussion of this clarification, *see Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

[18] *See Order.*

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XV150]

Gulf of Mexico Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The Gulf of Mexico Fishery Management Council will hold a one day in-person meeting of its Standing, Reef Fish, Socioeconomic and Coral Scientific and Statistical Committees (SSC).

DATES: The meeting will convene on Thursday, January 9, 2020, from 9 a.m. to 4 p.m., EST.

ADDRESSES: The meeting will take place at the Gulf Council office.

Council address: Gulf of Mexico Fishery Management Council, 4107 W Spruce Street, Suite 200, Tampa, FL 33607; telephone: (813) 348–1630.

FOR FURTHER INFORMATION CONTACT: Ryan Rindone, Fishery Biologist, Gulf of Mexico Fishery Management Council; *ryan.rindone@gulfcouncil.org,* telephone: (813) 348–1630.

SUPPLEMENTARY INFORMATION:

Thursday, January 9, 2020; 9 a.m.–4 p.m.

The meeting will begin with introductions, adoption of agenda, and approval of minutes from the September 2019 meeting and October 2019 webinar; along with a review of the Scope of Work and selection of an SSC Representative to attend the January Council meeting in New Orleans, LA. The Committees will receive a presentation on the Florida Keys National Marine Sanctuary Expansion; an overview of Coral and Shrimp SSC recommendations on Draft Environment Impact Statement (DEIS); and, review other Coral SSC Recommendations.

Following lunch, the Committees will review an updated analysis of Lane Snapper with Marine Recreational Information Program-Fishing Effort Survey (MRIP–FES) Data including Overfishing Limits (OFL) and Acceptable Biological Catch (ABC) recommendations, and SEDAR 61: Gulf Red Grouper Projections with MRIP–FES revised allocations and projections. The National Marine Fisheries Service will review Standardized Economic Reports for the Gulf of Mexico Reef Fish and Mackerel Fisheries; and, there will

be a discussion of a Joint Gulf and South Atlantic SSC Meeting in May 2020.

Lastly, the Committees will discuss any Other Business items.

—Meeting Adjourns

The meeting will be broadcast via webinar. You may register for the webinar by visiting *www.gulfcouncil.org* and clicking on the SSC meeting on the calendar.

The Agenda is subject to change, and the latest version along with other meeting materials will be posted on *www.gulfcouncil.org* as they become available.

Although other non-emergency issues not on the agenda may come before the Scientific and Statistical Committees for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act, those issues may not be the subject of formal action during this meeting. Actions of the Scientific and Statistical Committee will be restricted to those issues specifically identified in the agenda and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Kathy Pereira at the Gulf Council Office (see **ADDRESSES**), at least 5 working days prior to the meeting.

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

Dated: December 17, 2019.

Tracey L. Thompson,

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

[FR Doc. 2019–27537 Filed 12–19–19; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Statement of Financial Interests, Regional Fishery Management Councils

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: To ensure consideration, written or on-line comments must be submitted on or before February 18, 2020.

ADDRESSES: Direct all written comments to Adrienne Thomas, PRA Officer, NOAA, 151 Patton Avenue, Room 159, Asheville, NC 28801 (or via the internet at *PRAcomments@doc.gov*). All comments received are part of the public record. Comments will generally be posted without change. All Personally Identifiable Information (for example, name and address) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Diane Daly, (301) 427–8573 or *diane.daly@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The Magnuson-Stevens Fishery Conservation and Management Act (Magnuson Stevens Act) authorizes the establishment of Regional Fishery Management Councils to exercise sound judgment in the stewardship of fishery resources through the preparation, monitoring, and revision of such fishery management plans under circumstances (a) which will enable the States, the fishing industry, consumers, environmental organizations, and other interested persons to participate in the development of such plans, and (b) which take into account the social and economic needs of fishermen and dependent communities.

Section 302(j) of the Magnuson-Stevens Act requires that Council members appointed by the Secretary, Scientific and Statistical Committee (SSC) members appointed by a Council under Section 302(g)(1), or individuals nominated by the Governor of a State for possible appointment as a Council member, disclose their financial interest in any Council fishery. These interests include harvesting, processing, lobbying, advocacy, or marketing activity that is being, or will be, undertaken within any fishery over which the Council concerned has jurisdiction, or with respect to an individual or organization with a financial interest in such activity. The authority to require this information and reporting and filing requirements has not changed. NOAA Fisheries is in the process of conducting minor revisions to the form by adding clearer instructions and clarifying some of the questions asked to ensure the questions are consistent with the regulatory requirements. Revisions will also include a specific check box to indicate that a Council nominee, and not a member, is completing the form.

The Secretary is required to submit an annual report to Congress on action taken by the Secretary and the Councils to implement the disclosure of financial interest and recusal requirements, including identification of any conflict of interest problems with respect to the Councils and SSCs and recommendations for addressing any such problems.

The Act further provides that a member shall not vote on a Council decision that would have a significant and predictable effect on a financial interest if there is a close causal link between the Council decision and an expected and substantially disproportionate benefit to the financial interest of the affected individual relative to the financial interest of other participants in the same gear type or sector of the fishery. However, an affected individual who is declared ineligible to vote on a Council action may participate in Council deliberations relating to the decision after notifying the Council of his/her recusal and identifying the financial interest that would be affected.

II. Method of Collection

Respondents submit paper forms. The forms and related instructions are available to the public on the internet and can be completed online and printed. Seated Council members appointed by the Secretary, including the Tribal Government appointee and SSC members, must file a financial interest form within 45 days of taking office and must provide updates of their statements at any time any such financial interest is acquired, or substantially changed.

III. Data

OMB Number: 0648–0192.

Form Number: NOAA Form 88–195.

Type of Review: Regular submission (request for extension of a current information collection).

Affected Public: Individuals or households.

Estimated Number of Respondents: 330.

Estimated Time per Response: 45 minutes.

Estimated Total Annual Burden Hours: 247.

Estimated Total Annual Cost to Public: $353.10 in recordkeeping/reporting costs.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2019–27472 Filed 12–19–19; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XY054]

Fisheries of the Exclusive Economic Zone Off Alaska; North Pacific Halibut and Sablefish Individual Fishing Quota Cost Recovery Programs

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

ACTION: Notice of standard prices and fee percentage.

SUMMARY: NMFS publishes the individual fishing quota (IFQ) standard prices and fee percentage for cost recovery for the IFQ Program for the halibut and sablefish fisheries of the North Pacific (IFQ Program). The fee percentage for 2019 is 3.0 percent. This action is intended to provide holders of halibut and sablefish IFQ permits with the 2019 standard prices and fee percentage to calculate the required payment for IFQ cost recovery fees due by January 31, 2020.

DATES: The standard prices and fee percentages are valid on December 20, 2019.

FOR FURTHER INFORMATION CONTACT: Carl Greene, Fee Coordinator, 907–586–7105.

SUPPLEMENTARY INFORMATION:

Background

NMFS Alaska Region administers the IFQ Program in the North Pacific. The IFQ Program is a limited access system authorized by the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) and the Northern Pacific Halibut Act of 1982. Fishing under the IFQ Program began in March 1995. Regulations implementing the IFQ Program are set forth at 50 CFR part 679.

In 1996, the Magnuson-Stevens Act was amended to, among other purposes, require the Secretary of Commerce to ''collect a fee to recover the actual costs directly related to the management and enforcement of any . . . individual quota program.'' This requirement was further amended in 2006 to include collection of the actual costs of data collection, and to replace the reference to ''individual quota program'' with a more general reference to ''limited access privilege program'' at section 304(d)(2)(A). Section 304(d)(2) of the Magnuson-Stevens Act also specifies an upper limit on these fees, when the fees must be collected, and where the fees must be deposited.

On March 20, 2000, NMFS published regulations in § 679.45 implementing cost recovery for the IFQ Program (65 FR 14919). Under the regulations, an IFQ permit holder must pay a cost recovery fee for every pound of IFQ halibut and IFQ sablefish that is landed on his or her IFQ permit(s). The IFQ permit holder is responsible for self-collecting the fee for all IFQ halibut and IFQ sablefish landings on his or her permit(s). The IFQ permit holder is also responsible for submitting IFQ fee payment(s) to NMFS on or before the due date of January 31 of the year following the year in which the IFQ landings were made. The total dollar amount of the fee due is determined by multiplying the NMFS published fee percentage by the ex-vessel value of all IFQ landings made on the permit(s) during the IFQ fishing year. As required by § 679.45(d)(1) and (d)(3)(i), NMFS publishes this notice of the fee percentage for the halibut and sablefish IFQ fisheries in the **Federal Register** during or before the last quarter of each year.

Standard Prices

The fee is based on the sum of all payments made to fishermen for the sale of the fish during the year. This includes any retro-payments (*e.g.,* bonuses, delayed partial payments, post-season payments) made to the IFQ permit holder for previously landed IFQ halibut or sablefish.

For purposes of calculating IFQ cost recovery fees, NMFS distinguishes between two types of ex-vessel value: Actual and standard. Actual ex-vessel value is the amount of all compensation, monetary or non-monetary, that an IFQ permit holder received as payment for his or her IFQ fish sold. Standard ex-vessel value is the default value used to calculate the fee. IFQ permit holders have the option of using actual ex-vessel value if they can satisfactorily document it; otherwise, the standard ex-vessel value is used.

Section 679.45(b)(3)(iii) requires the Regional Administrator to publish IFQ standard prices during the last quarter of each calendar year. These standard prices are used, along with estimates of IFQ halibut and IFQ sablefish landings, to calculate standard ex-vessel values. The standard prices are described in U.S. dollars per IFQ equivalent pound for IFQ halibut and IFQ sablefish landings made during the year. According to § 679.2, IFQ equivalent pound(s) means the weight amount, recorded in pounds, and calculated as round weight for sablefish and headed and gutted weight for halibut, for an IFQ landing. The weight of halibut in pounds landed as guided angler fish is converted to IFQ equivalent pound(s) as specified in § 300.65(c) of this title. NMFS calculates the standard prices to closely reflect the variations in the actual ex-vessel values of IFQ halibut and IFQ sablefish landings by month and port or port-group. The standard prices for IFQ halibut and IFQ sablefish are listed in the tables that follow the next section. Data from ports are combined as necessary to protect confidentiality.

Fee Percentage

NMFS calculates the fee percentage each year according to the factors and methods described at § 679.45(d)(2). NMFS determines the fee percentage that applies to landings made in the previous year by dividing the total costs directly related to the management, data collection, and enforcement of the IFQ Program (management costs) during the previous year by the total standard ex-vessel value of IFQ halibut and IFQ

sablefish landings made during the previous year (fishery value). NMFS captures the actual management costs associated with certain management, data collection, and enforcement functions through an established accounting system that allows staff to track labor, travel, contracts, rent, and procurement. NMFS calculates the fishery value as described under the section, Standard Prices.

Using the fee percentage formula described above, the estimated percentage of management costs to fishery value for the 2019 calendar year is 3.0 percent of the standard ex-vessel value, which is the maximum fee percentage allowed under section 304(d)(2)(B) of the Magnuson-Stevens Act. An IFQ permit holder is to use the fee percentage of 3.0 percent to calculate his or her fee for IFQ equivalent pound(s) landed during the 2019 halibut and sablefish IFQ fishing season. An IFQ permit holder is responsible for submitting the 2019 IFQ fee payment to NMFS on or before January 31, 2020. Payment must be made in accordance with the payment methods set forth in § 679.45(a)(4). NMFS no longer accepts credit card information by phone or in-person for fee payments. NMFS has determined that the practice of accepting credit card information by phone or in-person no longer meets agency standards for protection of personal financial information (81 FR 23645, April 22, 2016).

The 2019 fee percentage of 3.0 percent is higher than the 2018 fee percentage of 2.8 percent (83 FR 63834, December 12, 2018). Although management costs for the IFQ Program fisheries dropped 2.5 percent from 2018 to 2019, the rise in fee percentage can be attributed to an estimated 7.0 percent decrease in the value of fisheries over the same period.

TABLE 1—REGISTERED BUYER STANDARD EX-VESSEL PRICES BY LANDING LOCATION FOR THE 2019 IFQ SEASON [1]

Landing location	Period ending	Halibut standard ex-vessel price	Sablefish standard ex-vessel price
CORDOVA	March 31		
	April 30	5.36	3.01
	May 31		3.22
	June 30		
	July 31	6.18	
	August 31	6.02	
	September 30	5.97	3.29
	October 31	5.97	3.29
	November 30	5.97	3.29
HOMER	March 31	5.98	
	April 30	5.40	2.50
	May 31	5.55	2.59
	June 30	5.98	2.79
	July 31	5.43	
	August 31	5.60	2.86
	September 30	5.47	2.44
	October 31	5.47	2.44
	November 30	5.47	2.44
KETCHIKAN	March 31		
	April 30		
	May 31	5.49	
	June 30	5.61	
	July 31	5.70	
	August 31	5.59	
	September 30		
	October 31		
	November 30		
KODIAK	March 31	5.49	2.27
	April 30	5.05	2.28
	May 31	5.03	2.57
	June 30	5.10	2.26
	July 31	5.07	2.85
	August 31	5.03	2.97
	September 30	4.94	2.64
	October 31	4.94	2.64
	November 30	4.94	2.64
PETERSBURG	March 31	5.77	
	April 30		
	May 31		
	June 30		
	July 31		
	August 31		
	September 30	5.41	3.43
	October 31	5.41	3.43
	November 30	5.41	3.43
SEWARD	March 31	6.06	3.44
	April 30	5.33	
	May 31		
	June 30		
	July 31		
	August 31		
	September 30		
	October 31		
	November 30		
SITKA	March 31		
	April 30	5.43	
	May 31	5.50	3.40
	June 30		

TABLE 1—REGISTERED BUYER STANDARD EX-VESSEL PRICES BY LANDING LOCATION FOR THE 2019 IFQ SEASON [1]—Continued

Landing location	Period ending	Halibut standard ex-vessel price	Sablefish standard ex-vessel price
	July 31		
	August 31	5.59	
	September 30		
	October 31		
	November 30		
PORT GROUP BERING SEA [2]	March 31		2.26
	April 30	4.39	1.84
	May 31	4.35	1.94
	June 30	4.40	2.26
	July 31	4.43	2.96
	August 31	4.37	3.20
	September 30	4.31	3.10
	October 31	4.31	3.10
	November 30	4.31	3.10
PORT GROUP CENTRAL GULF [3]	March 31	5.92	2.99
	April 30	5.29	2.61
	May 31	5.31	2.84
	June 30	5.71	2.73
	July 31	5.48	3.06
	August 31	5.62	3.15
	September 30	5.28	3.27
	October 31	5.28	3.27
	November 30	5.28	3.27
PORT GROUP SOUTHEAST [4]	March 31	5.92	3.35
	April 30	5.58	2.96
	May 31	5.52	3.21
	June 30	5.60	3.94
	July 31	5.76	3.47
	August 31	5.78	3.70
	September 30	5.55	3.29
	October 31	5.55	3.29
	November 30	5.55	3.29
ALL-ALASKA [5]	March 31	5.90	3.24
	April 30	5.36	2.64
	May 31	5.35	2.84
	June 30	5.54	3.16
	July 31	5.30	3.21
	August 31	5.27	3.33
	September 30	5.10	3.27
	October 31	5.10	3.27
	November 30	5.10	3.27
ALL [5]	March 31	5.90	3.24
	April 30	5.36	2.64
	May 31	5.35	2.84
	June 30	5.54	3.16
	July 31	5.30	3.21
	August 31	5.27	3.33
	September 30	5.10	3.27
	October 31	5.10	3.27
	November 30	5.10	3.27

[1] **Note:** In many instances, prices are not shown in order to comply with confidentiality guidelines when there are fewer than three processors operating in a location during a month.

[2] *Landing Locations Within Port Group—Bering Sea:* Adak, Akutan, Akutan Bay, Atka, Bristol Bay, Chefornak, Dillingham, Captains Bay, Dutch Harbor, Egegik, Ikatan Bay, Hooper Bay, King Cove, King Salmon, Kipnuk, Mekoryuk, Naknek, Nome, Quinhagak, Savoonga, St. George, St. Lawrence, St. Paul, Togiak, Toksook Bay, Tununak, Beaver Inlet, Ugadaga Bay, Unalaska.

[3] *Landing Locations Within Port Group—Central Gulf of Alaska:* Anchor Point, Anchorage, Alitak, Chignik, Cordova, Eagle River, False Pass, West Anchor Cove, Girdwood, Chinitna Bay, Halibut Cove, Homer, Kasilof, Kenai, Kenai River, Alitak, Kodiak, Port Bailey, Nikiski, Ninilchik, Old Harbor, Palmer, Sand Point, Seldovia, Resurrection Bay, Seward, Valdez, Whittier.

[4] *Landing Locations Within Port Group—Southeast Alaska:* Angoon, Baranof Warm Springs, Craig, Edna Bay, Elfin Cove, Excursion Inlet, Gustavus, Haines, Hollis, Hoonah, Hyder, Auke Bay, Douglas, Tee Harbor, Juneau, Kake, Ketchikan, Klawock, Metlakatla, Pelican, Petersburg, Portage Bay, Port Alexander, Port Graham, Port Protection, Point Baker, Sitka, Skagway, Tenakee Springs, Thorne Bay, Wrangell, Yakutat.

[5] *Landing Locations Within Port Group—All:* For Alaska: All landing locations included in 2, 3, and 4. For California: Eureka, Fort Bragg, other California. For Oregon: Astoria, Aurora, Lincoln City, Newport, Warrenton, other Oregon. For Washington: Anacortes, Bellevue, Bellingham, Nagai Island, Edmonds, Everett, Granite Falls, Ilwaco, La Conner, Port Angeles, Port Orchard, Port Townsend, Rainier, Fox Island, Mercer Island, Seattle, Standwood, other Washington. For Canada: Port Hardy, Port Edward, Prince Rupert, Vancouver, Haines Junction, other Canada.

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

Dated: December 16, 2019.

Jennifer M. Wallace,

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

[FR Doc. 2019–27436 Filed 12–19–19; 8:45 am]

BILLING CODE 3510–22–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Deletions from the Procurement List.

SUMMARY: This action deletes products and services from the Procurement List that were furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

DATES: *Date deleted from the Procurement List:* January 19, 2020.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, 1401 S Clark Street, Suite 715, Arlington, Virginia, 22202–4149.

FOR FURTHER INFORMATION CONTACT: Michael R. Jurkowski, Telephone: (703) 603–2117, Fax: (703) 603–0655, or email *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION:

Deletions

On 11/15/2019, the Committee for Purchase From People Who Are Blind or Severely Disabled published notice of proposed deletions from the Procurement List.

After consideration of the relevant matter presented, the Committee has determined that the products and services listed below are no longer suitable for procurement by the Federal Government under 41 U.S.C. 8501–8506 and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in additional reporting, recordkeeping or other compliance requirements for small entities.

2. The action may result in authorizing small entities to furnish the products and services to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 8501–8506) in connection with the products and services deleted from the Procurement List.

End of Certification

Accordingly, the following products and services are deleted from the Procurement List:

Products

NSN(s)—Product Name(s):
7510–00–NIB–1783—Portfolio Pad Holder, with Pad, Custom Logo & Color, 9′ x 12″
Mandatory Source of Supply: Alphapointe, Kansas City, MO
Contracting Activity: GSA/FAS Admin SVCS Acquisition BR(2, New York, NY

NSN(s)—Product Name(s):
2540–00–T27–8865—Chock Block
2540–00–T27–9043—Chock Block
Mandatory Source of Supply: NewView Oklahoma, Inc., Oklahoma City, OK
Contracting Activity: DLA Support Services—DSS, Fort Belvoir, VA

NSN(s)—Product Name(s):
7210–01–245–4393—Cover, Mattress
Mandatory Source of Supply: Winston-Salem Industries for the Blind, Inc., Winston-Salem, NC
Contracting Activity: DLA Troop Support, Philadelphia, Pa

Services

Service Type: Administrative Services
Mandatory for: Robert C. Byrd Federal Building: United States Courthouse, Charleston, WV
Mandatory Source of Supply: Goodwill Industries of Kanawha Valley, Charleston, WV
Contracting Activity: General Services Administration, FPDS Agency Coordinator

Service Type: Dining Facility Attendant Services
Mandatory for: 29th Engineering Battalion: Building 503B, Fort Shafter, HI
Mandatory for: 65th Engineering Battalion: Building 1492, Schofield Barracks, HI
Mandatory Source of Supply: Opportunities and Resources, Inc., Wahiawa, HI
Contracting Activity: Dept. of the Army, W40M RHCO–Atlantic USAHCA

Service Type: Janitorial/Custodial
Mandatory for: U.S. Federal Building, Courthouse and Post Office: Main and Poplar Streets, Greenville, MS
Contracting Activity: General Services Administration, FPDS Agency Coordinator

Patricia Briscoe,

Deputy Director, Business Operations (Pricing and Information Management).

[FR Doc. 2019–27433 Filed 12–19–19; 8:45 am]

BILLING CODE 6353–01–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Addition and Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed addition to and deletions from the Procurement List.

SUMMARY: The Committee is proposing to add a service to the Procurement List that will be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities, and deletes services previously furnished by such agencies.

DATES: Comments must be received on or before: January 19, 2020.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, 1401 S Clark Street, Suite 715, Arlington, Virginia 22202–4149.

FOR FURTHER INFORMATION CONTACT: For further information or to submit comments contact: Michael R. Jurkowski, Telephone: (703) 603–2117, Fax: (703) 603–0655, or email *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 8503 (a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

Additions

If the Committee approves the proposed addition, the entities of the Federal Government identified in this notice will be required to procure the service listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

The following service is proposed for addition to the Procurement List for production by the nonprofit agencies listed:

Service Type: IT Service Desk Operations
Mandatory for: U.S. Army Human Resources Command, Fort Knox, KY
Mandatory Source of Supply: InspiriTec, Inc., Philadelphia, PA
Contracting Activity: W6QM MICC–FT KNOX

Deletions

The following services are proposed for deletion from the Procurement List:

Services

Service Type: Custodial service
Mandatory for: DISA DECC Pacific, 1942 Gaffney Street, Suite 200, Pearl Harbor Naval Station, HI
Mandatory Source of Supply: Opportunities and Resources, Inc., Wahiawa, HI
Contracting Activity: DEFENSE INFORMATION SYSTEMS AGENCY (DISA), IT CONTRACTING DIVISION—PL83

Service Type: Microfilming
Mandatory for: Government Printing Office: Program B510–S, Washington, DC
Mandatory Source of Supply: Alliance, Inc., Baltimore, MD
Contracting Activity: Government Printing Office

Service Type: Janitorial/Custodial
Mandatory for: VA Outpatient Clinic, Allentown, PA
Mandatory Source of Supply: Via of the Lehigh Valley, Inc., Bethlehem, PA
Contracting Activity: VETERANS AFFAIRS, DEPARTMENT OF, NAC

Service Type: Mailing Services
Mandatory for: U.S. Department of Interior: Bureau of Land Management, Oregon State Office, Portland, OR
Mandatory Source of Supply: Relay Resources, Portland, OR
Contracting Activity: BUREAU OF LAND MANAGEMENT, OR—OREGON STATE OFFICE

Service Type: Cleaning Services
Mandatory for: Laguna Atascosa NWR, Rio Hondo, TX
Mandatory Source of Supply: Training, Rehabilitation, & Development Institute,

Inc., San Antonio, TX
Contracting Activity: OFFICE OF POLICY, MANAGEMENT, AND BUDGET, NBC ACQUISITION SERVICES DIVISION

Service Type: Janitorial/Custodial
Mandatory for: Department of the Treasury: Birmingham Regional Financial Center, Birmingham, AL
Mandatory Source of Supply: Alabama Goodwill Industries, Inc., Birmingham, AL
Contracting Activity: TREASURY, DEPARTMENT OF THE, DEPT OF TREAS/

Service Type: Document Destruction
Mandatory for: Social Security Administration: 600 West Madison St., Chicago, IL
Mandatory Source of Supply: Goodwill Industries of Southeastern Wisconsin, Inc—Deleted, Milwaukee, WI
Contracting Activity: SOCIAL SECURITY ADMINISTRATION, REGION 05—RELOCATIONS

Service Type: Grounds Maintenance
Mandatory for: USCG, Chief of Staff Quarters, Bethesda, MD
Mandatory for: USCG, Commandant Quarters, Kenwood, MD
Mandatory for: USCG, Vice Commandant Quarters, Bethesda, MD
Mandatory Source of Supply: The Arc of Montgomery County, Inc., Rockville, MD
Contracting Activity: U.S. COAST GUARD, U.S. COAST GUARD

Patricia Briscoe,

Deputy Director, Business Operations (Pricing and Information Management).

[FR Doc. 2019–27470 Filed 12–19–19; 8:45 am]

BILLING CODE 6353–01–P

CONSUMER PRODUCT SAFETY COMMISSION

[Docket No. CPSC–2009–0102]

Collection of Information; Submission for OMB Review; Comment Request—Follow-Up Activities for Product-Related Injuries Including NEISS

AGENCY: Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: As required by the Paperwork Reduction Act of 1995, the Consumer Product Safety Commission (CPSC) announces that the CPSC has submitted to the Office of Management and Budget (OMB), a request for extension of approval of a collection of information previously approved under OMB Control No. 3041–0029, on consumer product-related injury data, and follow-up activities for product-related injuries. On October 8, 2019, CPSC published a notice in the **Federal Register** announcing the agency's intent to seek this extension. CPSC made available a copy of the supporting statement, ''PRI ICR 2019 60-day,'' under Supporting and Related Materials in Docket No. CPSC–2009–0102. CPSC received no comments in response to that notice. By publication of this notice, the Commission announces that CPSC has submitted to the OMB a request for extension of approval of that collection of information, without change.

DATES: Written comments on this request for extension of approval of information collection requirements should be submitted by January 21, 2020.

ADDRESSES: Submit comments about this request by email: *OIRA_submission@omb.eop.gov* or fax: 202–395–6881. Comments by mail should be sent to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the CPSC, Office of Management and Budget, Room 10235, 725 17th Street NW, Washington, DC 20503. In addition, written comments that are sent to OMB also should be submitted electronically at *http://www.regulations.gov,* under Docket No. CPSC–2009–0102.

FOR FURTHER INFORMATION CONTACT: For further information or a copy of the supporting statement contact: Bretford Griffin, Consumer Product Safety Commission, 4330 East-West Highway, Bethesda, MD 20814; (301) 504–7037, or by email to: *bgriffin@cpsc.gov.*

SUPPLEMENTARY INFORMATION:

A. Background

Section 5(a) of the Consumer Product Safety Act, 15 U.S.C. 2054(a), requires the CPSC to collect information related to the causes and prevention of death, injury, and illness associated with consumer products. That section also requires the CPSC to conduct continuing studies and investigations of deaths, injuries, diseases, other health impairments, and economic losses resulting from accidents involving consumer products.

The CPSC obtains information about product-related deaths, injuries, and illnesses from a variety of sources, including newspapers, death certificates, consumer complaints, and medical facilities. In addition, the CPSC receives information via its internet website through forms reporting on product-related injuries or incidents. The CPSC also operates the National Electronic Injury Surveillance System (NEISS), which provides timely data on consumer product-related injuries treated in hospital emergency departments in the United States. The CPSC also uses the NEISS system to collect information on childhood poisonings, in accordance with the Poison Prevention Packaging Act of 1970.

From these sources, CPSC staff selects cases of interest for further investigation, by contacting persons who witnessed or were injured in incidents involving consumer products. These investigations are conducted on-site (face-to-face), by telephone, or by the internet. On-site investigations are usually made in cases where CPSC staff needs photographs of the incident site, the product involved, or detailed information about the incident. This information also can come from contact with state and local officials, including police, coroners, and fire investigators, and others with knowledge of the incident.

Through interagency agreements, the CPSC also uses the NEISS system to collect information on injuries for the Centers for Disease Control and Prevention (CDC) under the NEISS All-Injury Program (NEISS–AIP). The NEISS–AIP is a sub-sample of approximately two-thirds of the full NEISS sample. In addition to the standard data variables collected on all NEISS injuries, the NEISS–AIP collects additional variables on several studies for CDC (Adverse Drug Events, Assaults, Self-Inflicted Violence, and Work-Related Injuries) and one study on non-crash motor vehicle-related injuries for the National Highway and Transportation Safety Administration (NHTSA). Additional special study variables are collected for CDC in the full NEISS sample for firearm-related injuries.

The current NEISS probability sample was drawn and recruited in 1995–1996 and implemented in 1997. Since then, several of the selected hospitals have stopped participating for reasons such as closures and mergers with other hospitals, and were replaced with other purposively-selected hospitals. While hospital weights are adjusted to account for changes in the population of hospitals over time, the current sample of hospitals participating in NEISS is being reviewed to assess their representativeness. The selection process may be revised in future years in order to strengthen the quality and representativeness of the estimates generated by the NEISS–AIP. CPSC has entered into a contract with Westat to perform an independent statistical assessment of the NEISS and NEISS–AIP samples under CPSC contract 61320619F0134 with a period of performance of September 27, 2019, through September 26, 2020.

B. NEISS Estimated Burden

The NEISS system collects information on consumer product-related incidents and other injuries from a statistical sample of 96 hospitals in the United States. Respondents to NEISS include hospitals that directly report information to NEISS, and hospitals that allow access to a CPSC contractor, who collects the data. Collecting emergency department records for review, correcting error messages, among other tasks, takes about 36 minutes per day. Each record takes about 30 seconds to review. Coding and reporting records that involve consumer products or other injuries takes about 2 minutes per record. Coding and reporting additional special study information (Adverse Drug Effects) takes about 2 minutes and 90 seconds per record for other special studies. Respondents also spend about 36 hours per year in related activities (training, evaluations, and communicating with other hospital staff).

In 2018, there were 130 NEISS respondents (total hospitals and CPSC contractors). These NEISS respondents reviewed an estimated 5.53 million emergency department records and reported 727,544 total cases (363,221 consumer product-related injuries for CPSC, and 364,323 other injuries for the NEISS–AIP). The table below lists the number of reported cases, and the number of reported cases with additional special study information.

Total NEISS Cases Reported	727,544
Consumer Product-Related Injuries	363,221
CDC NEISS–AIP	364,323
Special Studies Reported (subset of above)	
Child Poisoning (CPSC)	4,734
Adverse Drug Events (CDC)	36,858
Assaults (CDC)	32,990
Firearm-Related Injuries (CDC)	6,159
Self-Inflicted Violence (CDC)	9,106
Work-Related Injuries (CDC)	38,132
Motor Vehicle Non-Crash Injuries (NHTSA)	12,813

The total burden hours for all NEISS respondents are estimated to be 100,781 for 2018. The average burden hour per respondent is 775 hours. However, the total burden hour on each respondent varies due to differences in size of the hospital (*e.g.,* small rural hospitals versus large metropolitan hospitals). The smallest hospital reported 82 cases with a burden of about 258 hours, while the largest hospital reported 47,801 cases with a burden of about 4,125 hours.

The total cost to NEISS respondents for 2018 was approximately $3,391,000. NEISS respondents enter into contracts with CPSC and are compensated for these costs. The average cost per respondent is estimated to be about $26,000. The average cost per burden hour is estimated to be $33.65 per hour (including wages and overhead). However, the actual cost to each respondent varies, due to the type of respondent (hospital versus CPSC contractor), size of hospital, and regional differences in wages and overhead. Therefore, the actual annual cost for any given respondent may vary between $3,048 at a small rural hospital, and $329,690 at the largest metropolitan hospital.

C. Other Burden Hours

In cases that require more information regarding product-related incidents or injuries, CPSC staff conducts face-to-face interviews with approximately 375 persons each year. On average, an on-site interview takes about 4.5 hours. CPSC staff also conducts about 175 in-depth investigations (IDIs) by telephone annually. Each telephone IDI requires about 20 minutes. CPSC staff is planning to conduct about 50 internet-based questionnaires per year, which require about 20 minutes each. The CPSC estimates 1,763 annual burden hours on these respondents: 1,688 hours for face-to-face interviews; 58 hours for in-depth telephone interviews, and 17 hours for internet-based questionnaires. CPSC staff estimates the value of the time required for reporting at $36.77 an hour (U.S. Bureau of Labor Statistics, ''Employer Costs for Employee Compensation,'' March 2019: *https://www.bls.gov>new.release>ecec.toc.htm*). At this valuation, the estimated annual cost to the public is about $64,826.

The total burden hours for the information collection is 102,544 (100,781 NEISS and 1,763 other), which is an increase of 21,334 hours. The increase in burden is due primarily to the increase in the number of emergency department charts being reviewed and coded since this collection of information was last approved by OMB in 2017.

This information collection request excludes the burden associated with other publicly available Consumer Product Safety Information Databases, such as internet complaints, Hotline, and Medical Examiners and Coroners Alert Project (MECAP) reports, which are approved under OMB control number 3041–0146. This information collection request also excludes the burden associated with follow-up investigations conducted by other federal agencies.

Abioye Mosheim,

Acting Secretary, Consumer Product Safety Commission.

[FR Doc. 2019–27509 Filed 12–19–19; 8:45 am]

BILLING CODE 6355–01–P

CONSUMER PRODUCT SAFETY COMMISSION

[Docket No. CPSC–2010–0041]

Collection of Information; Submission for OMB Review; Comment Request—Publicly Available Consumer Product Safety Information Database

AGENCY: Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: As required by the Paperwork Reduction Act of 1995 (PRA), the Consumer Product Safety Commission (CPSC) announces that the CPSC has submitted to the Office of Management and Budget (OMB) a request for extension of approval of a collection of information for the Publicly Available Consumer Product Safety Information Database, previously under OMB Control No. 3041–0146. On October 8, 2019, the CPSC published a notice in the **Federal Register** announcing the agency's intent to seek this extension. CPSC made a copy of the supporting statement available under Supporting and Related Materials under Docket No. CPSC–2010–0041. CPSC received no comments in response to that notice. By publication of this notice, the Commission announces that CPSC has submitted to the OMB a request for extension of approval of that collection of information, without change.

DATES: Written comments on this request for extension of approval of information collection requirements should be submitted by January 21, 2020.

ADDRESSES: Submit comments about this request by email: *OIRA_submission@omb.eop.gov* or fax: 202–395–6881. Comments by mail should be sent to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the CPSC, Office of Management and Budget, Room 10235, 725 17th Street NW, Washington, DC 20503. In addition, written comments that are sent to OMB, also should be submitted electronically at: *http://www.regulations.gov,* under Docket No. CPSC–2010–0041.

FOR FURTHER INFORMATION CONTACT: For further information, or a copy of the supporting statement, contact: Bretford Griffin, Consumer Product Safety Commission, 4330 East-West Highway, Bethesda, MD 20814; (301) 504–7037, or by email to: *bgriffin@cpsc.gov.*

SUPPLEMENTARY INFORMATION:

A. Background

Section 212 of the Consumer Product Safety Improvement Act of 2008 (CPSIA) added section 6A to the Consumer Product Safety Act (CPSA), which requires the CPSC to establish and maintain a publicly available, searchable database (Database) on the safety of consumer products and other products or substances regulated by the CPSC. Among other things, section 6A of the CPSA requires the CPSC to collect reports of harm from the public for potential publication in the publicly available Database, and to collect and publish comments from manufacturers about reports of harm.

The CPSC announced that a proposed collection of information in conjunction with the Database, called the Publicly Available Consumer Product Safety Information Database, had been submitted to OMB for review and clearance under 44 U.S.C. 3501–3520 in a proposed rule published on May 24, 2010 (75 FR 29156). The CPSC issued a final rule on the Database on December 9, 2010 (75 FR 76832). The final rule interprets various statutory requirements in section 6A of the CPSA pertaining to the information to be included in the Database; and the final rule also establishes provisions regarding submitting reports of harm; providing notice of reports of harm to manufacturers; publishing reports of harm and manufacturer comments in the Database; and dealing with confidential and materially inaccurate information.

B. Information Collected Through the Database

The primary purpose of this information collection is to populate the publicly searchable Database of consumer product safety information mandated by section 6A of the CPSA. The Database information collection has four components: Reports of harm, manufacturer comments, branding information, and the Small Batch Manufacturer Registry (SBMR).

Reports of Harm: Reports of harm communicate information regarding an injury, illness, or death, or any risk (as determined by CPSC) of injury, illness, or death, relating to the use of a consumer product. Reports can be submitted to the CPSC by consumers; local, state, or federal government agencies; health care professionals; child service providers; public safety entities; and others. Reports may be submitted in one of three ways: Via the CPSC website (*www.SaferProducts.gov*), by telephone via a CPSC call center, or by email, fax, or mail using the incident report form (available for download or printing via the CPSC website). Reports may also originate as a free-form letter or email. Submitters must consent to including their report of harm in the publicly searchable Database.

Manufacturer Comments: A manufacturer or private labeler may submit a comment related to a report of harm after the CPSC transmits the report to the manufacturer or private labeler identified in the report. Manufacturer comments may be submitted through the business portal, by email, mail, or fax. The business portal is a feature of the Database that allows manufacturers who register there to receive reports of harm and comment on such reports through the business portal. Use of the business portal expedites the receipt of reports of harm and business response times.

A manufacturer may request that the CPSC designate as confidential information in a report of harm. Such a request may be made using the business portal, by email, by mail, or by fax. Additionally, any person or entity reviewing a report of harm or manufacturer comment, either before or after publication in the Database, may request that the report or comment, or portions of the report or comment, be excluded from the Database because it contains materially inaccurate information. Such a request may be made by manufacturers using the business portal, by email, mail or fax, and may be submitted by anyone else by email, mail, or fax.

Branding Information: Using the business portal, registered businesses may voluntarily submit branding information to assist CPSC in correctly and timely routing reports of harm involving their products to them. Brand names may be licensed to another entity for use in labeling consumer products manufactured by that entity. CPSC's understanding of licensing arrangements for consumer products ensures that the correct manufacturer is timely notified regarding a report of harm.

Small Batch Manufacturers Registry: The business portal also contains the SBMR, which is the online mechanism by which ''small batch manufacturers'' (as defined in the CPSA) can identify themselves to obtain relief from certain third party testing requirements for children's products. To register as a small batch manufacturer, a business must attest that the company's income level, and the number of units of the covered product manufactured for which relief is sought, both fall within the statutory limits to receive relief from third party testing.

C. Estimated Burden

1. Estimated Annual Burden for Respondents

We estimate the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN FOR REPORTS OF HARM

Collection type	Number of respondents	Response frequency [1]	Total annual responses	Minutes per response	Total burden, in hours [2]
Reports of Harm—submitted through website	5,646	1.07	6,023	12	1,205
Reports of Harm—submitted by phone	1,397	1.02	1,418	10	236
Reports of Harm—submitted by mail, email, fax	349	43.88	15,314	20	5,105
Total	7,392		22,755		6,546

[1] Frequency of responses is calculated by dividing the number of responses by the number of respondents.
[2] Numbers have been rounded.

TABLE 2—ESTIMATED ANNUAL REPORTING BURDEN FOR MANUFACTURER SUBMISSIONS

Collection type	Number of respondents	Response frequency [1]	Total annual responses	Minutes per response	Total burden, in hours [2]
Manufacturer Comments—submitted through website	2,311	1.06	2,461	117	4,799

TABLE 2—ESTIMATED ANNUAL REPORTING BURDEN FOR MANUFACTURER SUBMISSIONS—Continued

Collection type	Number of respondents	Response frequency [1]	Total annual responses	Minutes per response	Total burden, in hours [2]
Manufacturer Comments—submitted by mail, email, fax	182	1.90	346	147	848
Requests to Treat Information as Confidential—submitted through website	2	1.00	2	42	1
Requests to Treat Information as Confidential—submitted by mail, email, fax	0	n/a	0	72	0
Requests to Treat Information as Materially Inaccurate—submitted through website	141	1.19	168	165	462
Requests to Treat Information as Materially Inaccurate—submitted by mail, email, fax	25	1.12	28	195	91
Voluntary Brand Identification	932	1.37	1,281	10	214
Small Batch Manufacturer Identification	2,292	1	2,292	10	382
Total	5,885		6,578		6,797

[1] Frequency of responses is calculated by dividing the number of responses by the number of respondents.
[2] Numbers have been rounded.

Based on the data set forth in Tables 1 and 2 above, the annual reporting cost is estimated to be $691,884. This estimate is based on the sum of two estimated total figures for reports of harm and manufacturer submissions. The estimated number of respondents and responses are based on the actual responses received in FY 2018. We assume that the number of responses and respondents will be similar in future years.

Reports of Harm: Table 1 sets forth the data used to estimate the burden associated with submitting reports of harm. We had previously estimated the time associated with the electronic and telephone submission of reports of harm at 12 and 10 minutes, respectively; and because we have had no indication that these estimates are not appropriate or accurate, we used those figures for present purposes as well. We estimate that the time associated with a paper or PDF form would be 20 minutes, on average.

To estimate the costs for submitting reports of harm, we multiplied the estimated total burden hours associated with reports of harm (1,205 hours + 236 hours + 5,105 hours = 6,546 hours) by an estimated total compensation for all workers in private industry of $34.05 per hour,[3] which results in an estimated cost of $222,891 (6,546 hours × $34.05 per hour = $222,891).

Manufacturer Submissions: Table 2 sets forth the data used to estimate the burden associated with manufacturers' submissions to the Database. We observed that a large percentage of the general comments come from a few businesses, and we assumed that the experience of a business that submits many comments each year would be different from one that submits only a few. Accordingly, we divided all responding businesses into three groups based on the number of general comments submitted in FY 2018, and then we selected several businesses to contact from each group. The first group contacted consisted of businesses that submitted 50 or more comments in FY 2018, accounting for 31 percent of all general comments received. The second group contacted included businesses that submitted 6 to 49 comments, accounting for 39 percent of all general comments received. The last group contacted included businesses that submitted no more than 5 comments, accounting for 30 percent of all general comments received. We asked each company how long it typically takes to research, compose, and enter a comment or a claim of materially inaccurate information.

To estimate the burden associated with submitting a general comment regarding a report of harm through the business portal, we averaged the burden provided by each company within each group, and then we calculated a weighted average from the three groups, weighting each group by the proportion of comments received from that group. We found that the average time to submit a general comment regarding a report of harm is 117 minutes, based on the data in Table 3 (((15 minutes + 45 minutes + 30 minutes + 15 minutes)/4 companies) * .31 + ((105 minutes + 45 minutes + 150 minutes + 15 minutes)/4 companies) * .39 + ((240 minutes + 60 minutes + 480 minutes)/3 companies) * .30 = 117 minutes).

TABLE 3—ESTIMATED BURDEN TO ENTER A GENERAL COMMENT IN THE DATABASE

Group	Company	General comments (minutes)
Group 1 (>= 50 comments)	Company A	15
	Company B	45
	Company C	30
	Company D	15
Group 2 (6–49 comments)	Company A	105
	Company B	45
	Company C	150
	Company D	15
Group 3 (<= 5 comments)	Company A	240
	Company B	60
	Company C	480

[3] U.S. Department of Labor, Bureau of Labor Statistics, Table 9 of the Employer Costs for Employee Compensation (ECEC), Private Industry, goods-producing and service-providing industries, by occupational group, Dec 2018 (data extracted on 8/2/2019 from: *http://www.bls.gov/news.release/ecec.t09.htm.*

Registered businesses generally submit comments through our website. Unregistered businesses submit comments by mail, email, or fax. We estimate that submitting comments via mail, email, or fax takes a little longer because often, we must ask businesses to amend their submissions to include the required certifications. Thus, we estimated that, on average, comments submitted by mail, email, or fax take 30 minutes longer than comments submitted through our website (117 minutes + 30 minutes = 147 minutes).

The submission of a claim of materially inaccurate information is a relatively rare event for all respondents, so we averaged all responses together. Eight of the businesses contacted had submitted claims of materially inaccurate information. We found that the average time to submit a claim that a report of harm contains a material inaccuracy is 165 minutes ((30 minutes + 90 minutes + 45 minutes + 90 minutes + 60 minutes + 660 minutes + 45 minutes + 300 minutes)/8 companies = 165 minutes).

Registered businesses generally submit claims through the business portal. Unregistered businesses submit claims by mail, email, or fax. We estimate that submitting claims via mail, email, or fax takes a little longer because often, we must ask businesses to amend their submission to include the required certifications. Thus, we estimated that, on average, claims submitted by mail, email, or fax take 30 minutes longer than those submitted through our website (165 minutes + 30 minutes = 195 minutes).

The submission of a claim of confidential information is a relatively rare event for all respondents, so we averaged all responses together. Five of the businesses contacted had submitted claims of confidential information. We found that the average time to submit a claim that a report of harm contains confidential information is 42 minutes ((45 minutes + 15 minutes + 60 minutes + 30 minutes + 60 minutes)/5 companies = 42 minutes).

Registered businesses generally submit confidential information claims through the business portal. Unregistered businesses submit confidential information claims by mail, email, or fax. We estimate that submitting claims by mail, email, or fax takes a little longer because often, we must ask businesses to amend their submission to include the required certifications. Thus, we estimate that a confidential information claim submitted by mail, email, or fax would take 30 minutes longer than those submitted through our website (42 minutes + 30 minutes = 72 minutes).

For voluntary brand identification, we estimate that a response would take 10 minutes, on average. Most responses consist only of the brand name and a product description. In many cases, a business will submit multiple entries in a brief period of time, and we can see from the date and time stamps on these records that an entry often takes less than 2 minutes. CPSC staff enters the same data in a similar form, based on our own research, and that experience was also factored into our estimate.

For small batch manufacturer identification, we estimate that a response would take 10 minutes, on average. The form consists of three check boxes and the information should be readily accessible to the respondent.

The responses summarized in Table 2 are generally submitted by manufacturers. To avoid underestimating the cost associated with the collection of this data, we assigned the higher hourly wage associated with a manager or professional in goods-producing industries to these tasks. To estimate the cost of manufacturer submissions, we multiplied the estimated total burden hours in Table 2 (6,797 hours), by an estimated total compensation for a manager or professional in goods-producing industries of $69.00 per hour,[4] which results in an estimated cost of $468,993 (6,797 hours × $69.00 per hour = $468,993).

Therefore, the total estimated annual cost to respondents is $691,884 ($222,891 burden for reports of harm + $468,993 burden for manufacturer submissions = $691,884).

2. Estimated Annual Burden on Government

We estimate the annualized cost to the CPSC to be $982,166. This figure is based on the costs for four categories of work for the Database: Reports of Harm, Materially Inaccurate Information Claims, Manufacturer Comments, and Small Batch Identification. Each category is described below. No government cost is associated with voluntary brand identification because this information is entered directly into the Database by the manufacturer with no processing required by the government. The information assists the government in directing reports of harm to the correct manufacturer. We did not attempt to calculate separately the government cost for claims of confidential information because the number of claims is so small. The time to process these claims is included with claims of materially inaccurate information.

Reports of Harm: The Reports of Harm category includes many different tasks. Some costs related to this category are from two data entry contracts. Tasks related to these contracts include clerical coding of the report, such as identifying the type of consumer product reported and the appropriate associated hazard, as well as performing quality control on the data in the report. Contractor A spends an estimated 5,267 hours per year performing these tasks. With an hourly rate of $38.10 for contractor services, the annual cost to the government of contract A is $200,673. Contractor B spends an estimated 2,029 hours per year performing these tasks. With an hourly rate of $41.33 for contractor services, the annual cost to the government of contract B is $83,859.

The Reports of Harm category also includes sending consent requests for reports when necessary, processing that consent when received, determining whether a product is out of CPSC's jurisdiction, and confirming that pictures and attachments do not have any personally identifiable information. The Reports of Harm category also entails notifying manufacturers when one of their products is reported, completing a risk of harm determination form for every report eligible for publication, referring some reports to a Subject Matter Expert (SME) within the CPSC for a determination on whether the reports meet the requirement of having a risk of harm, and determining whether a report meets all the statutory and regulatory requirements for publication. Detailed costs are:

[4] U.S. Department of Labor, Bureau of Labor Statistics, Table 9 of the Employer Costs for Employee Compensation (ECEC), Private Industry, goods-producing and service-providing industries, by occupational group, December 2018 (data extracted on 09/13/2019 from: *http://www.bls.gov/news.release/ecec.t09.htm.*

TABLE 4—ESTIMATED COSTS FOR REPORTS OF HARM TASK

Grade level	Number of hours (annual)	Total compensation per hour	Total annual cost
Contract A	5,267	$38.10	$200,673
Contract B	2,029	41.33	83,859
7	200	37.37	7,474
9	300	45.72	13,716
12	5,528	66.31	366,562
13	428	78.84	33,744
14	1,068	93.18	99,516
Total	14,820		825,544

Materially Inaccurate Information (MII) Claims: The MII claims category includes reviewing and responding to claims, participating in meetings where the claims are discussed, and completing a risk of harm determination on reports when a company alleges that a report does not describe a risk of harm.

TABLE 5—ESTIMATED COSTS FOR MII CLAIMS TASK

Grade level	Number of hours (annual)	Total compensation per hour	Total annual cost
12	275	$66.31	$18,235
13	167	78.84	13,166
14	323	93.18	30,097
15	50	109.60	5,480
SES	50	131.52	6,576
Total	865		73,554.00

Manufacturer Comments: The Comments category includes reviewing and accepting or rejecting comments.

TABLE 6—ESTIMATED COSTS FOR MANUFACTURER COMMENTS TASK

Grade level	Number of hours (annual)	Total compensation per hour	Total annual cost
12	62	$66.31	$4,111
13	109	78.84	8,594
Total	171		12,705

Small Batch Manufacturer Identification: The Small Batch Manufacturer Identification category includes time spent posting the list of small batch registrations, as well as answering companies' questions on registering as a Small Batch Manufacturer and the implications of small batch registration.

TABLE 7—ESTIMATED COSTS FOR SMALL BATCH TASK

Grade level	Number of hours (annual)	Total compensation per hour	Total annual cost
15	642	$109.60	$70,363
Total	642		70,363

We estimate the annualized cost to the CPSC of $954,531, by adding the four categories of work related to the Database summarized in Tables 4 through 7 (Reports of Harm ($825,544) + MII Claims ($73,554) + Manufacturer Comments ($12,705) + Small Batch Identification ($70,363) = $982,166).

This information collection renewal request is based on an estimated 13,343 burden hours per year for the Database, which represents an increase of 983 hours since this collection of information was last approved by OMB in 2017. The increase in burden is due

primarily to the increase in the number of incoming reports of harm, and the increase in the number of claims based on those reports. Comments have also increased significantly, but shifted to the more efficient, online submission. A slight increase in small batch manufacturer activity occurred, as well, continuing a long-term trend.

Abioye Mosheim,

Acting Secretary, Consumer Product Safety Commission.

[FR Doc. 2019–27508 Filed 12–19–19; 8:45 am]

BILLING CODE 6355–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 19–44]

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)(1) 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 19–44 with attached Policy Justification and Sensitivity of Technology.

Dated: December 16, 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

AUG 2 7 2019

The Honorable Nancy Pelosi
Speaker of the House
U.S. House of Representatives
H-209, The Capitol
Washington, DC 20515

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 19-44 concerning the Navy's proposed Letter(s) of Offer and Acceptance to the Government of Denmark for defense articles and services estimated to cost $200 million. After this letter is delivered to your office, we plan to issue a news release to notify the public of this proposed sale.

Sincerely,

Charles W. Hooper
Lieutenant General, USA
Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology

BILLING CODE 5001–06–C

Transmittal No. 19-44

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as amended

(i) *Prospective Purchaser*: Government of Denmark

(ii) *Total Estimated Value*:

Major Defense Equipment *	$100 million
Other	$100 million
TOTAL	$200 million

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase*: The Government of Denmark has requested to expand operational mission capability of previously purchased nine (9) MH-60R Multi-Mission helicopters, by equipping them with Anti-Submarine Warfare (ASW) capabilities inherent in MH-60R design to include the following items:

Major Defense Equipment (MDE):

Nine (9) AN/AQS-22 Airborne Low Frequency Sonar (ALFS) Systems

Non-MDE:

Also included are six hundred (600) AN/SSQ-36/53/62 Sonobuoys; spare

and repair parts; support and test equipment; communication equipment; publications and technical documentation; personnel training and training equipment; U.S. Government and contractor engineering, technical, and logistics support services; and other related elements of logistical and program support.

(iv) *Military Department*: Navy (DE-P-LBT)

(v) *Prior Related Cases, if any*: DE-P-SAE and DE-P-GBP

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid*: None

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold*: See Attached Annex.

(viii) *Date Report Delivered to Congress*: August 27, 2019

* As defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Denmark—Airborne Low Frequency Sonar System and Sonobuoys

The Government of Denmark has requested to buy nine (9) AN/AQS-22 Airborne Low Frequency Sonar (ALFS) systems; six hundred (600) AN/SSQ-36/53/62 Sonobuoys; spare and repair parts; support and test equipment; communication equipment; publications and technical documentation; personnel training and training equipment; U.S. Government and contractor engineering, technical, and logistics support services; and other related elements of logistical and program support. The total estimated program cost is $200 million.

This proposed sale will support the foreign policy and national security objectives of the United States by helping to improve the military capability of Denmark, a NATO ally that is an important force for ensuring political stability and economic progress within Europe.

The proposed sale will improve Denmark's capability to meet current and future threats from enemy weapon systems. The ALFS and Sonobuoys will provide the capability to perform anti-submarine warfare missions. Denmark will use the enhanced capability as a deterrent to regional threats and to strengthen its homeland defense. Denmark will have no difficulty absorbing this equipment into its armed forces.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

The principal contractor will be Lockheed Martin Rotary and Mission Systems in Oswego, New York. There are no known offset agreements in connection with this potential sale.

Implementation of this proposed sale will not require the assignment of additional U.S. Government or contractor representatives to Denmark.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 19-44

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex

Item No. vii

(vii) *Sensitivity of Technology*:

1. The AN/AQS-22 Airborne Low Frequency Sonar (ALFS) is the primary undersea warfare sensor of the MH-60R multi-mission helicopter. This integrated dipping sonar system enables the MH-60R to accomplish the assigned Anti-Submarine Warfare missions of submarine detection, tracking, localization, and classification. It also performs missions relating to acoustic intercept, underwater communications, and environmental data acquisition. Acoustics algorithms are used to process dipping sonar and sonobuoy data for target tracking and for the Acoustics Mission Planner (AMP), which is a tactical aid employed to optimize the deployment of the sonobuoy and the dipping sonar. Acoustics hardware is Unclassified. The acoustics system is classified up to Secret when environmental and threat databases are loaded and/or the system is processing acoustic data. ALFS hardware and support equipment, test equipment, and maintenance spares are unclassified. Technical data and documentation for the ALFS weapon system is classified up to Secret.

2. The AN/SSQ-36 Bathythermograph (BT) sonobuoy is an A-size, expendable and non repairable sonobuoy. The BT sonobuoy is an expendable thermal gradient measurement sonobuoy that operates over Radio Frequency (RF) channels. It consists of a thermistor temperature probe that descends through the bottom of the sonobuoy canister, producing a continuous reading of temperature versus depth, and transmits the readings to an aircraft or nearby vessel. The thermistor temperature probe can descend up to 2625 feet.

3. The AN/SSQ-53 Directional Frequency Analysis and Recording (DIFAR) sonobuoy is an A-size, expendable and non-repairable directional passive sonobuoy. Basic capabilities include four hydrophone depth selections up to 1000 feet with five time duration selections up to eight hours.

4. The AN/SSQ-62 Directional Command Activated Sonobuoy System (DICASS) sonobuoy is an A-size, expendable, non-repairable, directional active sonobuoy. The DICASS, in conjunction with the monitoring unit's signal processing equipment, provides active sonar range, bearing, and Doppler information on a submerged contact. The DICASS sonobuoy is designed to develop and maintain attack criteria. While often employed in multiple sonobuoy patterns; the DICASS sonobuoy is designed to permit single buoy attack criteria. The flexibility inherent in the monitoring unit's control over the various sonobuoy functions enables optimum sonobuoy employment over a wide range of environmental and target conditions.

5. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures, which might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

6. A determination has been made that the recipient country can provide substantially the same degree of protection for the sensitive technology being released as the U.S. Government. This sale is necessary in furtherance of the U.S. foreign policy and national security objectives outlined in the Policy Justification.

7. All defense articles and services listed in this transmittal have been authorized for release and export to Denmark.

[FR Doc. 2019–27491 Filed 12–19–19; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 19–38]

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)(1) 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 19–38 with attached Policy Justification and Sensitivity of Technology.

Dated: December 16, 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, STE 203
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 1 2019

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 19-38 concerning the Air Force's proposed Letter(s) of Offer and Acceptance to the Government of Morocco for defense articles and services estimated to cost $209 million. After this letter is delivered to your office, we plan to issue a news release to notify the public of this proposed sale.

Sincerely,

Charles W. Hooper
Lieutenant General, USA
Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology
4. Regional Balance (Classified document provided under separate cover)

BILLING CODE 5001–06–C

Transmittal No. 19-38

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as amended

(i) *Prospective Purchaser*: Kingdom of Morocco

(ii) *Total Estimated Value*:

Major Defense Equipment *	$187 million
Other	$ 22 million
TOTAL	$209 million

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase*:

Major Defense Equipment (MDE):

Five thousand eight hundred and ten (5,810) MK82-1 Bomb (Tritonal)

Three hundred (300) MK84-4 Bomb (Tritonal)

One hundred and five (105) Joint Direct Attack Munitions (JDAM) KMU-572F/B Tail Kits

One hundred eighty (180) MXU-651B/B Air Foil Group (AFG), GBU-10

Four thousand one hundred twenty five (4,125) MXU-650C/B AFG, GBU-12

Four thousand three hundred and five (4,305) MAU-169L/B Computer Control Group (CCG), GBU-10,-12,-16

Five thousand one hundred seventy-eight (5,178) FMU-152 Fuze

Non-MDE:

Also included are flares M-206, Flares MJU-7A/B, Impulse Cartridges BBU-36, Impulse Cartridges BBU-35/B, Bomb Sensor DSU-33C/B, chaff, bomb components, spares, repair parts, support equipment, publications and technical documentation, engineering technical and support services, and other related elements of logistics, transportation, and program support.

(iv) *Military Department*: Air Force (MO-D-AAG and MO-D-AAE)

(v) *Prior Related Cases, if any*: MO-D-SAY

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid*: None

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold*: See Attached Annex.

(viii) *Date Report Delivered to Congress*: September 11, 2019

* As defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Morocco—Additional F-16 Ammunition

The Government of Morocco has requested a possible sale of five thousand eight hundred and ten (5,810) MK82-1 Bombs (Tritonal); three hundred (300) MK84-4 Bombs (Tritonal); one hundred and five (105) Joint Direct Attack Munitions (JDAM) KMU-572F/B Tail Kits; one hundred eighty (180) MXU-651B/B Air Foil Groups (AFG), GBU-10; four thousand one hundred twenty five (4,125) MXU-650C/B AFGs, GBU-12; four thousand three hundred and five (4,305) MAU-169L/B Computer Control Groups (CCG), GBU-10,-12,-16; and five thousand one hundred seventy-eight (5,178) FMU-152 Fuzes. Also included are flares M-206, Flares MJU-7A/B, Impulse Cartridges BBU-36, Impulse Cartridges BBU-35/B, Bomb Sensor DSU-33C/B, chaff, bomb components, spares, repair parts, support equipment, publications and technical documentation, engineering technical and support services, and other related elements of logistics, transportation, and program support. The estimated cost is $209 million.

This proposed sale will support the foreign policy and national security of the United States by helping to improve the security of a major Non-NATO ally that continues to be an important force for political stability and economic progress in Africa.

The proposed sale will improve Morocco's capability to meet current and future threats of terror from violent extremist organizations prevalent throughout the region. Additionally, the additional munitions provided by this sale will improve interoperability with the United States and other regional allies and enhance Morocco's ability to undertake coalition operations, as it has done in the past in flying sorties against ISIS in Syria and Iraq. Morocco will have no difficulty absorbing these additional munitions and services into its armed forces.

The proposed sale of this equipment will not alter the basic military balance in the region.

The principal contractors will be Raytheon USA, Orbital ATK (USA), General Dynamics, Kilgore Cheming Groupe (USA), Cheming Groupe (USA), and Kaman Precision Products (USA). The purchaser typically requests offsets, however there are no known offset agreements at this time in connection with this potential sale.

Implementation of this proposed sale will not require U.S. Government or contractor representatives to be assigned to Morocco.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 19-38

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex

Item No. vii

(vii) *Sensitivity of Technology*:

1. Sensitive and/or classified (up to SECRET) elements of the proposed sale include munitions and support equipment: MK82-1 Bomb (Tritonal), MAU-169L/B, MXU-651B/B, MXU-650C/B, Fuzes FMU-152A/B, and JDAM MK-84 KMU-572 F/B. The hardware, software, and data identified are classified to protect vulnerabilities, design and performance parameters, and other similar critical information.

2. GBU-10/12/16/58 Paveway II (PWII), a Laser Guided Bomb (LGB), is a maneuverable, free-fall weapon that guides to a spot of laser energy reflected off the target. The LGB is delivered like a normal general purpose (GP) warhead, and the semi-active guidance corrects for many of the normal errors inherent in any delivery system. Laser designation for the LGB consists of a Computer Control Group (CCG) that is not warhead specific, and a warhead specific Air Foil Group (AFG) that attaches to the nose and tail of a GP bomb body. The PWII can use either the FMU-152 or FMU-139D/B fuzes. The overall weapon is CONFIDENTIAL. The GBU-10 is a 2,000 lb (MK-84 or BLU-117 B/B) GP bomb body fitted with the MXU-650 AFG, and MAU-209C/B or MAU-168L/B CCGs to guide to its laser designated target. MK-82 bomb body's hardware are UNCLASSIFIED.

3. Joint Direct Attack Munitions (JDAM) is a Joint Service weapon which uses an onboard GPS-aided Inertial Navigation System (INS) Guidance Set with a MK82, MK83, MK84, BLU-109, BLU-100, BLU-111, BLU-117, BLU-126 (Navy) or BLU-129 warhead. The Guidance Set, when combined with a warhead and appropriate fuze, forms a JDAM Guided Bomb Unit (GBU). The JDAM Guidance Set gives these bombs adverse weather capability with improved accuracy. The JDAM weapon can be delivered from modest standoff ranges at high or low altitudes against a variety of land and surface targets during the day or night. After release, JDAM autonomously guides to a target using the resident GPS-aided INS guidance system. JDAM is capable of receiving target coordinates via preplanned mission data from the delivery aircraft, by onboard aircraft sensors (i.e. FLIR, Radar, etc.) during captive carry, or from a third party source via manual or automated aircrew

cockpit entry. The JDAM as an All Up Round is UNCLASSIFIED; technical data for JDAM is classified up to SECRET.

4. Joint Programmable Fuze (JPF) FMU-152 is a multi-delay, multi-arm and proximity sensor compatible with general purpose blast, frag and hardened-target penetrator weapons. The JPF settings are cockpit selectable in flight when used with JDAM weapons.

5. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures that might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

6. A determination has been made that Morocco can provide substantially the same degree of protection for the sensitive technology being released as the U.S. Government. This sale is necessary in furtherance of the U.S. foreign policy and national security objectives outlined in the Policy Justification.

7. All defense articles and services listed in this transmittal are authorized for release and export to the Government of Morocco.

[FR Doc. 2019–27480 Filed 12–19–19; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 19–43]

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)(1) 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 19–43 with attached Policy Justification and Sensitivity of Technology.

Dated: December 17, 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

AUG 07 2019

The Honorable Nancy Pelosi
Speaker of the House
U.S. House of Representatives
H-209, The Capitol
Washington, DC 20515

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 19-43 concerning the Navy's proposed Letter(s) of Offer and Acceptance to the Republic of Korea for defense articles and services estimated to cost $800 million. After this letter is delivered to your office, we plan to issue a news release to notify the public of this proposed sale.

Sincerely,

Charles W. Hooper
Lieutenant General, USA
Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology

BILLING CODE 5001–06–C

Transmittal No. 19-43

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as amended

(i) *Prospective Purchaser*: Republic of Korea

(ii) *Total Estimated Value*:

Major Defense Equipment *.	$610 million
Other	$190 million
TOTAL	$800 million

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase*:

Major Defense Equipment (MDE):

Twelve (12) MH-60R Multi-Mission Helicopters, equipped with the following:

Thirteen (13) APS-153(V) Multi-Mode Radars (12 installed, 1 spare)

Twenty-five (25) T-700-GE-401C Engines (24 installed, 1 spare)

Twelve (12) Airborne Low Frequency Sonar Systems (ALFS) (12 installed)

Thirteen (13) AN/AAS-44C(V) Multi-Spectral Targeting Systems (12 installed, 1 spare)
Twenty-four (24) Embedded Global Positioning System/Inertial Navigation Systems (EGI) with Selective Availability/Anti-Spoofing Module (SAASM) (24 installed)
Twelve (12) Link 16 Multifunctional Information Distribution Systems – Low Volume Terminals (MIDS-LVT) Block Upgrade Two Terminals
Four (4) M-240D Crew Served Guns
Four (4) GAU-21 Crew Served Guns
One thousand (1,000) AN/SSQ-36/53/62 Sonobuoys

Non-MDE:

Also included are twenty-four (24) AN/ARC-210 RT-1990A(C) radios with Communications Security (COMSEC); twenty (20) AN/ARC-220 High Frequency radios; twenty (20) AN/APX-123 Identification Friend or Foe (IFF) transponders; spare engine containers; facilities study; design and construction; spare and repair parts; support and test equipment; communications equipment; ferry support; publications and technical documentation; personnel training and training equipment; U.S. Government and contractor engineering, technical, and logistics support services; and other related elements of logistics and program support.

(iv) *Military Department*: Navy (KS-P-SEL)

(v) *Prior Related Cases, if any*: None

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid*: None

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold*: See Annex Attached

(viii) *Date Report Delivered to Congress*: August 7, 2019

* As defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Republic of Korea—MH-60R Multi-Mission Helicopters with Support

The Republic of Korea has requested to buy twelve (12) MH-60R Multi-Mission Helicopters, equipped with the following: thirteen (13) APS-153(V) Multi-Mode Radars (12 installed, 1 spare); twenty-five (25) T-700-GE-401C Engines (24 installed, 1 spare); twelve (12) Airborne Low Frequency Sonar Systems (ALFS) (12 installed); thirteen (13) AN/AAS-44C(V) Multi-Spectral Targeting Systems (12 installed, 1 spare); twenty-four (24) Embedded Global Positioning System/Inertial Navigation Systems (EGI) with Selective Availability/Anti-Spoofing Module (SAASM) (24 installed); twelve (12) Link 16 Multifunctional Information Distribution Systems – Low Volume Terminals (MIDS-LVT) Block Upgrade Two Terminals; four (4) M-240D crew served guns; four (4) GAU-21 crew served guns; and one thousand (1,000) AN/SSQ-36/53/62 sonobuoys. Also included are twenty-four (24) AN/ARC-210 RT-1990A(C) radios with Communications Security (COMSEC); twenty (20) AN/ARC-220 High Frequency radios; twenty (20) AN/APX-123 Identification Friend or Foe (IFF) transponders; spare engine containers; facilities study; design and construction; spare and repair parts; support and test equipment; communications equipment; ferry support; publications and technical documentation; personnel training and training equipment; U.S. Government and contractor engineering, technical, and logistics support services; and other related elements of logistics and program support. The total estimated program cost is $800 million.

This proposed sale will support the foreign policy and national security objectives of the United States by meeting the legitimate security and defense needs of one of the closest allies in the INDOPACOM Theater. The Republic of Korea is one of the major political and economic powers in East Asia and the Western Pacific and a key partner of the United States in ensuring peace and stability in that region. It is vital to U.S. national interests to assist the Republic of Korea in developing and maintaining a strong and ready self-defense capability.

The proposed sale will improve the Republic of Korea Navy's capability to perform anti-surface and anti-submarine warfare missions, along with the ability to perform secondary missions including vertical replenishment, search and rescue, and communications relay. The Republic of Korea will use the enhanced capability as a deterrent to regional threats and to strengthen its homeland defense. The Republic of Korea will have no difficulty absorbing these helicopters and support into its armed forces.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

The prime contractor will be Lockheed Martin Rotary and Mission Systems, Owego, New York. There are no known offset agreements proposed in connection with this potential sale. Any offset agreement required by the Republic of Korea will be defined in negotiations between the purchaser and the contractor.

Implementation of the proposed sale will require approximately two U.S. contractors to be assigned in country to support the program. However, U.S. Government engineering and technical services may be required on an interim basis for training and technical assistance.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 19-43

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex

Item No. vii

(vii) *Sensitivity of Technology*:

1. The MH-60R Multi-Mission Helicopter focuses primarily on anti-submarine and anti-surface warfare missions. The MH-60R carries several sensors and data links to enhance its ability to work in a network-centric battle group and as an extension of its home ship/main operating base. The mission equipment subsystem consists of the following sensors and subsystems: an acoustics systems consisting of a dipping sonar and sonobuoys, Multi-Mode Radar (MMR) with integral Identification Friend or Foe (IFF) interrogator, Radios with COMSEC, Electronic Support Measures (ESM), Integrated Self-Defense (ISD), and Multi-Spectral Targeting System (MTS). The aircraft processes sensor data onboard and transmits data via Common Data Link (CDL) (also referred to as Hawklink). The aircraft is night vision compatible. It can carry AGM-114A/B/K/N Hellfire missiles, as well as MK 46/54 torpedoes to engage surface and sub-surface targets. The Republic of Korea Navy MH-60R platform will include provisions for the MK 54 lightweight torpedo. The MH-60R weapons system is classified up to SECRET. Unless otherwise noted below, MH-60R hardware and support equipment, test equipment and maintenance spares are unclassified except when electrical power is applied to hardware containing volatile data storage. Technical data and documentation for MH-60R weapons systems (to include sub-systems and weapons listed below) are classified up to SECRET. The sensitive technologies include:

a. Communications security devices contain sensitive encryption algorithms and keying material. The purchasing country has previously been released and utilizes COMSEC devices in accordance with set procedures and without issue. COMSEC devices will be classified up to SECRET when keys are loaded.

b. Identification Friend or Foe (IFF) (KIV-78) contains embedded security

devices containing sensitive encryption algorithms and keying material. The purchasing country will utilize COMSEC devices in accordance with set procedures. The AN/APX-123 is classified up to SECRET.

c. GPS/PPS/SAASM - Global Positioning System (GPS) provides a space-based Global Navigation Satellite System (GNSS) that has reliable location and time information in all weather and at all times and anywhere on or near the earth when and where there is an unobstructed line of sight to four or more GPS satellites. Selective Availability/Anti-Spoofing Module (SAASM) (AN/PSN-11) is used by military GPS receivers to allow decryption of precision GPS coordinates. In addition, the GPS Antenna System (GAS-1) provides protection from enemy manipulation of the GPS system. The GPS hardware is UNCLASSIFIED. When electrical power is applied, the system is classified up to SECRET.

d. Acoustics algorithms are used to process dipping sonar and sonobuoy data for target tracking and for the Acoustics Mission Planner (AMP), which is a tactical aid employed to optimize the deployment of sonobuoys and the dipping sonar. Acoustics hardware is UNCLASSIFIED. The acoustics system is classified up to SECRET when environmental and threat databases are loaded and/or the system is processing acoustic data.

e. The AN/APS-153 multi-mode radar with an integrated IFF and Inverse Synthetic Aperture (ISAR) provides target surveillance/detection capability. The AN/APS-153 hardware is unclassified. When electrical power is applied and mission data loaded, the AN/APS-153 is classified up to SECRET.

f. The AN/ALQ-210 (ESM) system identifies the location of an emitter. The ability of the system to identify specific emitters depends on the data provided by Indian Navy. The AN/ALQ-210 hardware is UNCLASSIFIED. When electrical power is applied and mission data loaded, the AN/ALQ-210 system is classified up to SECRET.

g. The AN/AAS-44C(V) Multi-spectral Targeting System (MTS) operates in day/night and adverse weather conditions. Imagery is provided by a Forward Looking Infrared (FLIR) sensor, a color/monochrome day television (DTV) camera, and a Low-Light TV (LLTV). The AN/AAS-44C(V) hardware is UNCLASSIFIED. When electrical power is applied, the AN/AAS-44C(V) is classified up to SECRET.

h. Ultra High Frequency/Very High Frequency (UHF/VHF) Radios (ARC-210) contain embedded sensitive encryption algorithms and keying material. The purchasing country will utilize COMSEC devices in accordance with set procedures. The ARC-210 hardware is UNCLASSIFIED. When electrical power is applied and mission data loaded, the ARC-210 is classified up to SECRET.

i. Advanced Data Transfer System (ADTS) with Type 1 encryption for data at rest.

j. Satellite Communications Demand Assigned Multiple Access (SATCOM DAMA), which provides increased, interoperable communications capabilities with US forces. SATCOM DAMA hardware is UNCLASSIFIED. When electrical power is applied and mission data loaded these systems are classified up to SECRET.

2. All the mission data, including sensitive parameters, is loaded from an off board station before each flight and does not stay with the aircraft after electrical power has been removed. Sensitive technologies are protected as defined in the program protection and anti-tamper plans. The mission data and off board station are classified up to SECRET.

3. If a technologically advanced adversary were to obtain knowledge of the hardware and software elements, the information could be used to develop countermeasures or equivalent systems, which might reduce system effectiveness or be used in the development of a system with similar or advanced capabilities.

4. A determination has been made that the Republic of Korea can provide substantially the same degree of protection for the sensitive technology being released as the U.S. Government. This sale is necessary in furtherance of the U.S. foreign policy and national security objectives outlined in the Policy Justification.

5. All defense articles and services listed in this transmittal have been authorized for release and export to the Republic of Korea.

[FR Doc. 2019–27510 Filed 12–19–19; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 19–40]

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)(1) 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 19–40 with attached Policy Justification and Sensitivity of Technology.

Dated: December 16, 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, STE 203
ARLINGTON, VA 22202-5408

JUL 2 9 2019

The Honorable Nancy Pelosi
Speaker of the House
U.S. House of Representatives
H-209, The Capitol
Washington, DC 20515

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 19-40 concerning the Navy's proposed Letter(s) of Offer and Acceptance to the Government of Egypt for defense articles and services estimated to cost $554 million. After this letter is delivered to your office, we plan to issue a news release to notify the public of this proposed sale.

Sincerely,

Charles W. Hooper
Lieutenant General, USA
Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Regional Balance (Classified document provided under separate cover)

BILLING CODE 5001–06–C

Transmittal No. 19-40

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as amended

(i) *Prospective Purchaser*: Government of Egypt

(ii) *Total Estimated Value*:

Major Defense Equipment *	$ 0 million
Other	$554 million
TOTAL	$554 million

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase*: Foreign Military Sales (FMS) case EG-P-GKB, implemented in September 2018, was below congressional notification threshold at $45 million ($0 in MDE) and provided for material and labor services in support of Oliver Hazard Perry Class Frigates (FFG-7), Fast Missile Craft (FMC), Mine Hunter Coastal (MHC) ships, Coastal Mine Hunter (CMH) ships, and 25 Meter and 28 Meter Fast Patrol Craft (FPC). Egypt has requested the case be amended to continue providing the same support on the basic case. This amendment will push the current case above the non-MDE or services congressional notification threshold and thus requires notification of the entire case.

Major Defense Equipment (MDE): None

Non-MDE:

Provides for material and labor services in support of Oliver Hazard Perry Class Frigates (FFG-7 class ships), Fast Missile Craft (FMC), Mine Hunter Coastal (MHC) ships, Coastal Mine Hunter (CMH) ships, and 25 Meter and 28 Meter Fast Patrol Craft (FPC).

(iv) *Military Department*: Navy (EG-P-GKB)

(v) *Prior Related Cases, if any*: None

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid*: None

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold*: None

(viii) *Date Report Delivered to Congress*: July 29, 2019

* As defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Egypt – Follow on Technical Support (FOTS)

The Government of Egypt has requested a possible sale of Follow on Technical Support (FOTS) that provides for material and labor services in support of Oliver Hazard Perry Class Frigates (FFG-7 class ships), Fast Missile Craft (FMC), Mine Hunter Coastal (MHC) ships, Coastal Mine Hunter (CMH) ships, and 25 Meter and 28 Meter Fast Patrol Craft (FPC). The estimated cost is $554 million.

This proposed sale will support the foreign policy and national security of the United States by helping to provide a strategic partner with critical support for multiple type ships responsible for Egypt's maritime security. The proposed sale is essential to maintain Egypt's national security, regional stability, and the free flow of worldwide commerce via the Suez Canal.

Egypt intends to use this technical maintenance and service support to ensure the Egyptian Navy is operationally capable of providing coastal defense and security. The proposed sale will increase the Egyptian Navy's material and operational readiness. Egypt will have no difficulties absorbing this support into its armed forces.

The proposed sale will not alter the basic military balance in the region.

The prime contractor for Engineering Services Support will be VSE Corporation and U.S. Government activities will provide FOTS for Egypt. There are no known offset agreements proposed in connection with this potential sale.

Implementation of this proposed sale will require periodic trips to Egypt involving U.S. Government and contractor representatives for technical reviews, support, and oversight for approximately five years.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

[FR Doc. 2019–27482 Filed 12–19–19; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 19–41]

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)(1) 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 19–41 with attached Policy Justification and Sensitivity of Technology.

Dated: December 16, 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, STE 203
ARLINGTON, VA 22202-5408

AUG 2 7 2019

The Honorable Nancy Pelosi
Speaker of the House
U.S. House of Representatives
H-209, The Capitol
Washington, DC 20515

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 19-41 concerning the Navy's proposed Letter(s) of Offer and Acceptance to the Government of Japan for defense articles and services estimated to cost $3.295 billion. After this letter is delivered to your office, we plan to issue a news release to notify the public of this proposed sale.

Sincerely,

Charles W. Hooper
Lieutenant General, USA
Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology

BILLING CODE 5001–06–C

Transmittal No. 19-41

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as amended

(i) *Prospective Purchaser*: Government of Japan

(ii) *Total Estimated Value*:

Major Defense Equipment *	$3.159 billion
Other	.136 billion
TOTAL	3.295 billion

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase*:

Major Defense Equipment (MDE):

Up to seventy-three (73) Standard Missile-3 (SM-3) Block IIA Missiles

Non-MDE:

Also included are MK 29 Canisters with packing, handling, storage, and transportation (PHS&T) kits; up to ten (10) Special Assignment Airlift Mission (SAAM) flights; U.S. Government and contractor representatives' technical assistance, engineering and logistical support services, and other related elements of logistics and program support.

(iv) *Military Department*: Navy (JA-P-ATZ)

(v) *Prior Related Cases, if any*: JA-P-ATB & JA-P-AUA

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid*: None

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold*: See Attached Annex.

(viii) *Date Report Delivered to Congress*: August 27, 2019

* As defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Japan—Standard Missile (SM)-3 Block IIA

The Government of Japan has requested to buy up to seventy-three (73) Standard Missile-3 (SM-3) Block IIA missiles. Also included are MK 29 Canisters with packing, handling, storage, and transportation (PHS&T) kits; up to ten (10) Special Assignment Airlift Mission (SAAM) flights; U.S. Government and contractor representatives' technical assistance, engineering and logistical support services, and other related elements of logistics and program support. The estimated cost is $3.295 billion.

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.

The proposed sale will provide Japan with increased ballistic missile defense capability to assist in defending the Japanese homeland and U.S. personnel stationed there. Japan will have no difficulty absorbing these additional missiles into its armed forces.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

The prime contractor for the SM-3 Block IIA All Up Rounds will be Raytheon Missile Systems, Tucson, Arizona. The prime contractor for the MK 29 Canisters and PHS&T kits will be BAE Systems, Minneapolis, Minnesota. There are no known offset agreements proposed in connection with this potential sale.

Implementation of this proposed sale will require annual trips to Japan involving U.S. Government and contractor representatives for technical reviews, support, and oversight for approximately five years.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 19-41

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex

Item No. vii

(vii) *Sensitivity of Technology*:

1. The proposed sale will involve the release of sensitive technology to the Government of Japan related to the Standard Missile-3 (SM-3):

The ship- or ground-launched SM-3 Block IIA is the most recent iteration in the SM-3 family. It has two distinct new features: larger rocket motors that will allow it to defend broader areas from ballistic missile threats; and a larger kinetic warhead. The kinetic warhead has been enhanced, improving the search, discrimination, acquisition and tracking functions, to address emerging threats. Once enclosed in the canister, the SM-3 Block IIA missile is classified CONFIDENTIAL. The optics hardware and signal processor are classified SECRET.

2. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures that might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

3. The sensitive technology being released under this notification is subject to special security measures. This sale is necessary in furtherance of the U.S. foreign policy and national security objectives outlined in the Policy Justification.

4. All defense articles and services listed in this transmittal are authorized for release and export to the Government of Japan.

[FR Doc. 2019–27488 Filed 12–19–19; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Department of Defense Military Family Readiness Council; Notice of Federal Advisory Committee Meeting; Cancellation

AGENCY: Under Secretary of Defense for Personnel and Readiness, Department of Defense (DoD).

ACTION: Notice of Federal Advisory Committee meeting; cancellation.

SUMMARY: On December 2, 2019, the DoD published a notice that announced the next meeting of the Department of Defense Military Family Readiness Council, which was to take place on Tuesday, December 17, 2019 from 10:00 a.m. to 12:00 p.m. DoD is publishing this notice to announce that this Federal Advisory Committee meeting has been cancelled and will be re-scheduled at a later date.

FOR FURTHER INFORMATION CONTACT: William Story, (571) 372–5345 (Voice), (571) 372–0884 (Facsimile), OSD Pentagon OUSD P–R Mailbox Family Readiness Council, *osd.pentagon.ousd-p-r.mbx.family-readiness-council@mail.mil* (Email). Mailing address is: Office of the Deputy Assistant Secretary of Defense (Military Community & Family Policy), Office of Military Family Readiness Policy, 4800 Mark Center Drive, Alexandria, VA 22350–2300, Room 3G15. Website: *https://www.militaryonesource.mil/leaders-service-providers/military-family-readiness-council.*

SUPPLEMENTARY INFORMATION: Due to circumstances beyond the control of the Department of Defense and the Designated Federal Officer, the Department of Defense Military Family Readiness Council was unable to provide public notification required by 41 CFR 102–3.150(a) concerning the cancellation of the previously noticed

meeting for December 17, 2019. Accordingly, the Advisory Committee Management Officer for the Department of Defense, pursuant to 41 CFR 102–3.150(b), waives the 15-calendar day notification requirement.

On December 2, 2019 (84 FR 65974), the DoD published a notice that announced a December 17, 2019 meeting of the Department of Defense Military Family Readiness Council. DoD is publishing this notice to announce that this Federal Advisory Committee meeting has been cancelled and will be re-scheduled at a later date. The rescheduled meeting will be announced in the **Federal Register**.

Dated: December 16, 2019.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2019–27441 Filed 12–19–19; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2019–ICCD–0128]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; State Education Agency, Local Educational Agency, and School Data Collection and Reporting Under ESEA, Title I, Part A

AGENCY: Office of Elementary and Secondary Education (OESE), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing a revision of an existing information collection.

DATES: Interested persons are invited to submit comments on or before January 21, 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–0128. 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 Evan Skloot, 202–453–6515.

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: State Education Agency, Local Educational Agency, and School Data Collection and Reporting under ESEA, Title I, Part A.

OMB Control Number: 1810–0581.

Type of Review: A revision of an existing information collection.

Respondents/Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 17,022.

Total Estimated Number of Annual Burden Hours: 293,152.

Abstract: Title I, Part A (Title I) of the Elementary and Secondary Education Act of 1965 (ESEA), as amended by the Every Student Succeeds Act of 2015 (ESSA), contains several provisions that require State education agencies (SEAs), local educational agencies (LEAs), and schools to collect and disseminate information. The Paperwork Reduction Act (PRA) covers these activities. The previous authorization of the ESEA contained information collection requirements which are currently approved by OMB under control number 1810–0581.

Congress approved a joint resolution on March 9, 2017 disapproving the U.S. Department of Education's (Department's) regulations related to State plans, statewide accountability systems, and data reporting. The burden changes reflected in this revision renewal data collection are a result of this joint resolution and reflect only the requirements of the statute. The requirement to produce a State and LEA report card remains unchanged under this revision renewal and most of the work to produce the report cards is the same. There are some requirements that were in the regulations that are not required due to the joint resolution. As a result, the burden estimate is slightly lower under this revision renewal.

SEAs, LEAs, and schools collect and disseminate the information to carry out the reporting requirements of Title I of the ESEA. The information is used to facilitate compliance with statutory requirements and to provide information to school communities (including parents), LEAs, SEAs and the Department regarding activities required under Title I of the ESEA.

Dated: December 17, 2019.

Kate Mullan,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer.

[FR Doc. 2019–27500 Filed 12–19–19; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2019–ICCD–0130]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Institutional Disclosures for Distance Education or Correspondence Programs

AGENCY: Federal Student Aid (FSA), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing an extension of an existing information collection.

DATES: Interested persons are invited to submit comments on or before January 21, 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–0130. 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: Institutional Disclosures for Distance Education or Correspondence Programs.

OMB Control Number: 1845–0145.

Type of Review: An extension of an existing information collection.

Respondents/Affected Public: State, Local, and Tribal Governments; Private Sector

Total Estimated Number of Annual Responses: 3,588.

Total Estimated Number of Annual Burden Hours: 152,405.

Abstract: The Department of Education (Department) requests an extension without change to the information collection tied to 34 CFR part 668.50 requiring institutional disclosures for distance education and correspondence courses. This regulatory action establishes requirements for institutional disclosures to prospective and enrolled students in programs offered solely through distance education or correspondence courses, which the Department believes will protect students by providing them with important information that may influence their attendance in distance education programs or correspondence courses as well as improve the efficacy of State-based consumer protections for students. Since distance education may involve multiple States, institutional and program authorization requirements among States may differ, and students may be unfamiliar with or fail to receive information about complaint processes, licensure requirements, or other requirements of authorities in States in which they do not reside.

The final regulations, based on the 2019 negotiated rulemaking, will rescind the requirements of § 668.50 in its entirety. While the Secretary is exercising her authority to allow for early implementation of the rescission of this section, the final rule and the rescission will not fully take place until July 1, 2020. The Department is asking to extend the current burden assessment until the effective date of the change and at that time a discontinuation request will be filed.

Dated: December 17, 2019.

Kate Mullan,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer.

[FR Doc. 2019–27499 Filed 12–19–19; 8:45 am]

BILLING CODE 4000–01–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: RP20–323–000.
Applicants: Bear Creek Storage Company, L.L.C.
Description: Compliance filing Annual Fuel Assessment 2019 to be effective N/A.
Filed Date: 12/12/19.
Accession Number: 20191212–5043.
Comments Due: 5 p.m. ET 12/24/19.

Docket Numbers: RP20–324–000.
Applicants: Wyoming Interstate Company, L.L.C.
Description: § 4(d) Rate Filing: Non-Conforming Agreements Update (EnerVest) to be effective 1/1/2020.
Filed Date: 12/12/19.
Accession Number: 20191212–5084.
Comments Due: 5 p.m. ET 12/24/19.

Docket Numbers: RP20–325–000.
Applicants: Florida Gas Transmission Company, LLC.
Description: § 4(d) Rate Filing: Service Agreement with FPU Filing on 12–12–19 to be effective 1/1/2020.
Filed Date: 12/12/19.
Accession Number: 20191212–5141.
Comments Due: 5 p.m. ET 12/24/19.

Docket Numbers: RP20–326–000.
Applicants: Florida Gas Transmission Company, LLC.
Description: § 4(d) Rate Filing: Update Non-Conforming List (FPU) and Negotiated Rate Record to be effective 1/1/2020.
Filed Date: 12/12/19.
Accession Number: 20191212–5153.
Comments Due: 5 p.m. ET 12/24/19.

Docket Numbers: RP20–327–000.
Applicants: Southern Star Central Gas Pipeline, Inc.
Description: § 4(d) Rate Filing: Vol.2—Negotiated Rate Agreements—Spotlight to be effective 12/12/2019.
Filed Date: 12/12/19.
Accession Number: 20191212–5171.
Comments Due: 5 p.m. ET 12/24/19.

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 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 13, 2019.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2019–27497 Filed 12–19–19; 8:45 am]

BILLING CODE 6717–01–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: ER10–1982–015; ER10–1246–014; ER10–1252–014; ER10–1253–014.

Applicants: Consolidated Edison Energy, Inc, Consolidated Edison Solutions, Inc., Consolidated Edison Company of New York, Inc., Orange and Rockland Utilities, Inc.

Description: Triennial Market Power Analysis of the Con Edison Companies.

Filed Date: 12/16/19.

Accession Number: 20191216–5098.

Comments Due: 5 p.m. ET 2/14/20.

Docket Numbers: ER10–2732–018; ER10–2733–018; ER10–2734–018; ER10–2736–018; ER10–2737–018; ER10–2741–018; ER10–2749–018; ER10–2752–018; ER12–2492–014; ER12–2493–014; ER12–2494–014; ER12–2495–014; ER12–2496–014; ER14–264–005; ER16–2455–008; ER16–2456–008; ER16–2457–008; ER16–2459–008; ER18–1404–004; ER19–2096–001.

Applicants: Emera Energy Services, Inc., Emera Energy LNG, LLC, Emera Energy Services Subsidiary No. 1 LLC, Emera Energy Services Subsidiary No. 2 LLC, Emera Energy Services Subsidiary No. 3 LLC, Emera Energy Services Subsidiary No. 4 LLC, Emera Energy Services Subsidiary No. 5 LLC, Emera Energy Services Subsidiary No. 6 LLC, Emera Energy Services Subsidiary No. 7 LLC, Emera Energy Services Subsidiary No. 8 LLC, Emera Energy Services Subsidiary No. 9 LLC, Emera Energy Services Subsidiary No. 10 LLC, Emera Energy Services Subsidiary No. 11 LLC, Emera Energy Services Subsidiary No. 12 LLC, Emera Energy Services Subsidiary No. 13 LLC, Emera Energy Services Subsidiary No. 15 LLC, Emera Energy U.S. Subsidiary No. 1, Inc., Emera Energy U.S. Subsidiary No. 2, Inc., Emera Maine, NS Power Energy Marketing Inc.

Description: Triennial Market Power Update for Northeast Region of the Emera Entities.

Filed Date: 12/16/19.

Accession Number: 20191216–5065.

Comments Due: 5 p.m. ET 2/14/20.

Docket Numbers: ER11–3376–005; ER11–3377–005; ER11–3378–005.

Applicants: North Hurlburt Wind, LLC, Horseshoe Bend Wind, LLC, South Hurlburt Wind, LLC.

Description: Triennial Market Power Analysis for Northwest Region of North Hurlburt Wind, LLC, et al.

Filed Date: 12/13/19.

Accession Number: 20191213–5225.

Comments Due: 5 p.m. ET 2/11/20.

Docket Numbers: ER19–460–005.

Applicants: Southwest Power Pool, Inc.

Description: Compliance filing: Order No. 841 Compliance Filing in Response to October 2019 Order to be effective 12/31/9998.

Filed Date: 12/16/19.

Accession Number: 20191216–5060.

Comments Due: 5 p.m. ET 1/6/20.

Docket Numbers: ER19–469–003.

Applicants: PJM Interconnection, L.L.C.

Description: Compliance filing: Compliance Filing Pursuant October 17, 2019 Order re ESR to be effective 12/3/2019.

Filed Date: 12/16/19.

Accession Number: 20191216–5080.

Comments Due: 5 p.m. ET 1/6/20.

Docket Numbers: ER20–270–002.

Applicants: Dynegy Oakland, LLC.

Description: Tariff Amendment: Deferral of Commission Action to Permit Ongoing Settlement Discussions to be effective 12/31/9998.

Filed Date: 12/13/19.

Accession Number: 20191213–5205.

Comments Due: 5 p.m. ET 1/3/20.

Docket Numbers: ER20–599–000.

Applicants: Northern Indiana Public Service Company.

Description: § 205(d) Rate Filing: Filing of a CIAC Agreement to be effective 2/11/2020.

Filed Date: 12/13/19.

Accession Number: 20191213–5181.

Comments Due: 5 p.m. ET 1/3/20.

Docket Numbers: ER20–600–000.

Applicants: Florida Power & Light Company.

Description: § 205(d) Rate Filing: FPL–TECO-Revisions to Rate Schedule No. 23 Contract for Interchange Service to be effective 1/1/2020.

Filed Date: 12/13/19.

Accession Number: 20191213–5187.

Comments Due: 5 p.m. ET 1/3/20.

Docket Numbers: ER20–601–000.

Applicants: Northern Indiana Public Service Company.

Description: § 205(d) Rate Filing: Filing of a CIAC Agreement to be effective 2/11/2020.

Filed Date: 12/13/19.

Accession Number: 20191213–5206.

Comments Due: 5 p.m. ET 1/3/20.

Docket Numbers: ER20–602–000.

Applicants: Northern Indiana Public Service Company.

Description: § 205(d) Rate Filing: Filing of a CIAC Agreement to be effective 1/15/2020.

Filed Date: 12/13/19.

Accession Number: 20191213–5207.

Comments Due: 5 p.m. ET 1/3/20.

Docket Numbers: ER20–603–000.

Applicants: Northern Indiana Public Service Company.

Description: § 205(d) Rate Filing: Filing of a CIAC Agreement to be effective 1/15/2020.

Filed Date: 12/13/19.

Accession Number: 20191213–5209.

Comments Due: 5 p.m. ET 1/3/20.

Docket Numbers: ER20–604–000.

Applicants: PacifiCorp.

Description: Notice of Cancellation of Rate Schedule No. 298 of PacifiCorp.

Filed Date: 12/13/19.

Accession Number: 20191213–5239.

Comments Due: 5 p.m. ET 1/3/20.

Docket Numbers: ER20–605–000.

Applicants: Midcontinent Independent System Operator, Inc.

Description: § 205(d) Rate Filing: 2019–12–16_SA 3391 Ameren IL-Maple Flats Solar Energy Center GIA (J813) to be effective 12/2/2019.

Filed Date: 12/16/19.

Accession Number: 20191216–5071.

Comments Due: 5 p.m. ET 1/6/20.

Docket Numbers: ER20–606–000.

Applicants: Midcontinent Independent System Operator, Inc.

Description: § 205(d) Rate Filing: 2019–12–16_SA 3390 MDU-Emmons-Logan Wind GIA (J302 J503) to be effective 12/2/2019.

Filed Date: 12/16/19.

Accession Number: 20191216–5074.

Comments Due: 5 p.m. ET 1/6/20.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES20–11–000.

Applicants: ITC Midwest LLC.

Description: Application Under Section 204 of the Federal Power Act for Authorization to Issue Securities of ITC Midwest LLC.

Filed Date: 12/16/19.

Accession Number: 20191216–5105.

Comments Due: 5 p.m. ET 1/6/20.

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 16, 2019.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2019–27496 Filed 12–19–19; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 3452–017]

Erie Boulevard Hydropower, L.P.; Notice of Application Accepted for Filing and Soliciting Motions To Intervene and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Subsequent Minor License.

b. *Project No.:* 3452–017.

c. *Date Filed:* June 28, 2019.

d. *Applicant:* Erie Boulevard Hydropower, L.P.

e. *Name of Project:* Oak Orchard Hydroelectric Project.

f. *Location:* The project is located adjacent to the New York State Canal Corporation's barge canal in the Village of Medina, Orleans County, New York. The project does not occupy any federal land.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Mr. Steven P. Murphy, Director, U.S. Licensing, Erie Boulevard Hydropower, L.P., 33 West 1st Street South, Fulton, NY 13069; (315) 598–6130; email—*steven.murphy@brookfieldrenewable.com.*

i. *FERC Contact:* Laurie Bauer at (202) 502–6519; or email at *laurie.bauer@ferc.gov.*

j. *Deadline for filing motions to intervene and protests:* 60 days from the issuance date of this notice.

The Commission strongly encourages electronic filing. Please file motions to intervene and protests using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, please send a paper copy to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. The first page of any filing should include docket number P–3452–017.

The Commission's Rules of Practice require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. This application has been accepted, but is not ready for environmental analysis at this time.

l. *The Oak Orchard Project consists of the following existing facilities:* (1) A concrete gravity dam containing a spillway with a crest elevation of 507.6 feet mean sea level (msl) surmounted by 2-foot-high flashboards and two 5-foot-high, 5-foot-wide flood gates; (2) a forebay with a surface area of 0.25 acre and a storage capacity of 3 acre-feet at the normal pool elevation of 509.6 feet msl; (3) an intake structure with trashracks; (4) a 7-foot-diameter, 85-foot-long welded steel penstock from the intake to the turbine; (5) a 20-foot-long, 43-foot-wide powerhouse containing a single turbine-generator unit with a rated capacity of 350 kilowatts; (6) a tailrace located on the left (west) bank of Oak Orchard Creek; (7) a 55-foot-long underground generation lead; (8) three single-phase 167 kilovolt-ampere pole-mounted power transformers; (9) a 400-foot-long access road; and (10) appurtenant facilities.

The Oak Orchard Project is operated in a run-of-river mode with an average annual generation of 1,147 megawatt-hours between 2009 and 2018.

m. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's website at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support. A copy is also available for inspection and reproduction at the address in item h above.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. Anyone may submit a protest or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, and .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any protests or motions to intervene must be received on or before the specified comment date for the particular application.

All filings must: (1) Bear in all capital letters the title PROTEST or MOTION TO INTERVENE; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application.

o. *Procedural schedule and final amendments:* The application will be processed according to the following preliminary schedule. Revisions to the schedule will be made as appropriate.

Issue Scoping Document 1 for comments—January 2020

Request Additional Information (if necessary)—March 2020

Issue Scoping Document 2 (if necessary)—April 2020

Issue notice of ready for environmental analysis—April 2020

Commission issues EA—October 2020

Comments on EA—November 2020

p. Final amendments to the application must be filed with the Commission no later than 30 days from the issuance date of the notice of ready for environmental analysis.

Dated: December 16, 2019.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2019–27494 Filed 12–19–19; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM19–12–000]

Revisions to the Filing Process for Commission Forms; Notice of Technical Conference

Take notice that the Federal Energy Regulatory Commission (Commission) will hold a staff-led technical conference in the above-referenced proceedings on Tuesday through Thursday, February 4–6, 2020, from 9:00 a.m. to 5:00 p.m. Eastern time. The conference will be held in the Commission Meeting Room at Commission headquarters, 888 First Street NE, Washington, DC 20426. Staff anticipates issuing a supplemental notice and an agenda to provide additional information and a list of topics to be addressed prior to the technical conference.

In Order No. 859,[1] the Commission adopted a final rule requiring the use of XBRL format for filing Commission Form Nos. 1, 1–F, 2, 2–A, 3–Q electric, 3–Q natural gas, 6, 6–Q, 60, and 714 (collectively, Commission Forms). The Commission instructed staff to convene a technical conference or conferences to enable interested industry members, vendors, and the public to discuss and propose revisions to the draft taxonomy, along with other important components of the XBRL system. The Commission stated that at the conclusion of the technical conference process, the Commission will solicit comments and, after reviewing those comments, will issue an order adopting the final taxonomy, protocols, implementation guide and other documents, and establishing an implementation schedule.

For the purposes of discussion at the conference, Commission staff has developed a draft FERC XBRL taxonomy that can be found at *http://www.ferc.gov/docs-filing/forms/forms-refresh.asp.* Prior to the conference, parties interested in making technical comments on the draft FERC Taxonomy code may do so. We encourage parties submitting technical comments to use the Yeti review tool provided by the Commission. The Yeti review tool provides an efficient method for interested parties to view and comment on the code of the draft XBRL taxonomies. To use this tool, parties should refer to the FERC Taxonomy Guide, which details the architecture of the FERC Taxonomy, and the FERC Yeti Taxonomy Viewer Guide, which explains how to submit comments using the Yeti taxonomy review tool. The FERC Taxonomy Guide, FERC Yeti Taxonomy Viewer Guide, and Yeti review tool are available at the FERC Forms Refresh website: *http://www.ferc.gov/docs-filing/forms/forms-refresh.asp.*

The purpose of the technical conference is to discuss the draft FERC Taxonomy and filing processes for implementing the XBRL data standard. Participants at the technical conference will have the opportunity to discuss any of the related documents, technical issues, and other issues related to the transition to XBRL, including the implementation schedule for the new data collection standard. The draft FERC Taxonomy referenced in this notice will be supplemented by documents containing the draft definitions, draft validations, draft visual renderings of the blank forms, and draft user guides for filing the Commission Forms, as they are completed. The additional documents also will be provided for review at the FERC Forms Refresh website: *http://www.ferc.gov/docs-filing/forms/forms-refresh.asp.*

Any person can review the draft FERC Taxonomy using the Yeti review tool, or by downloading the FERC Taxonomy file at the FERC Forms Refresh website. However, to gain Contributor access to make comments on the draft FERC Taxonomy in the Yeti review tool, interested persons must create a Yeti account by using the sign up link within the Yeti review tool and then email *XBRLFormsRefresh@ferc.gov* to request Contributor access with the following information:

(1) The first and last name of requester;

(2) the email address of the requester;

(3) the company name, if applicable;

(4) a statement noting whether the requester is filing as an individual or on behalf of the company;

(5) the requester's phone number; and

(6) ''Yeti Contributor Access Request'' in the subject line of the email.

In addition to filing technical comments on the taxonomy code using the Yeti review tool, parties may file written comments on issues related to the draft FERC Taxonomy or related draft documents listed above by January 17, 2020. After January 17, 2020, and before the technical conference, Commission staff will compile the comments made through Yeti and submit them into the record of this proceeding on the Commission's eLibrary. Parties also will have the opportunity to submit comments after the conference.

Based on comments received by January 17, 2020, the Commission will release a revised version of the draft FERC Taxonomy on the FERC Forms Refresh website prior to the commencement of the technical conference. The revised draft FERC Taxonomy will be discussed at the technical conference on February 4–6, 2020.

The technical conference will be open for the public to attend. Advanced registration is not required to attend but is encouraged. Attendees may register at the following link: *https://www.ferc.gov/whats-new/registration/02-04-s20-form.asp.* In-person attendees should allow time to pass through building security procedures before the start time of the technical conference.

The conference will be transcribed and webcast. Transcripts will be available immediately for a fee from Ace Reporting (202–347–3700). A link to the webcast of this event will be available in the Commission Calendar of Events at *www.ferc.gov.* The Capitol Connection provides technical support for the webcasts and offers the option of listening to the conferences via phone-bridge for a fee. For additional information, visit *www.CapitolConnection.org* or call (703) 993–3100.

Commission conferences are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations, please send an email to *accessibility@ferc.gov* or call toll free 1–866–208–3372 (voice) or 202–208–8659 (TTY), or send a fax to 202–208–2106 with the required accommodations.

For more information about this technical conference, please contact Robert Hudson at *Robert.Hudson@ferc.gov* or (202) 502–6889, or email *XBRLFormsRefresh@ferc.gov.* For information related to logistics, please contact Sarah McKinley at *Sarah.McKinley@ferc.gov* or (202) 502–8368.

Dated: December 16, 2019.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2019–27495 Filed 12–19–19; 8:45 am]

BILLING CODE 6717–01–P

[1] *Revisions to the Filing Process for Commissions Forms,* Order No. 859, 167 FERC ¶ 61,241 (2019).

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[EL18–201–001]

Notice of Filing

Louisiana Public Service Commission v. *Entergy Services, Inc.,Entergy Arkansas, Inc. Entergy Louisiana, LLC, Entergy Mississippi, LLC, Entergy New Orleans, LLC, Entergy Texas, Inc.*

Take notice that on December 13, 2019, Entergy Arkansas, LLC, Entergy Louisiana, LLC, Entergy Mississippi, LLC, Entergy New Orleans, LLC, and Entergy Texas, Inc., submitted updated accounting entries and rate calculations in compliance with the Commission's Order on Complaint in *Louisiana Public Service Commission* v. *Entergy Services, Inc., et al.*[1]

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 5 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

This filing is accessible online at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the website that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

[1] *Louisiana Public Service Commission* v. *Entergy Services, Inc., et al.,* 168 FERC ¶ 61,210 (2019) (Order on Complaint).

Comment Date: 5:00 p.m. Eastern Time on January 3, 2019.

Dated: December 13, 2019.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2019–27492 Filed 12–19–19; 8:45 am]

BILLING CODE 6717–01–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: ER10–2290–007.
Applicants: Avista Corporation.
Description: Second Amendment to July 1, 2019 Triennial Market Power Update for the Northwest Region of Avista Corporation.
Filed Date: 12/13/19.
Accession Number: 20191213–5059.
Comments Due: 5 p.m. ET 1/3/20.

Docket Numbers: ER19–1920–002.
Applicants: Tampa Electric Company.
Description: Compliance filing: Second Compliance Filing under Order Nos. 845 and 845A to be effective 5/22/2019.
Filed Date: 12/12/19.
Accession Number: 20191212–5163.
Comments Due: 5 p.m. ET 1/2/20.

Docket Numbers: ER19–460–004.
Applicants: Southwest Power Pool, Inc.
Description: Compliance filing: Second Request for Deferral of Effective Date—Order No. 841 Compliance Filing to be effective N/A.
Filed Date: 12/12/19.
Accession Number: 20191212–5165.
Comments Due: 5 p.m. ET 1/2/20.

Docket Numbers: ER20–313–001.
Applicants: Sun Streams 2, LLC.
Description: Tariff Amendment: Amended Certificate of Concurrence for Shared Facilities Agreement to be effective 11/6/2019.
Filed Date: 12/13/19.
Accession Number: 20191213–5142.
Comments Due: 5 p.m. ET 1/3/20.

Docket Numbers: ER20–314–001.
Applicants: Sun Streams 4, LLC.
Description: Tariff Amendment: Amended Certificate of Concurrence for Shared Facilities Agreement to be effective 11/6/2019.
Filed Date: 12/13/19.
Accession Number: 20191213–5145.
Comments Due: 5 p.m. ET 1/3/20.

Docket Numbers: ER20–316–001.
Applicants: Sun Streams PVS, LLC.
Description: Tariff Amendment: Amended Certificate of Concurrence for Shared Facilities Agreement to be effective 11/6/2019.
Filed Date: 12/13/19.
Accession Number: 20191213–5149.
Comments Due: 5 p.m. ET 1/3/20.

Docket Numbers: ER20–317–001.
Applicants: Sun Streams Expansion, LLC.
Description: Tariff Amendment: Amended Certificate of Concurrence for Shared Facilities Agreement to be effective 11/6/2019.
Filed Date: 12/13/19.
Accession Number: 20191213–5146.
Comments Due: 5 p.m. ET 1/3/20.

Docket Numbers: ER20–587–000.
Applicants: PPL Electric Utilities Corporation, PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: PPL Electric Utilities Corporation submits revised IA SA No. 941 to be effective 11/5/2019.
Filed Date: 12/12/19.
Accession Number: 20191212–5164.
Comments Due: 5 p.m. ET 1/2/20.

Docket Numbers: ER20–588–000.
Applicants: Midcontinent Independent System Operator, Inc.
Description: § 205(d) Rate Filing: 2019–12–12_Storage As Transmission Only Asset (SATOA) to be effective 3/11/2020.
Filed Date: 12/12/19.
Accession Number: 20191212–5170.
Comments Due: 5 p.m. ET 1/2/20.

Docket Numbers: ER20–589–000.
Applicants: Florida Power & Light Company.
Description: § 205(d) Rate Filing: FPL-City of NSB Revisions to Original Service Agreement No. 311 to be effective 1/1/2020.
Filed Date: 12/12/19.
Accession Number: 20191212–5191.
Comments Due: 5 p.m. ET 1/2/20.

Docket Numbers: ER20–590–000.
Applicants: Niagara Mohawk Power Corporation, New York Independent System Operator, Inc.
Description: § 205(d) Rate Filing: Cost Reimbursement Agreement (SA 2499) Niagara Mohawk and Northbrook Lyons Falls to be effective 11/15/2019.
Filed Date: 12/13/19.
Accession Number: 20191213–5005.
Comments Due: 5 p.m. ET 1/3/20.

Docket Numbers: ER20–591–000.
Applicants: Tampa Electric Company.
Description: § 205(d) Rate Filing: Second Revised Rate Schedule FERC No. 7—Interconnection Agreement w FPL to be effective 1/1/2020.
Filed Date: 12/13/19.
Accession Number: 20191213–5050.
Comments Due: 5 p.m. ET 1/3/20.

Docket Numbers: ER20–592–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Amendment to WMPA, SA No. 5147; Queue No. AD1–144 (amend) to be effective 6/15/2018.

Filed Date: 12/13/19.

Accession Number: 20191213–5056.

Comments Due: 5 p.m. ET 1/3/20.

Docket Numbers: ER20–593–000.

Applicants: Isabella Wind, LLC.

Description: § 205(d) Rate Filing: Isabella Wind LLC SFA Filing to be effective 2/10/2020.

Filed Date: 12/13/19.

Accession Number: 20191213–5058.

Comments Due: 5 p.m. ET 1/3/20.

Docket Numbers: ER20–594–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Second Revised ISA No. 2530; Queue No. AE2–273/AE2–274 to be effective 11/13/2019.

Filed Date: 12/13/19.

Accession Number: 20191213–5082.

Comments Due: 5 p.m. ET 1/3/20.

Docket Numbers: ER20–595–000.

Applicants: Midcontinent Independent System Operator, Inc.

Description: § 205(d) Rate Filing: 2019–12–13_Solar Dispatchable Intermittent Resources Filing to be effective 3/15/2020.

Filed Date: 12/13/19.

Accession Number: 20191213–5130.

Comments Due: 5 p.m. ET 1/3/20.

Docket Numbers: ER20–596–000.

Applicants: California Independent System Operator Corporation

Description: § 205(d) Rate Filing: 2019–12–13 EIM Implementation Agreement with Tucson Electric Power Company to be effective 4/1/2020.

Filed Date: 12/13/19.

Accession Number: 20191213–5148.

Comments Due: 5 p.m. ET 1/3/20.

Docket Numbers: ER20–597–000.

Applicants: ITC Midwest LLC.

Description: § 205(d) Rate Filing: Filing of Pole Attachment Agreement with ADM to be effective 2/12/2020.

Filed Date: 12/13/19.

Accession Number: 20191213–5168.

Comments Due: 5 p.m. ET 1/3/20.

Docket Numbers: ER20–598–000.

Applicants: Midcontinent Independent System Operator, Inc., Duke Energy Indiana, LLC

Description: § 205(d) Rate Filing: 2019–12–13_Duke Indiana Depreciation Rate Filing to be effective 2/12/2020.

Filed Date: 12/13/19.

Accession Number: 20191213–5171.

Comments Due: 5 p.m. ET 1/3/20.

Take notice that the Commission received the following qualifying facility filings:

Docket Numbers: QF18–452–000.

Applicants: North American Natural Resources, Inc.

Description: Response of North American Natural Resources to November 12, 2019 letter requesting additional information.

Filed Date: 12/12/19.

Accession Number: 20191212–5208.

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 13, 2019.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2019–27493 Filed 12–19–19; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–10003–59–Region 9]

Public Water System Supervision Program Revision for the State of Arizona

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of tentative approval.

SUMMARY: Notice is hereby given that the State of Arizona revised its approved Public Water System Supervision (PWSS) Program under the federal Safe Drinking Water Act (SDWA) by adopting the Public Notice (PN) Rule, Consumer Confidence Report (CCR) Rule, Public Water System (PWS) Definition and Administrative Penalty Authority. The Environmental Protection Agency (EPA) has determined that these revisions by the State of Arizona are no less stringent than the corresponding Federal regulations and otherwise meet applicable SDWA primacy requirements. Therefore, the EPA intends to approve these revisions as part of the State of Arizona's PWSS Program.

DATES: Request for a public hearing must be received on or before January 21, 2020.

ADDRESSES: All documents relating to this determination are available for inspection between the hours of 9:00 a.m. and 4:30 p.m., Monday through Thursday, except official State holidays and official Federal holidays, at the following offices: Arizona Department of Environmental Quality, Records Center, 1110 West Washington Street, Phoenix, AZ 85007; United States Environmental Protection Agency, Region 9, Drinking Water Management Section, 75 Hawthorne Street (WTR–4–1), San Francisco, California 94105.

Documents relating to this determination are also available online at *http://azdeq.gov/notices* for inspection.

FOR FURTHER INFORMATION CONTACT: Daria Evans-Walker, EPA Region 9, Drinking Water Management Section, at the Region 9 address provided above; via telephone at (415) 972–3451; or via email address at *evans-walker.daria@epa.gov.*

SUPPLEMENTARY INFORMATION: *Background.* The EPA approved the State of Arizona's original application for PWSS Program primary enforcement authority on August 25, 1978 (43 FR 38083). Primacy States such as Arizona must adopt and submit for approval to EPA all new and revised national primary drinking water regulations. Since that initial approval, EPA has approved various revisions to Arizona's PWSS Program. For the revisions covered by this action, the EPA promulgated the Public Notice (PN) Rule on May 4, 2000 (65 FR 25982), the Consumer Confidence Report (CCR) Rule on August 19, 1998 (63 FR 44512), and the Public Water System (PWS) Definition and Administrative Penalty Authority on April 28, 1998 (63 FR 23362); and EPA issued guidance on the PWS definition on August 5, 1998 (63 FR 41940). Arizona has incorporated by reference directly into the Arizona Administrative Code (AAC) in Title 18 Chapter 4 R18–4–103, R18–4–117 and R18–4–119 the definition of PWS found at 40 CFR 141.2, the requirements of the federal CCR Rule, 40 CFR part 141 subpart O, and the PN Rule, 40 CFR part 141 Subpart Q through a rulemaking made effective on April 2, 2016. Arizona has also revised its statutes related to Administrative Penalty Authority, Arizona Revised Statute (ARS) § 49–354, and PWS definition, ARS § 49–352, with

language sufficient to meet the federal requirements. These are the primacy revisions that the EPA Region 9 intends to approve as part of Arizona's PWSS Program.

In 2012, Arizona enacted an environmental audit law which had to be evaluated as part of EPA's approval of these revisions. In order to properly evaluate a request for approval, EPA requires a State Attorney General to certify that the State's environmental audit law does not affect its ability to implement the SDWA program. EPA applies the criteria outlined in its ''Statement of Principles Effect of State Audit Immunity/Privilege Laws on Enforcement Authority for Federal Programs'' memo issued on February 14, 1997 in determining whether states with audit laws have retained adequate enforcement authority. This Statement of Principles memo provides that, if provisions of state law are ambiguous, it is important for EPA to obtain an opinion from the State Attorney General interpreting the law as meeting specific federal requirements and, if the law cannot be so interpreted, changes to state law may be necessary to obtain federal program approval. In this case, the Arizona Attorney General's office submitted a legal opinion to EPA analyzing the audit law and concluding that it does not impede Arizona's ability to implement and enforce its PWSS Program. EPA finds this legal opinion sufficient to approve the PWSS Program revisions.

Public Process. Any interested party may request a public hearing on this determination. A request for a public hearing must be submitted by January 21, 2020, to the Regional Administrator of EPA Region 9, to the address shown above. The Regional Administrator may deny frivolous or insubstantial requests for a hearing. If a substantial request for a public hearing is made by January 21, 2020, EPA Region 9 will hold a public hearing. Any request for a public hearing shall include the following information: 1. The name, address, and telephone number of the individual, organization, or other entity requesting a hearing; 2. A brief statement of the requesting person's or organization's interest in the Regional Administrator's determination and a brief statement of the information that the requesting person intends to submit at such hearing; and 3. The signature of the individual making the request, or, if the request is made on behalf of an organization or other entity, the signature of a responsible official of the organization or other entity.

If EPA Region 9 does not receive a timely and substantive request for a hearing and the Regional Administrator does not elect to hold a hearing on his own motion on the determination at issue in this notice, the EPA's approval shall become final and effective on January 21, 2020, and no further public notice will be issued.

Authority: Section 1413 of the Safe Drinking Water Act, 42 U.S.C. 300g-2 (1996), and 40 CFR part 142 of the National Primary Drinking Water Regulations.

Dated: December 9, 2019.

Deborah Jordan,

Acting Regional Administrator, EPA Region 9.

[FR Doc. 2019–27540 Filed 12–19–19; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2003–0004; FRL–10002–63]

Access to Confidential Business Information by Science Applications International Corporation

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has authorized its contractor Science Applications International Corporation (SAIC) of Reston, VA, to access information which has been submitted to EPA under all sections of the Toxic Substances Control Act (TSCA). Some of the information may be claimed or determined to be Confidential Business Information (CBI).

DATES: Access to the confidential data will occur no sooner than December 27, 2019.

FOR FURTHER INFORMATION CONTACT:

For technical information contact: Recie Reese, Environmental Assistance Division (7408M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 564–8276; email address: *reese.recie@epa.gov.*

For general information contact: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; email address: *TSCA-Hotline@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general. This action may, however, be of interest to all who manufacture, process, or distribute industrial chemicals. Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action.

B. How can I get copies of this document and other related information?

The docket for this action, identified by docket identification (ID) number EPA–HQ–OPPT–2003–0004, is available at *http://www.regulations.gov* or at the Office of Pollution Prevention and Toxics Docket (OPPT Docket), Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

II. What action is the Agency taking?

Under contract number GS35F486BA, task order number 47QFPA20F0002, contractor SAIC of 12010 Sunset Hills Rd., Reston, VA, will assist the Office of Pollution Prevention and Toxics (OPPT) by developing new system functionalities to support the new chemical review post-regulatory business operations; implement new features/enhancements to New Chemical Review (NCR) and ChemView required by users and/or mandated by the Office of Chemical Safety and Pollution Prevention (OCSPP); and developing record management capability for new chemical review reports/documentation in content management platform to be determined by the Office of Mission Support (OMS).

In accordance with 40 CFR 2.306(j), EPA has determined that under EPA contract number GS35F486BA, task order number 47QFPA20F0002, SAIC will require access to CBI submitted under all sections of TSCA. EPA has determined that SAIC will need access to TSCA CBI submitted to EPA under all sections of TSCA to perform successfully the duties specified under the contract. SAIC's personnel will be given access to information claimed or determined to be CBI information submitted to EPA under all sections of TSCA.

EPA is issuing this notice to inform all submitters of information under all sections of TSCA that EPA will provide SAIC access to these CBI materials on a need-to-know basis only. All access to

TSCA CBI under this contract will take place at EPA Headquarters, in accordance with EPA's *TSCA CBI Protection Manual.*

Access to TSCA data, including CBI, will continue until October 31, 2024. If the contract is extended, this access will also continue for the duration of the extended contract without further notice.

SAIC's personnel will be required to sign nondisclosure agreements and will be briefed on specific security procedures for TSCA CBI.

Authority: 15 U.S.C. 2601 *et seq.*

Dated: December 2, 2019.

Pamela Myrick,

Director, Information Management Division, Office of Pollution Prevention and Toxics.

[FR Doc. 2019–27479 Filed 12–19–19; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA R9–2020–02; FRL–10003–31–Region 9]

Notice of Proposed Administrative Settlement Agreement for Recovery of Past Response Costs at the North Hollywood Operable Unit of the San Fernando Valley Area 1 Superfund Site in Los Angeles County, California

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed settlement; request for public comment.

SUMMARY: In accordance with the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (''CERCLA''), notice is hereby given that the Environmental Protection Agency (''EPA''), has entered into a proposed settlement, embodied in an Administrative Settlement Agreement for Recovery of Past Response Costs (''Settlement Agreement''), with Honeywell International Inc. Under the Settlement Agreement, Honeywell agrees to pay $11,600,000 to reimburse EPA for costs EPA has incurred at the North Hollywood Operable Unit of the San Fernando Valley Area 1 Superfund Site (''NHOU'') and in conjunction with the San Fernando Valley Basin-Wide Remedial Investigation.

DATES: Comments must be received on or before January 21, 2020.

ADDRESSES: The Settlement Agreement is available for public inspection at the United States Environmental Protection Agency, Superfund Records Center, 75 Hawthorne Street, Room 3110, San Francisco, California 94105. Telephone: 415–947–8717. Comments should be addressed to Michael Massey, Assistant Regional Counsel, Office of Regional Counsel (ORC–3), U.S. Environmental Protection Agency, 75 Hawthorne Street, San Francisco, CA 94105; or Email: *massey.michael@epa.gov* and should reference the NHOU and the EPA Docket Number for the Settlement Agreement, EPA R9–2020–02. EPA's response to any comments received will be available for public inspection at the same address.

FOR FURTHER INFORMATION CONTACT: Michael Massey, Assistant Regional Counsel (ORC–3), Office of Regional Counsel, U.S. EPA Region IX, 75 Hawthorne Street, San Francisco, CA 94105; Email: *massey.michael@epa.gov;* Phone (415) 972–3034.

SUPPLEMENTARY INFORMATION: Notice of this proposed Settlement Agreement is made in accordance with the Section 122(i) of CERCLA, 42 U.S.C. 9622(i). The Settlement Agreement concerns costs incurred by EPA in connection with the NHOU and the San Fernando Valley Basin-Wide Remedial Investigation, two CERCLA response actions in Los Angeles County, California, where groundwater contamination has come to be located. Honeywell, which agrees to pay EPA $11,600,000, is the only party to the Settlement Agreement. EPA intends to recover its remaining costs from other responsible parties in the future; however, because EPA is not recovering one hundred percent of its past costs at this time, this Settlement Agreement represents a compromise of EPA's costs. The settlement includes a covenant not to sue pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. 9606 and 9607(a).

EPA will consider all comments received on the Settlement Agreement in accordance with the **DATES** and **ADDRESSES** sections of this Notice and may modify or withdraw its consent to the Settlement Agreement if comments received disclose facts or considerations that indicate that the settlement is inappropriate, improper, or inadequate.

Dated: December 4, 2019.

Enrique Manzanilla,

Director, Superfund Division, EPA Region 9.

[FR Doc. 2019–27538 Filed 12–19–19; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–R08–OW–2019–0404; FRL–10003–46–Region 8]

Approval of Variance Decision Pursuant to the Safe Drinking Water Act; Alternative Treatment Technique for National Primary Drinking Water Lead and Copper Regulations for Denver Water

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice and opportunity for public comment.

SUMMARY: The Environmental Protection Agency (EPA) is approving a variance under the Safe Drinking Water Act (SDWA) for Denver Water. This variance will allow Denver Water to implement a Lead Reduction Program Plan (LRPP) as an alternative to using orthophosphate as a corrosion control treatment to reduce lead concentrations in drinking water. Denver Water's LRPP is expected to be as protective in lowering lead levels as the requirements under the Lead and Copper Rule (LCR). This variance is effective for an initial period of three years and may be extended if Denver Water demonstrates the effectiveness of this alternative approach. Concurrent with this action, the EPA is asking for comments on the potential criteria for how the Agency will determine whether to extend this variance for up to an additional twelve years. The EPA is accepting public comments on these criteria and on the EPA's interpretation of the statutory standard for future variance requests, as described under **SUPPLEMENTARY INFORMATION**.

DATES: All public comments on the criteria must be received on or before January 21, 2020.

ADDRESSES: All comments can be submitted directly through docket number EPA–R08–OW–2019–0404 available at *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: The variance documents are available through docket number EPA–R08–OW–2019–0404 available at *www.regulations.gov.* Questions can be directed to Natalie Cannon, Drinking Water B Section, EPA Region 8, 1595 Wynkoop Street, Denver, CO 80202–1129, phone 303–312–6625.

SUPPLEMENTARY INFORMATION: The Lead and Copper Rule (LCR) required that all large public water systems (PWSs) complete corrosion control treatment steps and install optimal corrosion control treatment for lead and copper by January 1, 1997, complete follow up

sampling, and operate in compliance with optimal water quality parameters (OWQPs) specified by the applicable regulatory authority by July 1, 1998. Denver Water conducted a corrosion control treatment study in the mid-1990's. Based on that study, CDPHE designated pH and alkalinity treatment as optimal corrosion control treatment for Denver Water and set a minimum pH of 7.5 and alkalinity of 15 mg/L, respectively, as OWQPs on October 18, 1995. Denver Water installed pH and alkalinity adjustment treatment prior to January 1, 1997. Denver Water has consistently monitored, met these OWQPs and has not had any excursions or violations related to OWQPs.

In 2012, Denver Water exceeded the lead action level of 15 μg/L, but Denver Water was not required to conduct any lead service line replacements under the LCR because Denver Water does not own any lead service lines. CDPHE, however, required Denver Water to conduct a new corrosion control treatment study, which was completed in September 2017. On March 20, 2018, CDPHE modified its designation of the optimal corrosion control treatment (OCCT) for Denver Water, requiring Denver Water to install and operate orthophosphate as OCCT by March 20, 2020.

Section 1415(a)(3) of the SDWA and 40 CFR 142.46 authorize the Administrator to grant a variance from a treatment technique ''upon a showing by any person that an alternative treatment technique not included in such requirement is at least as efficient in lowering the level of the contaminant with respect to which such requirement was prescribed. A variance under this paragraph shall be conditioned on the use of the alternative treatment technique which is the basis for the variance.''

On September 6, 2019, Denver Water requested a variance under Section 1415(a)(3) of the SDWA from the optimal corrosion control treatment requirements of the LCR. In its request, Denver Water proposed that instead of following the requirement to install the State's designation of orthophosphate as optimal corrosion control treatment as required by 40 CFR 141.82(e), it would implement its LRPP. The LRPP includes a suite of actions that will work together to reduce lead in Denver's drinking water including: (1) Developing a LSL inventory to identify and track lead service line replacements (LSLRs); (2) initiating a lead removal filter program for homes with LSLs and certain homes with copper pipe with lead solder; (3) conducting an accelerated LSLR program to replace all LSLs in 15 years; (4) operating increased pH/alkalinity adjustment as corrosion control treatment for all customers; and (5) implementing a communications, outreach, and education plan. Denver Water provided an analysis demonstrating that the LRPP is expected to provide public health protection and at least equivalent lead reductions as compared to compliance with the LCR provisions regarding corrosion control.

Under the LRPP, Denver Water will conduct full LSLRs of privately-owned LSLs at an accelerated rate compared to current conditions. Denver Water estimates it has approximately 64,000 LSLs. Under the LRPP, Denver Water commits to taking proactive steps to replace all LSLs in 15 years. Because some homes with LSLs will have to wait multiple years for their LSL to be replaced, Denver Water will also initiate a program that will provide a filter and replacement cartridges to every household with a LSL and select households with copper pipe with lead solder. In conjunction with these efforts, Denver Water will operate increased pH/alkalinity adjustment as corrosion control treatment to reduce lead corrosion from all sources. Denver Water will also conduct a full investigation of its LSL inventory and publish a map showing the locations of all LSLs. Finally, Denver Water will conduct extensive outreach to educate customers about the health risks of lead and ways that they can reduce their exposure to lead in drinking water.

Denver Water provided an analysis demonstrating that these steps are expected to provide at least equivalent lead reductions as orthophosphate treatment and will therefore be protective of public health. The EPA finds that Denver Water has made a showing that its alternative treatment technique appears to meet the requirements of SDWA Section 1415(a)(3). In the variance order, the EPA explains how it evaluated and compared the LRRP to the requirement to install the State's designation of optimal corrosion control treatment as defined in 40 CFR 141.2 in concluding that LRRP is ''at least as efficient'' in lowering the levels of lead in tap water as orthophosphate.

The EPA is therefore approving Denver Water's request for a SDWA Section 1415(a)(3) variance for an initial period of three years to enable Denver Water to further support its demonstration with additional data and for the EPA to verify the effectiveness of the LRPP. This variance is supported by the State of Colorado and will enable the State to modify its determination of optimal corrosion control treatment to incorporate the terms and conditions of this variance.

In evaluating the variance request, the EPA also considered other factors beyond the statutory standard of ''as efficient.'' Denver Water's 90th percentile lead levels have consistently been below the lead action level since 1997 (except in 2012). Denver Water has the technical, managerial, and financial capacity to implement the lead reduction program both for Denver water consumers and for the consecutive systems they serve. Importantly for long-term public health protection, Denver Water has committed to and has the capacity to fully replace all lead service lines in 15 years. The EPA also recognizes that Denver Water wants to more fully engage in a holistic water management strategy based on concerns about the potential impacts from increased levels of phosphate in wastewater discharges to the South Platte River. This river is dominated by the effluent of a waste water treatment plant so there are limited options to effectively control nutrient levels.

In the terms and conditions that make up the variance order, the EPA includes criteria for how the Agency will assess the effectiveness of Denver Water's program during the first three years and determine whether to extend this variance for an additional twelve years, which would provide the time necessary for Denver Water to complete its lead service line replacements. These criteria are intended to confirm the alternative treatment technique can be effectively implemented and results in ''at least as efficient'' lead reductions, as compared to installation of orthophosphate.

The EPA is accepting public comments on these criteria. The EPA is also requesting comment on how the Agency should evaluate whether any future treatment technique variance requests are at least as efficient as the treatment technique requirements of the LCR. The EPA is not taking comment on the EPA's approval of Denver Water's variance, which is effective per the variance order, given the EPA's analysis of Denver Water's variance application and the previous public participation opportunities that informed the application.

Specific questions the EPA is seeking comments on include:

(1) Do the criteria in the variance order capture the data and factors the EPA should examine during the initial three-year approval period? Are there other criteria or information relevant to the meaning of ''at least as efficient'' that the EPA should consider when deciding whether to extend Denver Water's SDWA variance?

(2) Should the EPA consider going through a notice and comment process for the extension?

(3) How should the EPA evaluate any future treatment technique variance requests to the LCR? Specifically, because the term is not currently defined in statute or regulation, how should the EPA interpret ''at least as efficient'' to satisfy the statutory requirements for a variance to be granted under the SDWA Section 1415(a)(3)? Beyond the criteria the EPA has evaluated in issuing the variance order, are there other criteria relevant to the meaning of ''at least as efficient'' that the EPA should consider for future requests? How should the Agency evaluate the combined overall efficiency of a proposed alternative treatment technique, including whether or how to:

a. Prepare an LSL inventory to identify and track LSLRs;

b. distribute filters certified for lead removal to homes at risk of elevated lead levels;

c. accelerate LSLRs;

d. achieve near optimal corrosion control treatment; and

e. conduct outreach and education with consumers?

(4) The EPA also requests comment on other actions that water systems could take to ensure equally efficient reductions in drinking water lead exposure.

The variance order and its terms and conditions are available online as part of docket number EPA–R08–OW–2019–0404 at *www.regulations.gov.*

After consideration of public comments received, the EPA may modify the terms and conditions of the variance order to change the criteria by which the EPA will assess the effectiveness of Denver Water's alternative program in order to determine whether the variance should be extended.

Dated: December 16, 2019.

Gregory Sopkin,

Regional Administrator, Region 8.

[FR Doc. 2019–27487 Filed 12–19–19; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–10002–55–OW]

Notice of Availability of the Deepwater Horizon Oil Spill Louisiana Trustee Implementation Group Draft Restoration Plan and Environmental Assessment #6: Wetlands, Coastal, and Nearshore Habitats

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability; request for public comments.

SUMMARY: In accordance with the Oil Pollution Act of 1990 (OPA) and the National Environmental Policy Act (NEPA), the Federal and State natural resource trustee agencies for the Louisiana Trustee Implementation Group (Louisiana TIG) prepared a Draft Restoration Plan and Environmental Assessment #6: Wetlands, Coastal, and Nearshore Habitats (Draft RP/EA). The Draft RP/EA describes and proposes restoration project alternatives considered by the Louisiana TIG to restore and conserve wetlands, coastal, and nearshore habitats injured as a result of the *Deepwater Horizon* oil spill. The Louisiana TIG evaluated these alternatives under criteria set forth in the OPA natural resource damage assessment (NRDA) regulations, and also evaluated the environmental consequences of the restoration alternatives in accordance with the NEPA. The proposed projects are consistent with the restoration alternatives selected in the *Deepwater Horizon* Oil Spill Final Programmatic Damage Assessment and Restoration Plan/Programmatic Environmental Impact Statement (PDARP/PEIS). This notice informs the public of the availability of the Draft RP/EA and provides an opportunity for the public to submit comments on the document.

DATES: The Louisiana TIG will consider public comments received on or before January 21, 2020.

Public Webinar: The Louisiana TIG will conduct a public webinar on January 8, 2020, at 12 p.m. Central Standard Time to facilitate public review and comment on the Draft RP/EA. The public webinar will include a presentation on the Draft RP/EA. Public comments will be taken during the public webinar. The public may register for the webinar at *https://attendee.gotowebinar.com/register/8527752114619805195.* After registering, participants will receive a confirmation email with instructions for joining the webinar. The presentation will be posted on the web shortly after the webinar is conducted.

ADDRESSES:

Obtaining Documents: You may download the Draft RP/EA at any of the following sites:

- *http://www.gulfspillrestoration.noaa.gov;*
- *http://www.la-dwh.com.*

Alternatively, you may request a CD of the Draft RP/EA (see **FOR FURTHER INFORMATION CONTACT**). You may also view the document at any of the public facilities listed at *http://www.gulfspillrestoration.noaa.gov.*

Submitting Comments: You may submit comments on the Draft RP/EA by one of the following methods:

- *Via the Web: http://www.gulfspillrestoration.noaa.gov/restoration-areas/louisiana.*
- *Via U.S. Mail:* U.S. Fish and Wildlife Service, P.O. Box 29649, Atlanta, GA 30345.
- *During the Public Webinar:* Comments may be provided by the public during the webinar on January 8, 2020.

Once submitted, comments cannot be edited or withdrawn. The Louisiana TIG may publish any comment received on the document. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The Louisiana TIG 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). Please be aware that your entire comment, including your personal identifying information, will become part of the public record. Please note that mailed comments must be postmarked on or before the comment deadline of 30 days following publication of this notice to be considered.

FOR FURTHER INFORMATION CONTACT:

- Louisiana—Joann Hicks, 225–342–5477
- EPA—Douglas Jacobson, 214–665–6692

SUPPLEMENTARY INFORMATION:

Introduction

On April 20, 2010, the mobile offshore drilling unit *Deepwater Horizon,* which was being used to drill a well for BP Exploration and Production, Inc. (BP), in the Macondo prospect (Mississippi Canyon 252–MC252), experienced a significant explosion, fire, and subsequent sinking in the Gulf of Mexico, resulting in the release of an unprecedented volume of oil and other discharges from the rig and from the wellhead on the seabed. The *Deepwater Horizon* oil spill is the largest offshore oil spill in U.S. history, discharging millions of barrels of oil over a period of 87 days. The Trustees conducted the natural resource damage assessment for the *Deepwater Horizon* oil spill under the Oil Pollution Act of 1990 (33 U.S.C. 2701 *et seq.*). Under the OPA, Federal and State agencies act as trustees on behalf of the public to assess natural resource injuries and losses and

to determine the actions required to compensate the public for those injuries and losses. The OPA further instructs the designated trustees to develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent of the injured natural resources under their trusteeship, including the loss of use and services from those resources from the time of injury until the time restoration to baseline (the resource quality and conditions that would exist if the spill had not occurred) is complete.

The *Deepwater Horizon* oil spill Trustees are:

- U.S. Environmental Protection Agency (EPA);
- U.S. Department of the Interior (DOI), as represented by the National Park Service, U.S. Fish and Wildlife Service, and Bureau of Land Management;
- National Oceanic and Atmospheric Administration (NOAA), on behalf of the U.S. Department of Commerce;
- U.S. Department of Agriculture (USDA);
- State of Louisiana Coastal Protection and Restoration Authority (CPRA), Oil Spill Coordinator's Office (LOSCO), Department of Environmental Quality (LDEQ), Department of Wildlife and Fisheries (LDWF), and Department of Natural Resources (LDNR);
- State of Mississippi Department of Environmental Quality;
- State of Alabama Department of Conservation and Natural Resources and Geological Survey of Alabama;
- State of Florida Department of Environmental Protection and Fish and Wildlife Conservation Commission; and
- State of Texas Parks and Wildlife Department, General Land Office, and Commission on Environmental Quality.

On April 4, 2016, the Trustees reached and finalized a settlement of their natural resource damage claims with BP in a Consent Decree approved by the United States District Court for the Eastern District of Louisiana. Pursuant to that Consent Decree, restoration projects in the Louisiana Restoration Area are chosen and managed by the Louisiana TIG. The Louisiana TIG is composed of the following Trustees: CPRA, LOSCO, LDEQ, LDWF, LDNR, EPA, DOI, NOAA, USDA.

Background

In a June 2019 notice posted at *http://www.gulfspillrestoration.noaa.gov,* the Louisiana TIG requested public input on restoration project ideas in Louisiana within the Wetlands, Coastal, and Nearshore Habitats restoration type. The Louisiana TIG reviewed and considered these restoration project ideas.

Overview of the Draft RP/EA

The Draft RP/EA is being released in accordance with the OPA, NRDA implementing regulations, and the NEPA. In the Draft RP/EA, the Louisiana TIG presents to the public their plan to restore and conserve wetlands, coastal, and nearshore habitats injured by the *Deepwater Horizon* oil spill. The Draft RP/EA evaluates a total of four restoration project alternatives within the Wetlands, Coastal, and Nearshore Habitats restoration type. Of those, three are identified as preferred alternatives.

The Draft RP/EA proposes the following preferred project alternatives:

- West Grand Terre Beach Nourishment and Stabilization;
- Golden Triangle Marsh Creation; and
- Biloxi Marsh Living Shoreline.

The Draft RP/EA also evaluates a no action alternative. One or more alternatives may be selected for implementation by the Louisiana TIG. The proposed projects are intended to continue the process of using restoration funding to restore and conserve wetlands, coastal, and nearshore habitats injured by the *Deepwater Horizon* oil spill. The total estimated cost of the preferred alternatives is approximately $209 million. Additional restoration planning for the Louisiana Restoration Area will continue.

Next Steps

The public is encouraged to review and comment on the Draft RP/EA. A public webinar is scheduled to help facilitate the public review and comment process. After the public comment period ends, the Louisiana TIG will consider the comments received before issuing a Final RP/EA. A summary of comments received and the Louisiana TIG's responses and any revisions to the document, as appropriate, will be included in the final document.

Administrative Record

The documents comprising the Administrative Record for the Draft RP/EA can be viewed electronically at *https://www.doi.gov/deepwaterhorizon/adminrecord.*

Authority

The authority for this action is the Oil Pollution Act of 1990 (33 U.S.C. 2701 *et seq.*), its implementing NRDA regulations found at 15 CFR part 990, and the NEPA (42 U.S.C. 4321 *et seq.*).

Dated: December 2, 2019.

Benita Best-Wong,

Deputy Assistant Administrator, Office of Water.

[FR Doc. 2019–26588 Filed 12–19–19; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–9048–5]

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information 202–564–5632 or *https://www.epa.gov/nepa/.*

Weekly receipt of Environmental Impact Statements

Filed 12/09/2019 10 a.m. ET Through 12/16/2019 10 a.m. ET

Pursuant to 40 CFR 1506.9.

Notice

Section 309(a) of the Clean Air Act requires that EPA make public its comments on EISs issued by other Federal agencies. EPA's comment letters on EISs are available at: *https://cdxnodengn.epa.gov/cdx-enepa-public/action/eis/search.*

EIS No. 20190294, Draft, BLM, ID, Blackrock Land Exchange, *Comment Period Ends:* 02/03/2020, *Contact:* Bryce Anderson 208–478–6353

EIS No. 20190295, Draft, USFS, ID, Land Management Plan Revision for the Nez Perce-Clearwater National Forests, *Comment Period Ends:* 03/19/2020, *Contact:* Zachary Peterson 208–935–4239

EIS No. 20190297, Final Supplement, USACE, NM, Middle Rio Grande Flood Protection Bernalillo to Belen, New Mexico: Mountain View, Isleta and Belen Units Integrated General Reevaluation Report and Supplemental Environmental Impact Statement, *Review Period Ends:* 01/21/2020, *Contact:* Michael D. Porter 505–342–3264

EIS No. 20190298, Final, FDOT, FL, Gulf Coast Parkway, *Review Period Ends:* 01/21/2020, *Contact:* Alan Vann 850–330–1523

EIS No. 20190299, Final, BR, CA, Reinitiation of Consultation on the Coordinated Long-Term Operation of the Central Valley Project and State Water Project, *Review Period Ends:* 01/21/2020, *Contact:* Cynthia Meyer 916–537–7060

EIS No. 20190300, Final, BIA, NV, Eagle Shadow Mountain Solar Project, *Review Period Ends:* 01/21/2020, *Contact:* Chip Lewis 602–379–6750

EIS No. 20190301, Second Final Supplemental, DOS, MT, Keystone XL Project, *Review Period Ends:* 01/21/2020, *Contact:* M. Ross Alliston 202–647–4828

Amended Notice

EIS No. 20190274, Draft, BIA, OK, Osage County Oil and Gas Draft Environmental Impact Statement, *Comment Period Ends:* 01/22/2020, *Contact:* Mosby Halterman 918–781–4660. Revision to FR Notice Published 11/22/2019; Extending the Comment Period from 1/6/2020 to 1/22/2020.

Dated: December 17, 2019.

Robert Tomiak,

Director, Office of Federal Activities.

[FR Doc. 2019–27519 Filed 12–19–19; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–1266; FRS 16331]

Information Collection Approved by the Office of Management and Budget

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: The Federal Communications Commission (Commission) announces that the Office of Management and Budget (OMB) has approved a new information collection associated with the Commission's 833 Auction Procedures Public Notice (FCC 19–75) (Public Notice), for a period of three years pursuant to the Paperwork Reduction Act of 1995. An agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number, and no person is required to respond to a collection of information unless it displays a currently valid control number. Comments concerning the accuracy of the burden estimates and any suggestions for reducing the burden should be directed to the person listed in the **FOR FURTHER INFORMATION CONTACT** section below.

FOR FURTHER INFORMATION CONTACT: Nicole Ongele, *Nicole.Ongele@fcc.gov,* (202) 418–2991.

SUPPLEMENTARY INFORMATION: The total annual reporting burdens and costs for the respondents are as follows:

OMB Control Number: 3060–1266.

OMB Approval Date: December 12, 2019.

OMB Expiration Date: December 31, 2022.

Title: Toll Free Number Auctions.

Form Number: FCC Form 5633.

Respondents: Individuals or Households, Business or other for-profit, Not-for-profit Institutions, Farms and/or Federal, State, Local and/or Tribal government agencies.

Number of Respondents and Responses: 1,220 respondents; 1,220 responses.

Estimated Time per Response: 0.084 hours (5 minutes)–0.166 hours (10 minutes).

Frequency of Response: On occasion and one-time reporting requirements.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. 251(e)(1).

Total Annual Burden: 105 hours.

Total Annual Cost: No Cost.

Nature and Extent of Confidentiality: The Commission is not requesting that respondents for this information collection (LOA and Secondary Market) submit confidential information to the FCC. For individuals, the Privacy Act, 5 U.S.C. 552a, is the statutory authority for confidentiality and it applies to this information collection. Respondents may, however, request confidential treatment for information they believe to be confidential under 47 CFR 0.459 of the Commission's rules.

Privacy Act Impact Assessment: The Commission will determine if a Privacy Act Impact Assessment is required. The System of Records Notice, FCC/WCB–2, Toll Free Number Auction System is available on the FCC's website.

Needs and Uses: On September 27, 2018, the Commission released a *Report and Order* in WC Docket No. 17–192, FCC 18–137 (*Report and Order*). In the *Report and Order,* the Commission established competitive bidding as a toll free number assignment method, and called for an auction for select numbers in the toll free code 833 as an experiment to test this method. To verify the relationship between the responsible organization (RespOrg) and the potential subscriber, a Letter of Authorization (LOA) is required during the bidding process. Additionally, a key component to the effectiveness of the auction is the adoption of a post-auction secondary market (Secondary Market) for the sale of the rights to use 833 code toll free numbers won at auction. Collecting data on Secondary Market transactions will allow the Commission to evaluate the operation of the secondary market which is an important component of the toll free number auction experiment, and to determine the potential use of competitive bidding in future toll free number assignments.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2019–27502 Filed 12–19–19; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–XXXX; FRS 16327]

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 21, 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–XXXX.

Title: Enhanced Geo-Targeted Wireless Emergency Alerts.

Form No.: Not applicable.

Type of Review: New information collection.

Respondents: Individuals or households; State, Local or Tribal Government.

Number of Respondents and Responses: 12,000 respondents and 14,000 responses.

Estimated Time per Response: 0.25 hours.

Frequency of Response: One-time reporting requirement.

Obligation to Respond: Voluntary. Statutory authority for this information collection is authorized under the Warning, Alert and Response Network Act, Title VI of the Security and Accountability for Every Port Act of 2006 (120 Stat. 1884, section 602(a), codified at 47 U.S.C. 1201, *et seq.,* 1202(a)) (WARN Act) and 47 U.S.C. 151, 154(i), 154(j), 154(o), 218, 219, 230, 256, 301, 302(a), 303(f), 303(g), 303(j), 303(r) and 403.

Total Annual Burden: 3,500 hours.

Total Annual Costs: No Cost.

Privacy Act Impact Assessment: Yes. The FCC is revising the Privacy Impact Assessment (PIA) and modifying the existing System of Records Notice (SORN), FCC/PSHSB–1, FCC Emergency and Continuity Contacts System (ECCS), for the Public Safety Support System to address the personally identifiable information (PII) that will be collected, used, and stored as part of the information collection requirements.

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Needs and Uses: The WARN Act gives the Commission authority to adopt relevant technical standards, protocols, procedures and other technical requirements governing Wireless Emergency Alerts (WEA). The Commission adopted rules to implement the WEA system (previously known as the Commercial Mobile Service Alert System) pursuant to the WARN Act to satisfy the Commission's mandate to promote the safety of life and property through the use of wire and radio communication. The WEA system transmits emergency alerts to WEA-capable mobile devices, providing consumers with timely warnings and information in emergencies. In 2018, the Commission issued a Report & Order requiring that Participating Commercial Mobile Service Providers (providers) implement enhanced geo-targeting functionality by November 30, 2019 to allow WEA alert originators (*e.g.,* local emergency management offices) to target a WEA alert to eligible devices in a prescribed geographic area (*e.g.,* an area where there is imminent threat of the loss of life or property). See Federal Communications Commission, Wireless Emergency Alerts; Emergency Alert System, 83 FR 8619, 8623 (Feb. 28, 2018) (announcing a Nov. 30, 2019 amendment to 47 CFR 10.450).

The Commission now seeks to evaluate WEA performance, particularly with respect to the accuracy of providers' geo-targeting capabilities. To do so, the Commission will use surveys to collect information and evaluate performance during a WEA test. Survey respondents affiliated with two alert originators, partnered with the Commission in different geographic areas of the country, will be asked to complete a preliminary survey. This survey will improve the utility of a ''live test'' survey, which respondents will subsequently receive via a hyperlink embedded in a WEA test alert. The Commission has developed survey templates, which are available at *https://www.fcc.gov/files/weaprelimtestsurveydec2019pdf* and *https://www.fcc.gov/files/wealivetestsurveydec2019pdf,* that are representative of how the surveys will appear on the Commission's Public Safety Support Center, and seeks OMB approval of these templates as a new information collection. The information sought in this collection is necessary and vital to ensuring that WEA is effective at protecting the life and property of the public.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2019–27501 Filed 12–19–19; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, 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 the BHC Act (12 U.S.C. 1842(c)).

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 Street and Constitution Avenue NW, Washington, DC 20551–0001, not later than January 20, 2020.

A. Federal Reserve Bank of San Francisco (Gerald C. Tsai, Director, Applications and Enforcement) 101 Market Street, San Francisco, California 94105–1579:

1. *Southern California Bancorp, San Diego, California;* to become a bank holding company by acquiring Bank of Southern California, National Association, San Diego, California.

2. *Southern California Bancorp, San Diego, California;* to acquire CalWest Bancorp and thereby indirectly acquire CalWest Bank, both of Rancho Santa Margarita, California.

Board of Governors of the Federal Reserve System, December 16, 2019.

Yao-Chin Chao,

Assistant Secretary of the Board.

[FR Doc. 2019–27469 Filed 12–19–19; 8:45 am]

BILLING CODE P

FEDERAL TRADE COMMISSION

Agency Information Collection Activities; Submission for OMB Review; Comment Request

AGENCY: Federal Trade Commission (FTC).

ACTION: Notice and request for comment.

SUMMARY: The FTC requests that the Office of Management and Budget (OMB) extend for three years the FTC's portion of the information collection requirements contained in the Consumer Financial Protection Bureau's Regulation N (the Mortgage Acts and Practices—Advertising Rule). The FTC shares enforcement of Regulation N with the Consumer Financial Protection Bureau (CFPB). That clearance expires on January 31, 2020.

DATES: Comments must be received by January 21, 2020.

ADDRESSES: Comments in response to this notice should be submitted to the OMB Desk Officer for the Federal Trade Commission within 30 days of this notice. You may submit comments using any of the following methods:

Electronic: Write ''Regulation N: PRA Comment, P072108,'' on your comment and file your comment online at *https://www.regulations.gov,* by following the instructions on the web-based form.

Email: MBX.OMB.OIRA.Submission@OMB.eop.gov.

Fax: (202) 395–5806.

Mail: Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for the Federal Trade Commission, New Executive Office Building, Docket Library, Room 10102, 725 17th Street NW, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Carole L. Reynolds, Attorney, Division of Financial Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580, (202) 326–3230.

SUPPLEMENTARY INFORMATION:

Title: Mortgage Acts and Practices—Advertising (Regulation N), 12 CFR 1014.

OMB Control Number: 3084–0156.

Type of Review: Extension of a currently approved collection.

Abstract: The FTC and the CFPB generally share enforcement authority for Regulation N and thus the two agencies share burden estimates for Regulation N.[1] Regulation N's recordkeeping requirements constitute a ''collection of information'' [2] for purposes of the PRA.[3] The Rule does not impose a disclosure requirement.

Regulation N requires covered persons to retain: (1) Copies of materially different commercial communications and related materials, regarding any term of any mortgage credit product, that the person made or disseminated during the relevant time period; (2) documents describing or evidencing all mortgage credit products available to consumers during the relevant time period; and (3) documents describing or evidencing all additional products or services (such as credit insurance or credit disability insurance) that are or may be offered or provided with the mortgage credit products available to consumers during the relevant time period.[4] A failure to keep such records would be an independent violation of the Rule. Regulation N's recordkeeping requirements constitute a ''collection of information'' for purposes of the PRA.[5] The Rule does not impose a disclosure requirement.

Commission staff believes the recordkeeping requirements pertain to records that are usual and customary and kept in the ordinary course of business for many covered persons, such as mortgage brokers, lenders, and servicers; real estate brokers and agents; home builders, and advertising agencies.[6] As to these persons, the retention of these documents does not constitute a ''collection of information,'' as defined by OMB's regulations that implement the PRA.[7] Certain other covered persons such as lead generators and rate aggregators may not currently maintain these records in the ordinary course of business.[8] Thus, the recordkeeping requirements for those persons would constitute a ''collection of information.''

The information retained under the Rule's recordkeeping requirements is used by the Commission to substantiate compliance with the Rule and may also provide a basis for the Commission to bring an enforcement action. Without the required records, it would be difficult either to ensure that entities are complying with the Rule's requirements or to bring enforcement actions based on violations of the Rule.

[1] As background, the FTC's Mortgage Acts and Practices—Advertising Rule, 16 CFR 321, was issued by the FTC in July 2011, 76 FR 43826 (July 22, 2011), and became effective on August 19, 2011. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act) transferred to the CFPB the Commission's rulemaking authority under section 626 of the 2009 Omnibus Appropriations Act on July 21, 2011. As a result, the CFPB republished the Mortgage Acts and Practices—Advertising Rule, at 12 CFR 1014, which became effective December 30, 2011. 76 FR 78130. Thereafter, the Commission rescinded its Rule, which was effective on April 13, 2012. 77 FR 22200. Under the Dodd-Frank Act, the FTC retains its authority to bring law enforcement actions to enforce Regulation N.

[2] Section 1014.5 of the Rule sets forth the recordkeeping requirements.

[3] *See* 44 U.S.C. 3502(3)(A).

[4] Section 1014.5 of the Rule sets forth the recordkeeping requirements.

[5] *See* 44 U.S.C. 3502(3)(A).

[6] Some covered persons, particularly mortgage brokers and lenders, are subject to state recordkeeping requirements for mortgage advertisements. *See, e.g.,* Fla. Stat. 494.00165 (2019); Ind. Code Ann. 23–2–5–18 (2018); Kan. Stat. Ann. 9–2208 (2018); Minn. Stat. 58.14 (2018); Wash. Rev. Code 19.146.060 (2018). Many mortgage brokers, lenders (including finance companies), and servicers are subject to state recordkeeping requirements for mortgage transactions and related documents, and these may include descriptions of mortgage credit products. *See, e.g.,* Mich. Comp. Laws Serv. 445.1671 (2019); N.Y. Banking Law 597 (Consol. 2018); Tenn. Code Ann. 45–13–206 (2019). Lenders and mortgagees approved by the Federal Housing Administration must retain copies of all print and electronic advertisements and promotional materials for a period of two years from the date the materials are circulated or used to advertise. *See* 24 CFR 202. Various other entities, such as real estate brokers and agents, home builders, and advertising agencies can be indirectly covered by state recordkeeping requirements for mortgage advertisements and/or retain ads to demonstrate compliance with state law. *See, e.g.,* 76 Del. Laws, c. 421, § 1.

[7] *See* 44 U.S.C. 3502(3)(A); 5 CFR 1320.3(b)(2).

[8] *See, e.g., United States* v. *Intermundo Media, LLC, dba Delta Prime Refinance,* No. 1:14–cv–2529 (D. Colo. filed Sept. 12, 2014) (D. Colo. Oct. 7, 2014) (stipulated order for permanent injunction and civil penalty judgment), *available at https://www.ftc.gov/system/files/documents/cases/140912deltaprimestiporder.pdf.* The complaint charged this lead generator with numerous violations of Regulation N, including recordkeeping, and of other federal mortgage advertising mandates.

On September 27, 2019, the FTC sought comment on the information collection requirements associated with the Rule. 84 FR 51160. The FTC received no comments that were germane to the issues that the agency sought comment on pursuant to the Paperwork Reduction Act (PRA) renewal request. Pursuant to OMB regulations, 5 CFR part 1320, that implement the PRA, 44 U.S.C. 3501 *et seq.,* the FTC is providing this second opportunity for public comment while seeking OMB approval to renew the pre-existing clearance for the Rule. For more details about the Rule requirements and the basis for the calculations summarized below, see 84 FR 51160. As required by OMB regulations, 5 CFR part 1320, the FTC is providing this second opportunity for public comment.

Likely Respondents: Lead generators and rate aggregators.

Estimated Annual Hours Burden: 1,500 hours.

- Derived from 1,000 likely respondents × approximately 3 hours for each respondent per year to do these tasks = 3,000 hours.
- Since the FTC shares enforcement authority with the CFPB for Regulation N, the FTC's allotted PRA burden is 1,500 annual hours.

Estimated Annual Labor Cost Burden: $24,375, which is derived from 1,500 hours × $16.25 per hour.[9]

Request for Comment

Your comment—including your name and your state—will be placed on the public record of this proceeding at the *https://www.regulations.gov* website. Because your comment will be made public, you are solely responsible for making sure that your comment does not include any sensitive personal information, such as anyone's Social Security number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any ''trade secret or any commercial or financial information which . . . is privileged or confidential''—as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Heather Hippsley,

Deputy General Counsel.

[FR Doc. 2019–27486 Filed 12–19–19; 8:45 am]

BILLING CODE 6750–01–P

[9] This estimate is based on mean hourly wages for office support file clerks provided by the Bureau of Labor Statistics. See U.S. Bureau of Labor Statistics, Occupational Employment and Wages—May 2018, table 1 (''National employment and wage data from the Occupational Employment Statistics survey by occupation''), released March 29, 2019, available at *http://www.bls.gov/news.release/pdf/ocwage.pdf.*

OFFICE OF GOVERNMENT ETHICS

Privacy Act of 1974; System Records

AGENCY: Office of Government Ethics.

ACTION: Notice of a new system of records.

SUMMARY: The Office of Government Ethics (OGE) proposes to create a new system of records pursuant to the provisions of the Privacy Act of 1974. This system of records contains personally identifiable information (PII) collected from Federal employees and/or members of the public who register to attend or otherwise participate in OGE-hosted meetings and events. The system will maintain the information necessary for OGE to collect information on participants that can be used to administratively organize a meeting or event.

DATES: This system of records will be applicable on December 20, 2019, subject to a 30-day period in which to comment on the routine uses, described below. Please submit any comments by January 21, 2020.

ADDRESSES: Comments may be submitted to OGE, by any of the following methods:

Email: usoge@oge.gov (Include reference to ''OGE/INTERNAL–6 comment'' in the subject line of the message.).

Fax: 202–482–9237, Attn: Sara Nekou.

Mail, Hand Delivery/Courier: Office of Government Ethics, 1201 New York Avenue NW, Suite 500, Attention: Sara Nekou, Assistant Counsel, Washington, DC 20005–3917.

Instructions: Comments may be posted on OGE's website, *https://www.oge.gov.* Sensitive personal information, such as account numbers or Social Security numbers, should not be included. Comments generally will not be edited to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT: Sara Nekou at the U.S. Office of Government Ethics; telephone: 202–482–9229; TTY: 800–877–8339; FAX: 202–482–9237; Email: *snekou@oge.gov.*

SUPPLEMENTARY INFORMATION: The Office of Government Ethics is establishing a new system of records that includes personal information obtained from individuals registering for OGE-hosted meetings or events. This personal information is used to manage the meetings and events, prepare event materials, and communicate with the event participants.

SYSTEM NAME AND NUMBER:

OGE/INTERNAL–6, Online Registration for OGE-Hosted Meetings and Events.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Office of Government Ethics, 1201 New York Avenue NW, Suite 500, Washington, DC 20005–3917. Records may be kept in commercial third-party applications, including *Pay.gov,* located at the Department of the Treasury, Bureau of the Fiscal Service, 401 14th Street SW, Washington DC 20227.

SYSTEM MANAGER(S):

Nicole Stein, Chief, Agency Assistance Branch, Office of Government Ethics, Suite 500, 1201 New York Avenue NW, Washington, DC 20005–3917.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. app. § 402 (Ethics in Government Act of 1978); 44 U.S.C. 3101.

PURPOSE(S) OF THE SYSTEM:

The purpose is to collect information on participants who register for an OGE-hosted meeting or event, which can be used to administratively organize a meeting or event. For example, OGE may need to track the collection of registration fees, create printed materials such as nametags, tent cards, and event programs and directories, or contact presenters to provide information.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Federal employees in the executive branch, and/or members of the public who register to attend or otherwise participate in OGE-hosted meetings and events.

CATEGORIES OF RECORDS IN THE SYSTEM:

This system of records contains personally identifiable information (PII) collected from individuals registering to attend or otherwise participate in OGE-hosted meetings and events. The PII

collected includes name, agency/organization, address, telephone number, email address, state, city or town, country, number of years worked in the field of ethics, and special accommodations requests.

RECORD SOURCE CATEGORIES:

Information in this system of records is provided by the individual on whom the record is maintained, or by the individual's organization if the organization is registering an individual on his or her behalf.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

These records and the information contained therein may be used:

a. To disclose information to all event participants for the purposes of displaying names and other personal information on event materials such as name badges, tent cards, or event programs or directories.

b. To disclose information to vendors, venues, or other Federal agencies for the purposes of event planning and/or venue security.

c. To disclose information when OGE determines that the records are arguably relevant and necessary to a proceeding before a court, grand jury, or administrative or adjudicative body; or in a proceeding before an administrative or adjudicative body when the adjudicator determines the records to be relevant and necessary to the proceeding.

d. To disclose information to the National Archives and Records Administration in records management inspections conducted under authority of 44 U.S.C. 2904 and 2906.

e. To disclose information to appropriate agencies, entities, and persons when: (1) OGE suspects or has confirmed that there has been a breach of the system of records; (2) OGE has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, the agency (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with OGE's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

f. To disclose information to another Federal agency or Federal entity, when OGE determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

These records are maintained in paper and/or electronic form.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

These records may be retrieved by name or other data elements such as an individual's agency.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

In accordance with General Records Schedule 6.4, item 010, Public affairs-related routine operational records, the records are destroyed when 3 years old, or no longer needed, whichever is later.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Hardcopy records are maintained in file cabinets which may be locked or in specified areas to which only authorized personnel have access. Electronic records are maintained either on the OGE network, in OGE internal applications, or in third party applications like *Pay.gov,* which is used to manage paid registrations. They are protected from unauthorized access through password identification procedures, limited access, firewalls, and other system-based protection methods.

RECORD ACCESS PROCEDURES:

Individuals requesting access to this system of records must follow the procedures set forth in OGE's Privacy Act regulations at 5 CFR part 2606.

CONTESTING RECORD PROCEDURES:

Individuals wishing to request amendment of records about themselves must follow the procedures set forth in OGE's Privacy Act regulations at 5 CFR part 2606.

NOTIFICATION PROCEDURE:

Individuals wishing to inquire whether this system of records contains information about them must follow the procedures set forth in OGE's Privacy Act regulations at 5 CFR part 2606.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

HISTORY:

None.

Approved: December 17, 2019.

Emory Rounds,

Director, U.S. Office of Government Ethics.

[FR Doc. 2019–27516 Filed 12–19–19; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–20–19BND]

Agency Forms Undergoing Paperwork Reduction Act Review

In accordance with the Paperwork Reduction Act of 1995, the Centers for Disease Control and Prevention (CDC) has submitted the information collection request titled Cognitive Testing and Pilot Testing for the National Center for Chronic Disease Prevention and Health Promotion to the Office of Management and Budget (OMB) for review and approval. CDC previously published a ''Proposed Data Collection Submitted for Public Comment and Recommendations'' notice on August 13, 2019 to obtain comments from the public and affected agencies. CDC received one comment related to the previous notice. This notice serves to allow an additional 30 days for public and affected agency comments.

CDC will accept all comments for this proposed information collection project. The Office of Management and Budget is particularly interested in comments that:

(a) 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;

(b) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(c) Enhance the quality, utility, and clarity of the information to be collected;

(d) Minimize the burden of the collection of information on those who are to respond, including, through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses; and

(e) Assess information collection costs.

To request additional information on the proposed project or to obtain a copy

of the information collection plan and instruments, call (404) 639–7570 or send an email to *omb@cdc.gov.* Direct written comments and/or suggestions regarding the items contained in this notice to the Attention: CDC Desk Officer, Office of Management and Budget, 725 17th Street NW, Washington, DC 20503 or by fax to (202) 395–5806. Provide written comments within 30 days of notice publication.

Proposed Project

Cognitive Testing and Pilot Testing for the National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP)—New—National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

CDC's National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP) plans to establish a generic clearance to support information collection for cognitive testing and pilot testing activities. Information collections that support the Behavioral Risk Factor Surveillance System (BRFSS) and other NCCDPHP programs are expected to be the major focus of activity under this generic. Additional information collections may also be considered for submission through this generic clearance if they are relevant to BRFSS and NCCDPHP programs or collaborations.

Cognitive testing and pilot testing are methodological procedures conducted to prepare for a large scale or key information collection. Cognitive and pilot testing activities are designed to improve information quality and the efficiency of information collection by addressing issues such as the use of new or existing survey questions, question formatting, survey protocols, data collection software systems and other related processes.

Cognitive testing is a technique used to clarify the meaning of survey questions and/or the response options for questions. Cognitive testing contributes to the understanding of the validity and reliability of questions used for a variety of public health purposes. Cognitive testing is conducted early in the process of considering questions for use in a survey or other information collection activity. This type of testing is usually conducted in a controlled setting, such as an office setting. Respondents participate in a discussion or interview with a trained interviewer and may respond individually or as members of focus groups.

Questions may undergo cognitive testing because they have not been used in previous surveys; for example, questions related to the emergence of a new public health concern (such as e-cigarettes). In addition, testing may be conducted on previously used questions to assess their use in a different information collection mode; for example, testing might be conducted to convert questions developed for a paper survey to an interview format or an electronic survey format; or testing might be conducted to identify issues specific to a subpopulation or language translation. Respondents are asked to review questions and/or surveys to discuss their impressions of the items under consideration, the questions, the response set, individual words within the question, or the focus of the questionnaire itself. Incentives may be offered to respondents who participate in the in-person phase of cognitive testing since these activities involve additional burden and inconvenience.

Pilot testing is used to determine whether methods or modes of data collection (such as phone or mail surveys, in-person interviews or online data collection) are appropriate and efficient ways of collecting data. Pilot testing may include testing of changes in sampling or contacting potential respondents.

The majority of participants in cognitive and pilot testing activities are expected to be adults > 18 years of age. Information may be collected during the recruitment process to assist in the selection of respondents. Respondents may be recruited to take part in testing through online or newspaper advertisements. If the participants are not recruited to be present at a physical location, they may be called and recruited by telephone.

Cognitive and pilot testing are efficient means of identifying problems with questions and procedures prior to implementation of data collection. Thus, they are cost effective approaches to providing evidence on survey questionnaire performance. A consequence of cognitive and pilot testing is to maintain high levels of participation in the information collection process itself.

Initial response and burden estimates are based on anticipated information collection needs for the BRFSS, with an additional allocation for a variety of NCCDPHP programs and collaborators. Each information collection activity conducted through this generic will be submitted to OMB for approval in a project-specific information collection request that describes its purpose and methods.

Participation in cognitive and pilot testing is voluntary, but respondents will be encouraged to participate by explanations of the need for their input in the introduction of each survey. There are no costs to respondents other than their time. The total estimated annual burden is 8,950 hours.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
General U.S. Population or Selected Sub-population.	Screening for cognitive testing	2,500	1	15/60
	Screening for pilot testing	2,400	1	15/60
	Cognitive testing in person	1,500	1	60/60
	Cognitive testing by phone	1,500	1	45/60
	Cognitive testing by ABS/mail/web	600	1	60/60
	Pilot testing in person	1,000	1	30/60
	Pilot testing by phone	3,000	1	30/60
	Pilot testing by ABS/mail/web	5,000	1	30/60

Jeffrey M. Zirger,

Lead, Information Collection Review Office, Office of Scientific Integrity, Office of Science, Centers for Disease Control and Prevention.

[FR Doc. 2019–27552 Filed 12–19–19; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Child Care and Development Fund (CCDF) Consumer Education Website and Reports of Serious Injuries and Death

AGENCY: Office of Child Care, Administration for Children and Families; HHS.

ACTION: Request for public comment.

SUMMARY: The Office of Child Care (OCC), Administration for Children and Families (ACF), U.S. Department of Health and Human Services (HHS), is proposing a revision to an approved information collection: ''Child Care and Development Fund (CCDF) Consumer Education website and Reports of Serious Injuries and Death.'' (OMB #0970–0473, expiration 2/29/2020).

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 (OPRE), 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 revised Consumer Education website reporting requirement will require states and territories to include certain information about their state or territory policies (related to background checks) on their Consumer Education websites.

The existing Reporting of Serious Injuries and Death reporting requirement will not be modified.

There are no standard federal forms associated with these reporting requirements.

Respondents: The Consumer Education website information collection requirement applies to the 50 States, the District of Columbia, and five Territories that receive CCDF grants. The estimated number of provider respondents for the Reporting of Serious Injuries and Death information collection requirement would be approximately 10,000 annually.

ANNUAL BURDEN ESTIMATES

Instrument	Annual number of respondents	Total number of responses per respondent	Average burden hours per response	Annual burden hours
Consumer Education Website	56 States and Territories	1	300	16,800
Reporting of Serious Injuries and Death	10,000 Child Care Providers	1	1	10,000

Estimated Total Annual Burden Hours: 26,800.

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: Pub. L. 113–186; 42 U.S.C. 9858 *et seq.*

Mary B. Jones,

ACF/OPRE Certifying Officer.

[FR Doc. 2019–27478 Filed 12–19–19; 8:45 am]

BILLING CODE 4184–43–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2018–D–3759]

Considerations for the Development of Dried Plasma Products Intended for Transfusion; Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a final guidance entitled ''Considerations for the Development of Dried Plasma Products Intended for Transfusion; Guidance for Industry.'' The guidance document provides recommendations intended to assist manufacturers, sponsors, and applicants developing dried plasma products intended for transfusion in order to facilitate the availability of safe and effective dried plasma products in the United States. The guidance document provides considerations for the successful development and licensing of dried plasma products and for the approval of devices used to manufacture dried plasma. The guidance includes recommendations on optimal sources of input plasma; manufacturing and product quality, including product characterization; packaging and reconstitution; clinical studies; and device submissions. The guidance announced in this notice finalizes the draft guidance of the same title dated October 2018.

DATES: The announcement of the guidance is published in the **Federal Register** on December 20, 2019.

ADDRESSES: You may submit either electronic or written comments on Agency guidances at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to

the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2018–D–3759 for ''Considerations for the Development of Dried Plasma Products Intended for Transfusion; Guidance for Industry.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of the guidance to the Office of Communication, Outreach and Development, Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 3128, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist the office in processing your requests. The guidance may also be obtained by mail by calling CBER at 1–800–835–4709 or 240–402–8010. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

FOR FURTHER INFORMATION CONTACT: Jenifer Stach, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993–0002, 240–402–7911.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a document entitled ''Considerations for the Development of Dried Plasma Products Intended for Transfusion; Guidance for Industry.'' This guidance provides recommendations intended to assist manufacturers, sponsors, and applicants developing dried plasma products intended for transfusion in order to facilitate the availability of safe and effective dried plasma products in the United States. This guidance provides considerations for the successful development and licensing of dried plasma products and for the approval of devices used to manufacture dried plasma. The guidance includes recommendations on optimal sources of input plasma; manufacturing and product quality, including product characterization; packaging and reconstitution; clinical studies; and device submissions.

Plasma is a critical component of early transfusion therapy in the management of traumatic hemorrhage. Plasma can replenish various coagulation proteins that are consumed during the coagulopathy that may accompany traumatic injury. Because plasma products intended for transfusion such as fresh frozen plasma, plasma frozen within 24 hours after phlebotomy, and plasma frozen within 24 hours after phlebotomy held at room temperature up to 24 hours after phlebotomy are stored frozen, these products need to be thawed prior to transfusion. This limits or prevents the use of plasma in settings where freezers and other support equipment are unavailable (*e.g.,* battlefields, remote locations, and other austere settings), and may lead to delayed administration. Dried plasma (such as freeze-dried or spray-dried plasma) offers the potential to address these challenges by providing a product that is stable at ambient temperatures, and which can be rapidly reconstituted and transfused.

In the **Federal Register** of October 30, 2018 (83 FR 54597), FDA announced the availability of the draft guidance of the same title. FDA received several comments on the draft guidance and those comments were considered as the guidance was finalized. The guidance announced in this notice finalizes the draft guidance dated October 2018.

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the current thinking of FDA on considerations for the development of dried plasma products intended for transfusion. It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

This guidance refers to previously approved collections of information found in FDA regulations. The collections of information in 21 CFR part 211 have been approved under

OMB control number 0910–0139; the collections of information in 21 CFR part 312 have been approved under OMB control number 0910–0014; the collections of information in 21 CFR part 601 have been approved under OMB control number 0910–0338; the collections of information in 21 CFR part 610 have been approved under OMB control numbers 0910–0116, 0910–0139, and 0910–0338; the collections of information in 21 CFR part 630 have been approved under OMB control number 0910–0116; the collections of information in 21 CFR part 640 have been approved under OMB control number 0910–0116; the collections of information in 21 CFR part 812 have been approved under OMB control number 0910–0078; and the collections of information in 21 CFR part 814 have been approved under OMB control number 0910–0231.

III. Electronic Access

Persons with access to the internet may obtain the guidance at either *https://www.fda.gov/vaccines-blood-biologics/guidance-compliance-regulatory-information-biologics* or *https://www.regulations.gov.*

Dated: December 16, 2019.

Lowell J. Schiller,

Principal Associate Commissioner for Policy.

[FR Doc. 2019–27520 Filed 12–19–19; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2019–D–4964]

Demonstrating Substantial Evidence of Effectiveness for Human Drug and Biological Products; Draft Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a draft guidance for industry entitled ''Demonstrating Substantial Evidence of Effectiveness for Human Drug and Biological Products.'' This guidance complements and expands on the 1998 guidance entitled ''Providing Clinical Evidence of Effectiveness for Human Drug and Biological Products'' (the 1998 guidance). Although FDA's evidentiary standard for effectiveness has not changed since 1998, the evolution of drug development and science has led to changes in the types of drug development programs submitted to the Agency. Specifically, there are more programs studying serious diseases lacking effective treatment, more programs in rare diseases, and more programs for therapies targeted at disease subsets. There is a need for more Agency guidance on the flexibility in the amount and type of evidence needed to meet the substantial evidence standard in these circumstances.

DATES: Submit either electronic or written comments on the draft guidance by February 18, 2020 to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance.

ADDRESSES: You may submit comments on any guidance at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2019–D–4964 for ''Demonstrating Substantial Evidence of Effectiveness for Human Drug and Biological Products.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of the draft guidance to the Office of Communication, Outreach and Development, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 3128, Silver Spring, MD 20993–0002 or

Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT: Stephen Ripley, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993–0002, 240–402–7911 or Ei Thu Lwin, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 22, Rm. 6236, Silver Spring, MD 20993–0002, 301–796–0728.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry entitled ''Demonstrating Substantial Evidence of Effectiveness for Human Drug and Biological Products.'' This guidance complements and expands on the 1998 guidance. The 1998 guidance was issued in response to the Food and Drug Administration Modernization Act of 1997 (FDAMA) (Pub. L. 105–115), which stated that the substantial evidence requirement for effectiveness, which had generally been interpreted as calling for two adequate and well-controlled trials, could also be met by a single trial plus confirmatory evidence. The 1998 guidance, therefore, provided many examples of the types of evidence that could be considered confirmatory evidence, with a specific focus on adequate and well-controlled trials of the test agent in related populations or indications, as well as a number of illustrations of a single adequate and well-controlled trial supported by convincing evidence of the drug's mechanism of action in treating a disease or condition.

FDAMA, thus, introduced a specific new area of flexibility in the evidence needed to support effectiveness, but there are many other characteristics of the evidence supporting effectiveness that can vary (notably, trial designs, trial endpoints, statistical methodology), and evidence that varies in such ways potentially can provide substantial evidence of effectiveness but because of these characteristics may provide greater or lesser certainty. These characteristics also deserve consideration and were not discussed in the 1998 guidance. FDA's use of these various designs, endpoints, and analyses which can differ in the strength of evidence they provide, reflects the Agency's longstanding flexibility when considering the types of data and evidence that can meet the substantial evidence requirement.

Although FDA's evidentiary standard for effectiveness has not changed since 1998, the evolution of drug development and science has led to changes in the types of drug development programs submitted to the Agency. Specifically, there are more programs studying serious diseases lacking effective treatment, more programs in rare diseases, and more programs for therapies targeted at disease subsets. There is a need for more Agency guidance on the flexibility in the amount and type of evidence needed to meet the substantial evidence standard in these circumstances. The approaches discussed in this guidance can yield evidence that meets the statutory standard for substantial evidence and reflect the evolving landscape of drug development.

This guidance discusses the quality of evidence to establish effectiveness, including trial designs and trial endpoints. It also discusses the quantity of evidence needed in a given development program, *i.e.,* two adequate and well-controlled trials, one adequate and well-controlled trial plus confirmatory evidence, or reliance on a previous finding of effectiveness of an approved drug when scientifically justified and legally permissible (*i.e.,* no new effectiveness or pharmacodynamic data would be needed). The guidance also expands upon the discussions included in the 1998 guidance on the types of mechanistic and pharmacologic evidence and non-clinical evidence that can constitute confirmatory evidence.

Although randomized superiority trials with a placebo- or active-control design generally provide the strongest evidence of effectiveness, this guidance discusses the circumstances under which trials not using a placebo control, superiority design, or randomization may be acceptable. In addition, this guidance also discusses situations in which human efficacy trials are not ethical or feasible, and the animal rule may be applied. In all cases, FDA must reach the conclusion that there is substantial evidence of effectiveness to approve a drug; however, the degree of certainty supporting such a conclusion may differ, depending on clinical circumstances (*e.g.,* severity and rarity of the disease and unmet medical need).

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on ''Demonstrating Substantial Evidence of Effectiveness for Human Drug and Biological Products.'' It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

This draft guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR part 312 for submission of an investigational new drug application have been approved under OMB control number 0910–0014. The collections of information in 21 CFR 314.50 for submission of an NDA have been approved under OMB control number 0910–0001. The collections of information in 21 CFR part 601 for submission of a BLA have been approved under OMB control number 0910–0338.

III. Electronic Access

Persons with access to the internet may obtain the draft guidance at either *https://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm, https://www.fda.gov/vaccines-blood-biologics/guidance-compliance-regulatory-information-biologics,* or *https://www.regulations.gov.*

Dated: December 16, 2019.

Lowell J. Schiller,

Principal Associate Commissioner for Policy.

[FR Doc. 2019–27524 Filed 12–19–19; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

Request for Public Comment: 60 Day Information Collection: Indian Health Service Medical Staff Credentials

AGENCY: Indian Health Service, HHS.

ACTION: Notice and request for comments. Request for revision to a collection.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the Indian Health Service (IHS) invites the general public to comment on the information collection titled, ''Indian

Health Service Medical Staff Credentials,'' OMB Control Number 0917–0009, which expires February 29, 2020.

DATES: *Comment Due Date:* February 18, 2020. Your comments regarding this information collection are best assured of having full effect if received within 60 days of the date of this publication.

ADDRESSES: Send your written comments, requests for more information on the collection, or requests to obtain a copy of the data collection instrument and instructions to Juliana Sadovich *by* one of the following methods:

- *Mail:* Juliana Sadovich, Ph.D., RN, CPHQ, Director, Office of Quality, Indian Health Service, 5600 Fishers Lane, Mail Stop: 08N78, Rockville, MD 20857.
- *Phone:* 301–443–4330.
- *Email: Juliana.Sadovich@ihs.gov.*

SUPPLEMENTARY INFORMATION: This notice announces our intent to revise the collection already approved by OMB, and to solicit comments on specific aspects of the information collection. The purpose of this notice is to allow 60 days for public comment to be submitted to IHS. A copy of the supporting statement is available at *www.regulations.gov* (see Docket ID IHS–2019–01).

Information Collection Title: ''Indian Health Service Medical Staff Credentials and Privileges Files, 0917–0009.'' *Type of Information Collection Request:* Extension of an approved information collection, and revised to, ''Indian Health Service Medical Staff Credentials, 0917–0009.'' *Form Numbers:* 0917–0009. *Need and Use of Information Collection:* This collection of information is used to evaluate individual health care providers applying for medical staff privileges at IHS health care facilities. The IHS operates health care facilities that provide health care services to American Indians and Alaska Natives. To provide these services, the IHS employs (directly and under contract) several categories of health care providers including: Physicians (M.D. and D.O.), dentists, psychologists, optometrists, podiatrists, audiologists, physician assistants, certified registered nurse anesthetists, nurse practitioners, and certified nurse midwives. IHS policy specifically requires physicians and dentists to be members of the health care facility medical staff where they practice. Health care providers become medical staff members, depending on the local health care facility's capabilities and medical staff bylaws. There are three types of IHS medical staff applicants: (1) Health care providers applying for direct employment with IHS; (2) contractors who will not seek to become IHS employees; and (3) employed IHS health care providers who seek to transfer between IHS health care facilities.

National health care standards developed by the Centers for Medicare and Medicaid Services, the Joint Commission, and other accrediting organizations require health care facilities to review, evaluate and verify the credentials, training and experience of medical staff applicants prior to granting medical staff privileges. In order to meet these standards, IHS health care facilities require all medical staff applicants to provide information concerning their education, training, licensure, and work experience and any adverse disciplinary actions taken against them. This information is then verified with references supplied by the applicant and may include: Former employers, educational institutions, licensure and certification boards, the American Medical Association, the Federation of State Medical Boards, the National Practitioner Data Bank, and the applicants themselves.

In addition to the initial granting of medical staff membership and clinical privileges, Joint Commission standards require that a review of the medical staff be conducted not less than every two years. This review evaluates the current competence of the medical staff and verifies whether they are maintaining the licensure or certification requirements of their specialty.

The medical staff credentials and privileges records are maintained at the health care facility where the health care provider is a medical staff member. The establishment of these records at IHS health care facilities is a Joint Commission requirement. Prior to the establishment of this Joint Commission requirement, the degree to which medical staff applications were maintained at all health care facilities in the United States that are verified for completeness and accuracy varied greatly across the Nation.

The application process has been streamlined and is using information technology to make the application electronically available via the internet. The IHS is transforming credentialing, which include granting privileges, into a centrally installed, automated, standardized, electronic/digital, measurable, portable, accessible, and efficient business process to improve the effectiveness of application and re-application to Medical Staffs, movement of practitioners within the IHS system, and recruitment/retention of high-quality practitioners. The credentialing process no longer requires paper/pdf forms for granting privileges. The electronic credentialing system incorporates privileges as part of the overall process for credentialing, eliminating the need for paper, and allows tailoring the needs to site specifications. Privileges will differ across IHS Areas and clinics, in compliance with accreditation standards.

The adoption of a central source IT system for medical practitioner staff credentialing/privileging data will enhance the quality, accuracy, and efficiency of the IHS credentialing/privileging process, which is expected to improve the recruitment and retention rates of medical practitioner staff at IHS. Cost savings will be obtained through the termination of disparate business processes; reduction of paperwork duplication; and eliminating systems that do not provide IHS enterprise access to credentialing/privileging information. Additionally, communicating information electronically can reduce costs and errors, promote collaboration, ensure accreditation/privileging requirements are met, and help bring practitioners on board more quickly, which will improve recruitment and retention.

Affected Public: Individuals and households. *Type of Respondents:* Individuals.

The table below provides: Types of data collection instruments, Estimated number of respondents, Number of annual number of responses, Average burden per response, and Total annual burden hours.

Data collection instrument(s)	Estimated number of respondents	Responses per respondent	Average burden hour per response *	Total annual burden (current)
Initial Application to Medical Staff	600	1	0.583 (35 min)	350
Application Packet/Signature Documents	1,300	1	0.167 (10 min)	217
Reappointment Application to Medical Staff	700	1	0.333 (20 min)	233

Data collection instrument(s)	Estimated number of respondents	Responses per respondent	Average burden hour per response *	Total annual burden (current)
Total	2,600			800

* For ease of understanding, burden hours are provided in actual minutes.

Annual number of respondents were factored based on total IHS providers credentialed and privileged on the indicated cycles in the paragraphs above. There are no capital costs, operating costs and/or maintenance costs to respondents.

Requests for Comments: Your written comments and/or suggestions are invited on one or more of the following points: (a) Whether the information collection activity is necessary to carry out an agency function; (b) whether the agency processes the information collected in a useful and timely fashion; (c) the accuracy of public burden estimate (the estimated amount of time needed for individual respondents to provide the requested information); (d) whether the methodology and assumptions used to determine the estimate is logical; (e) ways to enhance the quality, utility, and clarity of the information being collected; and (f) ways to minimize the public burden through the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Chris Buchanan,

Deputy Director, RADM, Assistant Surgeon General, USPHS, Indian Health Service.

[FR Doc. 2019–27442 Filed 12–19–19; 8:45 am]

BILLING CODE 4165–16–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Submission for OMB Review; 30-Day Comment Request; NIH Electronic Application System for Certificates of Confidentiality

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the National Institutes of Health (NIH) has submitted to the Office of Management and Budget (OMB) a request for review and approval of the information collection listed below.

DATES: Comments regarding this information collection are best assured of having their full effect if received within 30-days of the date of this publication.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the: Office of Management and Budget, Office of Regulatory Affairs, *OIRA_submission@omb.eop.gov* or by fax to 202–395–6974, Attention: Desk Officer for NIH.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact: Dr. Pamela Reed Kearney, Division of Human Subjects Research, OER, NIH, 6705 Rockledge Dr., Building Rockledge 1, Room 812–C, Bethesda, MD 20817, or email your request, including your address, to: *NIH-CoC-Coordinator@mail.nih.gov;* telephone number: 301–402–2512.

SUPPLEMENTARY INFORMATION: This proposed information collection was previously published in the **Federal Register** on August 14, 2019, page 40426–40427 (84 FR 40426) and allowed 60 days for public comment. No public comments were received. The purpose of this notice is to allow an additional 30 days for public comment.

The National Institutes of Health may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after December 31, 2019, unless it displays a currently valid OMB control number.

In compliance with Section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, the National Institutes of Health (NIH) has submitted to the Office of Management and Budget (OMB) a request for review and approval of the information collection listed below.

Proposed Collection: Electronic Application for NIH Certificates of Confidentiality (CoC E-application System), 0925–0689, REVISION, exp., date 12/31/2019, Office of Extramural Research (OER), National Institutes of Health (NIH).

Need and Use of Information Collection: This request system provides one electronic form to be used by all research organizations that request a Certificate of Confidentiality (CoC) from NIH. As described in the authorizing legislation (Section 301(d) of the Public Health Service Act, 42 U.S.C. 241(d)), CoCs are issued by the agencies of Department of Health and Human Services (DHHS), including NIH, to authorize researchers to protect the privacy of human research subjects by prohibiting them from releasing names and identifying characteristics of research participants to anyone not connected with the research, except in limited circumstances specified in the statute. At NIH, the issuance of CoCs has been delegated to the NIH OER in the NIH Office of the Director. NIH received 529 requests for CoCs from April 2017 through March 2018 and expects to receive approximately the same number of requests in subsequent years. The NIH has been using an online CoC system to review requests and issue CoCs since 2015. The current CoC request form includes 15 sections of information collected from research organizations. The information provided will be used to determine eligibility for a CoC and to issue the CoC to the requesting organization.

OMB approval is requested for three years. There are no costs to respondents other than their time. The total estimated annualized burden hours are 794.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total annual burden hours
CoC Applicants—Private	372	1	90/60	558

ESTIMATED ANNUALIZED BURDEN HOURS—Continued

Type of respondents	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total annual burden hours
CoC Applicants—State/local	26	1	90/60	3
CoC Applicants—Small business	53	1	90/60	80
CoC Applicants—Federal	78	1	90/60	117
Total		529		794

Dated: December 15, 2019.

Lawrence Tabak,

Principal Deputy Director, National Institutes of Health.

[FR Doc. 2019–27521 Filed 12–19–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Submission for OMB Review; 30-Day Comment Request; Office of Minority Health Research Coordination (OMHRC) Research Training and Mentor Programs Applications (National Institute of Diabetes and Digestive and Kidney Diseases)

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the National Institutes of Health (NIH) has submitted to the Office of Management and Budget (OMB) a request for review and approval of the information collection listed below.

DATES: Comments regarding this information collection are best assured of having their full effect if received within 30-days of the date of this publication.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the: Office of Management and Budget, Office of Regulatory Affairs, *OIRA_submission@omb.eop.gov* or by fax to 202–395–6974, Attention: Desk Officer for NIH.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact: Ms. Winnie Martinez, Project Officer, 6707 Democracy Blvd., 9th Floor, Bethesda, MD 20892 or call non-toll-free number (301) 435–2988 or Email your request, including your address to: *Winnie.Martinez@nih.gov.*

SUPPLEMENTARY INFORMATION: This proposed information collection was previously published in the **Federal Register** on October 16, 2019, page 55318–55319 (84 FR 55318) and allowed 60 days for public comment. No public comments were received. The purpose of this notice is to allow an additional 30 days for public comment. The National Institute of Diabetes and Digestive and Kidney Diseases (NIDDK), National Institutes of Health, may not conduct or sponsor, and the respondent is not required to respond to an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number.

In compliance with Section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, the National Institutes of Health (NIH) has submitted to the Office of Management and Budget (OMB) a request for review and approval of the information collection listed below.

Proposed Collection Title: Office of Minority Health Research Coordination Training and Mentor Programs Applications in use with OMB Control Number 0925–0748, exp., date 12/31/2019 REVISION, National Institute of Diabetes and Digestive and Kidney Diseases (NIDDK), National Institutes of Health (NIH).

Need and Use of Information Collection: In 2000, the National Institute of Diabetes and Digestive and Kidney Diseases of the National Institutes of Health established the Office of Minority Health Research Coordination to address the burden of diseases and disorders that disproportionately impact the health of minority populations. One of the major goals of the office is to build and sustain a pipeline of researchers from underrepresented populations in the biomedical, behavioral, clinical, and social sciences, with a focus on NIDDK mission areas. The office accomplishes this goal by administering a variety of programs and initiatives to recruit high school through post-doctoral educational level individuals into OMHRC research training and mentor programs: The Short-Term Research Experience for Underrepresented Persons (STEP–UP), the Diversity Summer Research Training Program (DSRTP) for Undergraduate Students, Network of Minority Health Research Investigators (NMRI), the NIH/National Medical Association (NMA) Academic Career Fellow Travel Awards, and the NIH/National Hispanic Medical Association (NHMA) Academic Career Fellow Travel Awards. Identification of participants to matriculate into the program and initiatives comes from applications and related forms hosted through the NIDDK website. The proposed information collection activity is necessary in order to determine the eligibility and quality of potential awardees for traineeship in these programs.

OMB approval is requested for three (3) years. There are no costs to respondents other than their time. The total estimated annualized burden hours are 2,291.

ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Type of respondent	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total annual burden hours
Short-Term Research Experience for Underrepresented Persons (STEP–UP) Application.	Individuals/Households	2,000	1	45/60	1,500
STEP–UP Student Feedback Form	Individuals/Households	200	1	15/60	50
Diversity Summer Research Training Program (DSRTP) Feedback Form.	Individuals/Households	14	1	30/60	7
Network of Minority Health Research Investigators (NMRI) Enrollment Form.	Private Sector	200	1	15/60	50
NMRI Evaluation Form	Private Sector	120	1	30/60	60
NMRI Survey Form	Private Sector	800	1	30/60	400
NMRI Mentor-Mentee Agreement Form	Private Sector	100	1	30/60	50
NIH/National Medical Association (NMA) Academic Career Fellow Travel Awards Application.	Private Sector	200	1	20/60	67
NIH/NMA Feedback Form	Private Sector	40	1	30/60	20
NIH/National Hispanic Medical Association (NHMA) Academic Career Fellow Travel Awards Application.	Private Sector	200	1	20/60	67
NIH/NHMA Feedback Form	Private Sector	40	1	30/60	20
Total			3,914		2,291

Dated: December 12, 2019.

Starsky Cheng,

NIDDK Project Clearance Liaison, Office of Management and Policy Analysis, National Institute of Diabetes and Digestive and Kidney Diseases, National Institutes of Health.

[FR Doc. 2019–27514 Filed 12–19–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed 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 Allergy and Infectious Diseases Special Emphasis Panel; ZAI1 FDS M M1, January 30–31, 2020, Targeted Prevention for Tickborne Diseases (R01—Clinical Trials Not Allowed).

Date: January 30–31, 2020.

Time: 8:00 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Frank S. De Silva, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, Room #3E72A, National Institutes of Health, National Institute of Allergy and Infectious Diseases, 5601 Fishers Lane, MSC 9823, Rockville, MD 20892–9823, (240) 669–5023, *fdesilva@niaid.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: December 16, 2019.

Tyeshia M. Roberson,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–27507 Filed 12–19–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; Notice of 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 on Drug Abuse.

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 on Drug Abuse.

Date: January 30, 2020.

Closed: 9:00 a.m. to 10:15 a.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center Building (NSC), Conference Rooms C&D, 6001 Executive Boulevard, Rockville, MD 20852.

Open: 10:30 a.m. to 4:30 p.m.

Agenda: This portion of the meeting will be open to the public for announcements and reports of administrative, legislative, and program developments in the drug abuse field.

Place: National Institutes of Health, Neuroscience Center Building (NSC), Conference Rooms C&D, 6001 Executive Boulevard, Rockville, MD 20852.

Contact Person: Susan R.B. Weiss, Ph.D., Director, Division of Extramural Research, Office of the Director, National Institute on Drug Abuse, NIH, DHHS, 6001 Executive Boulevard, NSC, Room 5274, MSC 9591,

Rockville, MD 20892, 301–443–6487, *sweiss@nida.nih.gov*.

Any member of the public interested in presenting oral comments to the committee may notify the Contact Person listed on this notice at least 10 days in advance of the meeting. Interested individuals and representatives of organizations may submit a letter of intent, a brief description of the organization represented, and a short description of the oral presentation. Only one representative of an organization may be allowed to present oral comments and if accepted by the committee, presentations may be limited to five minutes. Both printed and electronic copies are requested for the record. In addition, any interested person may file written comments with the committee by forwarding their 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: *www.drugabuse.gov/NACDA/NACDAHome.html,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: December 16, 2019.

Tyeshia M. Roberson,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–27512 Filed 12–19–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases, Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel HIV PATHOGENESIS.

Date: February 25, 2020.

Time: 11:00 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Boulevard, 6707 Democracy Boulevard, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Elena Sanovich, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 7351, 6707 Democracy Boulevard, Bethesda, MD 20892–2542, (301) 594–8886, *sanoviche@mail.nih.gov.*

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel Pragmatic Research/Natural Experiments.

Date: March 3, 2020.

Time: 9:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda Marriott Suites, Conference Room Democracy, 6711 Democracy Boulevard Bethesda, MD 20817.

Contact Person: Michele L. Barnard, Ph.D., Scientific Review Officer, Review Branch, Division of Extramural Activities, NIDDK, National Institutes of Health, Room 7353, 6707 Democracy Boulevard, Bethesda, MD 20892–2542, (301) 594–8898, *barnardm@extra.niddk.nih.gov.*

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel Digestive Diseases Research Core Centers (P30).

Date: March 26–27, 2020.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Residence Inn Bethesda, Conference Room Montgomery 1&2, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Jian Yang, Ph.D., Scientific Review Officer, Review Branch, Division of Extramural Activities, NIDDK, National Institutes of Health, Room 7111, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–7799, *yangj@extra.niddk.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: December 17, 2019.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–27513 Filed 12–19–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and/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 and/or contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Special Emphasis Panel; TEP–6: SBIR Contract Review Meeting.

Date: January 31, 2020.

Time: 11:00 a.m. to 3:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W106, Rockville, MD 20850 (Telephone Conference Call).

Contact Person: Reed A. Graves, Ph.D., Scientific Review Officer, 9609 Medical Center Drive, Room 7W106, Division of Extramural Activities, Research Technology and Contract Review Branch, National Cancer Institute, NIH, Rockville, MD 20850, 240–276–6384, *gravesr@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; SEP–4: NCI Clinical and Translational R21 and Omnibus R03.

Date: February 27–28, 2020.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda North Marriott Hotel & Conference Center, Montgomery County Conference Center Facility, 5701 Marinelli Road, North Bethesda, MD 20852.

Contact Person: Eduardo Emilio Chufan, Ph.D., Scientific Review Officer, Research Technology & Contract Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W254, Bethesda, MD 20892, 240–276–7975, *chufanee@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Outstanding Investigator Award.

Date: February 27–28, 2020.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda North Marriott Hotel & Conference Center, Montgomery County Conference Center Facility, 5701 Marinelli Road, North Bethesda, MD 20852.

Contact Person: Michael B. Small, Ph.D., Chief, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, 7 Floor, West Tower, Room 7W522, Bethesda, MD 20892–9750, 240–276–6438, *smallm@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; TEP–8: SBIR Contract Review Meeting.

Date: February 27–28, 2020.
Time: 4:00 p.m. to 4:00 p.m.
Agenda: To review and evaluate contract proposals.
Place: Hilton Washington/Rockville, 1750 Rockville Pike, Rockville, MD 20852.
Contact Person: Byeong-Chel Lee, Ph.D., Scientific Review Officer, Resources and Training Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W238, Rockville, MD 20850, 240–276–7755, *byeong-chel.lee@nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; TEP–13: SBIR Contract Review Meeting.
Date: March 5, 2020.
Time: 11:00 a.m. to 3:00 p.m.
Agenda: To review and evaluate contract proposals.
Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W264, Rockville, MD 20850 (Telephone Conference Call).
Contact Person: Ombretta Salvucci, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W264, Rockville, MD 20850, 240–276–7286, *salvucco@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; SEP—6 U01 Review Meeting.
Date: March 17, 2020.
Time: 1:00 p.m. to 4:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W624, Rockville, MD 20850 (Telephone Conference Call).
Contact Person: Tushar Deb, Ph.D., Scientific Review Officer, Research Technology and Contract Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W624, Rockville, MD 20850, 240–276–6132, *tushar.deb@nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Research Projects in Cancer Systems Biology.
Date: March 26, 2020.
Time: 10:00 a.m. to 5:30 p.m.
Agenda: To review and evaluate grant applications.
Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W238, Rockville, MD 20850 (Telephone Conference Call).
Contact Person: Byeong-Chel Lee, Ph.D., Scientific Review Officer, Resources and Training Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W238, Rockville, MD 20850, 240–276–7755, *byeong-chel.lee@nih.gov.*

Name of Committee: National Cancer Institute Initial Review Group; Subcommittee A—Cancer Centers.
Date: May 13–14, 2020.
Time: 5:00 p.m. to 6:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road NW, Washington, DC 20015.
Contact Person: Shamala K. Srinivas, Ph.D., Associate Director Office of Referral, Review, and Prog. Coordination, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W530, Bethesda, MD 20892, 240–276–6442, *shamala@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: December 16, 2019.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–27445 Filed 12–19–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Advancing Translational Sciences; 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 Advancing Translational Sciences Special Emphasis Panel: Rare Disease.
Date: March 5–6, 2020.
Time: 8:30 a.m. to 5:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, One Democracy Plaza, 6701 Democracy Blvd., Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Jing Chen, Ph.D., Scientific Review Officer, Office of Scientific Review, National Center for Advancing Translational Sciences (NCATS), National Institutes of Health, 6701 Democracy Blvd., Democracy 1, Room 1080, Bethesda, MD 20892–4874, *chenjing@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.350, B—Cooperative Agreements; 93.859, Biomedical Research and Research Training, National Institutes of Health, HHS)

Dated: December 17, 2019.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–27506 Filed 12–19–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; Down Syndrome and Cognition.
Date: February 26, 2020.
Time: 12:01 p.m. to 4:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Telephone Conference Call).
Contact Person: Maurizio Grimaldi, MD, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute on Aging, National Institutes of Health, 7201 Wisconsin Avenue, Gateway Building, Suite 2W200, Bethesda, MD 20892, (301) 496–9374, *grimaldim2@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: December 17, 2019.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–27505 Filed 12–19–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R1–ES–2019–N165; FXES11130100000–201–FF01E00000]

Endangered Species; Receipt of Recovery Permit Applications

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of permit applications; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service, have received applications for permits to conduct activities intended to enhance the propagation and survival of endangered species under the Endangered Species Act of 1973, as amended. We invite the public and local, State, Tribal, and Federal agencies to comment on these applications. Before issuing the requested permits, we will take into consideration any information that we receive during the public comment period.

DATES: We must receive your written comments on or before January 21, 2020.

ADDRESSES:

Document availability and comment submission: Submit requests for copies of the applications and related documents and submit any comments by one of the following methods. All requests and comments should specify the applicant name and application number (*e.g.,* Dana Ross TE–08964A–2):

- *Email: permitsR1ES@fws.gov.*
- *U.S. Mail:* Marilet Zablan, Program Manager, Restoration and Endangered Species Classification, Ecological Services, U.S. Fish and Wildlife Service, Pacific Regional Office, 911 NE 11th Avenue, Portland, OR 97232–4181.

FOR FURTHER INFORMATION CONTACT: Colleen Henson, Regional Recovery Permit Coordinator, Ecological Services, (503) 231–6131 (phone); *permitsR1ES@fws.gov* (email). Individuals who are hearing or speech impaired may call the Federal Relay Service at 1–800–877–8339 for TTY assistance.

SUPPLEMENTARY INFORMATION: We, the U.S. Fish and Wildlife Service, invite the public to comment on applications for permits under section 10(a)(1)(A) of the Endangered Species Act, as amended (ESA; 16 U.S.C. 1531 *et seq.*). The requested permits would allow the applicants to conduct activities intended to promote recovery of species that are listed as endangered under the ESA.

Background

With some exceptions, the ESA prohibits activities that constitute take of listed species unless a Federal permit is issued that allows such activity. The ESA's definition of ''take'' includes such activities as pursuing, harassing, trapping, capturing, or collecting, in addition to hunting, shooting, harming, wounding, or killing.

A recovery permit issued by us under section 10(a)(1)(A) of the ESA authorizes the permittee to conduct activities with endangered or threatened species for scientific purposes that promote recovery or for enhancement of propagation or survival of the species. These activities often include such prohibited actions as capture and collection. Our regulations implementing section 10(a)(1)(A) for these permits are found in the Code of Federal Regulations (CFR) at 50 CFR 17.22 for endangered wildlife species, 50 CFR 17.32 for threatened wildlife species, 50 CFR 17.62 for endangered plant species, and 50 CFR 17.72 for threatened plant species.

Permit Applications Available for Review and Comment

Proposed activities in the following permit requests are for the recovery and enhancement of propagation or survival of the species in the wild. The ESA requires that we invite public comment before issuing these permits. Accordingly, we invite local, State, Tribal, and Federal agencies and the public to submit written data, views, or arguments with respect to these applications. The comments and recommendations that will be most useful and likely to influence agency decisions are those supported by quantitative information or studies.

Application No.	Applicant, city, state	Species	Location	Take activity	Permit action
TE–050644–6	Washington Department of Fish and Wildlife, Ephrata, WA.	Columbia Basin pygmy rabbit (*Brachylagus idahoensis*).	Washington	Harass by survey, monitor, capture, handle, mark, tag, collect biological samples, translocate, captive propagation, veterinary care, vaccination, release, and salvage.	Amend.
TE–49208B–1	Tammy Summers, Rainbow Connection Research, Saipan, MP.	Hawksbill sea turtle (*Eretmochelys imbricata*).	Commonwealth of the Northern Marianas Islands.	Monitor and excavate nests, deploy nest temperature loggers, handle, measure, weigh, tag, attach transmitters, collect biological samples, salvage, photograph, and videograph.	Renew.

Public Availability of Comments

Written comments we receive become part of the administrative record associated with this action. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can request in your comment that we withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public disclosure in their entirety.

Next Steps

If we decide to issue a permit to the applicants listed in this notice, we will publish a notice in the **Federal Register**.

Authority

We publish this notice under section 10(c) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Rolland White,

Assistant Regional Director—Ecological Services, Pacific Region.

[FR Doc. 2019–27471 Filed 12–19–19; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[AAK6006201 190A2100DD AOR3030.999900]

Final Environmental Impact Statement for the Proposed Eagle Shadow Mountain Solar Project, Clark County, Nevada

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of availability.

SUMMARY: This notice advises the public that the Bureau of Indian Affairs (BIA), as the lead Federal agency, with the Bureau of Land Management (BLM), the Environmental Protection Agency (EPA), U.S. Fish and Wildlife Service (USFWS), Nevada Department of Wildlife (NDOW), and the Moapa Band of Paiute Indians (Band) as Cooperating Agencies, intends to file a Final Environmental Impact Statement (FEIS) with the EPA for the proposed Eagle Shadow Mountain Solar Project (ESM Solar Project) on the Moapa River Indian Reservation (Reservation) in Clark County, Nevada. This notice also announces that the FEIS is now available for public review.

DATES: The FEIS is available at the following website: *www.esmsolareis.com.* In order to be fully considered, written comments on the FEIS must arrive no later than 30 days after EPA publishes its Notice of Availability in the **Federal Register**.

ADDRESSES: You may mail, email, hand carry or telefax written comments to Mr. Chip Lewis, Regional Environmental Protection Officer, BIA Western Regional Office, Branch of Environmental Quality Services, 2600 North Central Avenue, 4th Floor Mail Room, Phoenix, Arizona 85004–3008; fax (602) 379–3833; email: *chip.lewis@bia.gov.*

FOR FURTHER INFORMATION CONTACT: Mr. Chip Lewis, BIA Western Regional Office, Branch of Environmental Quality Services, 2600 North Central Avenue, Phoenix, Arizona 85004–3008, telephone (602) 379–6750; or Mr. Garry Cantley at (602) 379–6750.

SUPPLEMENTARY INFORMATION: The proposed Federal action, taken under 25 U.S.C. 415, is BIA's approval of a solar energy ground lease and associated agreements entered into by the Band with 326MK 8me LLC (Applicant), to provide for construction, operation, maintenance, and eventual decommissioning of an up-to 300 megawatt (MW) alternating current solar photovoltaic (PV) electricity generation facility located entirely on the Moapa River Indian Reservation (Reservation) and specifically on lands held in trust by BIA for the Band. The proposed 230 kilovolt (kV) generation-tie transmission line required for interconnection would be located on Reservation lands, Reservation lands within a designated utility corridor and federal lands administered and managed by BLM, and private lands. In addition, the Applicant would require the use of an existing access road also located both within the utility corridor and federal lands managed by the BLM. The Applicant has accordingly requested that the BIA and BLM additionally approve rights-of-way (ROWs) authorizing the construction and operation of the transmission line and use of the existing access road. Together, the proposed solar energy facility, transmission line, access road, and other associated facilities make up the proposed ESM Solar Project.

The solar facility would generate electricity using PV panels. Also included would be inverters, a collection system, a potential battery storage system, an on-site substation to step-up the voltage to transmission level voltage at 230 kV, an operations and maintenance building, and other related facilities. An overhead 230 kV generation-tie transmission line, approximately 12.5 miles long, would connect the solar project to NV Energy's Reid-Gardner 230 kV substation.

Construction of the ESM Solar Project is expected to take approximately 16 to 18 months. The Applicant is expected to operate the energy facility for 30 years, with two options to renew the lease for an additional 5 years each, if mutually acceptable to the Band and Applicant. During construction, the PV panels would be placed on single-axis tracking mounting systems that are set on steel posts embedded in the ground. Other foundation design techniques may be used depending on the site topography and conditions. No water would be used to generate electricity during operations. Water would be needed during construction for dust control and a minimal amount would be needed during operations for panel washing and administrative and sanitary water use on site. The water supply required for the Project would be leased from the Band and would be provided via existing nearby wells. Access to the ESM Solar Project would be provided via the existing access road that connects to North Las Vegas Boulevard.

The purposes of the ESM Solar Project are to: (1) Help to provide a long-term, diverse, and viable economic revenue base and job opportunities for the Band; (2) help the state of Nevada to meet its renewable energy needs; and (3) allow the Band, in partnership with the Applicant, to optimize the use of the lease site while maximizing the potential economic benefit to the Band.

The BIA and BLM will use the EIS to make decisions on the land lease and ROW applications under their respective jurisdiction; the EPA may use the document to make decisions under its authorities; the Band may use the EIS to make decisions under its Environmental Policy Ordinance; and the USFWS may use the EIS to support its decision under the Endangered Species Act.

Directions for Submitting Comments: Please include your name, return address and the caption: ''FEIS Comments, Proposed Eagle Shadow Mountain Solar Project'', on the first page of your written comments.

Locations Where the FEIS is Available for Review: The FEIS will be available for review at: BIA Western Regional Office, 2600 North Central Avenue, 12th Floor, Suite 210, Phoenix, Arizona; BIA Southern Paiute Agency, 180 North 200 East, Suite 111, St. George, Utah; and the BLM Southern Nevada District Office, 4701 North Torrey Pines Drive, Las Vegas, Nevada. The FEIS is also available on line at: *www.esmsolareis.com.*

To obtain a compact disk copy of the FEIS, please provide your name and address in writing or by voicemail to Mr. Chip Lewis or Mr. Garry Cantley. Their contact information is listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice. An individual paper copy of the FEIS will be provided only upon request.

Public Comment Availability: Written comments, including names and addresses of respondents will be available for public review at the BIA Western Regional Office, 2600 North Central Avenue, 12th Floor, Suite 210, Phoenix, Arizona during regular business hours, 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. Before including your address, telephone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: This notice is published in accordance with section 1503.1 of the Council on Environmental Quality regulations (40 CFR 1500 *et seq.*) and

the Department of the Interior Regulations (43 CFR part 46) implementing the procedural requirements of the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), and in accordance with the exercise of authority delegated to the Assistant Secretary—Indian Affairs by part 209 of the Department Manual.

Dated: December 17, 2019.

Tara Sweeney,

Assistant Secretary—Indian Affairs.

[FR Doc. 2019–27531 Filed 12–19–19; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[19X.LL.AZP01000.L1400000.EQ0000; AZA–37401]

Notice of Realty Action: Classification and Segregation for Lease/Conveyance for Recreation and Public Purposes for Proposed Poston Butte Preserve in Pinal County, AZ

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of realty action.

SUMMARY: In accordance with Section 7 of the Taylor Grazing Act and Executive Order 6910, as amended, the Bureau of Land Management (BLM) has examined certain public lands in Pinal County, Arizona, and has found them suitable for classification for lease or conveyance to the Town of Florence, under the provisions of the Recreation and Public Purposes (R&PP) Act of June 14, 1926, as amended.

DATES: Interested parties may submit written comments regarding this proposed classification for lease or conveyance on or before February 3, 2020.

ADDRESSES: Send written comments to Edward J. Kender, Field Manager, BLM Lower Sonoran Field Office, 21605 North 7th Avenue, Phoenix, AZ 85027. Detailed information including, but not limited to, a proposed plan of development and preliminary maps are available for review during business hours, 7:30 a.m. to 4:30 p.m. Mountain Standard Time, Monday through Friday, except during Federal holidays, at the BLM Lower Sonoran Field Office.

FOR FURTHER INFORMATION CONTACT: Sirita Benally, Realty Specialist, at the location listed in the **ADDRESSES** section, by phone at 623–580–5557, or by email at *sbenally@blm.gov.* Persons who use a telecommunications device for the deaf may call the Federal Relay Service (FRS) at 1–800–877–8339 to leave a message or question for the above individual. The FRS is available 24 hours a day, 7 days a week. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The Town of Florence has submitted a statement in compliance with the regulations at 43 CFR 2741.4(b) and proposes to use the land to develop a public park for recreational purposes to meet future recreational needs. The project consists of non-motorized recreational trails, trailheads, picnic facilities, restrooms, perimeter fencing, site furnishings, directional and interpretive signage, and parking. The Town of Florence, has not applied for more than the 6,400-acre limitation for recreation uses in a year (or 640 acres if a nonprofit corporation or association), nor more than 640 acres for each of the programs involving public resources other than recreation. The lands examined and identified as suitable for lease or conveyance under the R&PP Act are legally described as:

Gila and Salt River Meridian, Arizona

T. 4 S., R. 9 E.,

Section 26, that portion of the NW¼ lying north of the existing railroad right-of-way;

Section 27, N½NW¼

The area described contains approximately 200 acres aggregate.

Lease or conveyance of the lands for recreational or public purposes use is in conformance with the BLM Lower Sonoran Record of Decision & Approved Resource Management Plan, approved September 2012.

The parcels are not identified as access points for recreation in accordance with Secretary's Order 3373—Evaluating Public Access in Bureau of Land Management Public Land Disposals and Exchanges. There are no anticipated impacts from the BLM-managed public land disposal on recreational access to adjacent tracts of publicly accessible lands.

All interested parties will receive a copy of this notice once it is published in the **Federal Register**. A copy of the **Federal Register** notice with information about this proposed realty action will be published in the newspaper of local circulation once a week for three consecutive weeks. The regulations at 43 CFR Subpart 2741 addressing requirements and procedures for conveyances under the R&PP Act do not require a public meeting.

Upon publication of this notice in the **Federal Register** the lands will be segregated from all forms of appropriation under the public land laws, including the United States general mining laws, except for lease or conveyance under the R&PP Act, leasing under the mineral leasing laws and disposals under the mineral material disposal laws.

The lease or conveyance of the land, when issued, will be subject to the following terms, conditions and reservations:

1. The reservation to the United States of a right-of-way thereon for ditches and canals constructed by the authority of the United States, Act of August 30, 1890 (43 U.S.C. 945);
2. Provisions of the R&PP Act and to all applicable regulations of the Secretary of the Interior;
3. All minerals shall be reserved to the United States, together with the right to prospect for, mine and remove such deposits from the same under applicable law and such regulations as the Secretary of the Interior may prescribe; and subject to valid exiting rights;
4. An appropriate indemnification clause protecting the United States from claims arising out of the lessee's/patentee's use, occupancy, or occupations on the leased/patented lands;
5. Any other reservations that the authorized officer determines appropriate to ensure public access and proper management of Federal lands and interests therein; and

Additional terms, conditions and reservations may be added that the authorized officer deems appropriate.

Classification Comments: Interested persons may submit comments involving the suitability of the land for development of public parks for recreational purposes. Comments on the classification are restricted to whether the land is physically suited for the proposal, whether the use will maximize the future use or uses of the land, whether the use is consistent with local planning and zoning, or if the use is consistent with state and Federal programs.

Application Comments: Interested persons may submit written comments, including notification of any encumbrances or other claims relating to the land, information regarding specific use proposed in the application, whether the BLM followed proper administrative procedures in reaching the decision to segregate the lands, or any other factor not directly related to the suitability of the lands for the R&PP lease/patent.

Any adverse comments will be reviewed by the BLM State Director or other authorized official of the Department of the Interior, who may sustain, vacate, or modify this realty action. In the absence of any adverse comments, the classification will become effective on February 18, 2020. The lands will not be offered for conveyance until after the classification becomes effective.

Before including your address, phone number, email address, or other personal identifying information in any comment, 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, the BLM cannot guarantee that we will be able to do so.

Authority: 43 CFR 2741.5.

Edward J. Kender,

Field Manager, Lower Sonoran Field Office.

[FR Doc. 2019–27498 Filed 12–19–19; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[19X.LLIDI02000.L71220000. FR0000.LVTFD1915100.241A.4500131504]

Notice of Availability for the Draft Environmental Impact Statement for the Proposed Blackrock Land Exchange, Bannock and Power Counties, Idaho

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

SUMMARY: In compliance with the National Environmental Policy Act of 1969 (NEPA), as amended, and the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, the Bureau of Land Management (BLM) Pocatello Field Office, in Pocatello, Idaho, has prepared a Draft Environmental Impact Statement (EIS) for the proposed Blackrock Land Exchange. By this notice, the BLM is announcing the beginning of the 45-day public comment period for the Draft EIS.

DATES: In order to have comments considered for inclusion in the Final EIS, the BLM must receive comments on the Draft EIS by February 3, 2020, or 45 days following the date that the Environmental Protection Agency publishes its Notice of Availability in the **Federal Register**, whichever is greater.

The date(s) and location(s) of public meetings are:

- January 7, 2020 from 4–6 p.m. at the Shoshone-Bannock Hotel and Event Center, 777 Bannock Trail Avenue, Fort Hall, Idaho
- January 8, 2020 from 5–7 p.m. at the BLM Pocatello Field Office, 4350 Cliffs Drive, Pocatello, Idaho

ADDRESSES: You may submit comments related to the proposed Blackrock Land Exchange only by the following methods:

- *Website: https://go.usa.gov/xEUuc.*
- *Fax:* 208.478.6376.
- *Mail:* BLM, Pocatello Field Office, Attention: Blackrock Land Exchange, 4350 S Cliffs Dr., Pocatello, ID 83204.

A copy of the Draft EIS is available at the BLM's ePlanning website: *https://go.usa.gov/xEUuc.* A hard copy of the document can be reviewed at the BLM Pocatello Field Office, at the address listed above.

FOR FURTHER INFORMATION CONTACT: Bryce Anderson, Project Manager, by telephone: 208–478–6353; address: 4350 S Cliffs Dr., Pocatello, ID 83204; or email: *bdanderson@blm.gov.* People who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339 to contact Mr. Anderson. The FRS is available 24 hours a day, 7 days a week, to leave a message or question with Mr. Anderson. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The BLM is the lead agency for the proposed land exchange. The Idaho Department of Environmental Quality (IDEQ), Idaho Governor's Office of Energy and Mineral Resources (OEMR), U.S. Environmental Protection Agency (EPA), and Department of Interior Bureau of Indian Affairs (BIA) are Cooperating Agencies.

In 1994, the J.R. Simplot Company (Simplot) submitted an application to acquire 719 acres of Federal land managed by the BLM in exchange for 667 acres of non-Federal land. The Federal lands are adjacent to Simplot's Don Plant in Power and Bannock Counties, Idaho. The non-Federal lands are located in the Blackrock and Caddy Canyon areas in Bannock County approximately 5 miles east-southeast of Pocatello.

In 1998, pursuant to the Comprehensive Environmental Response Compensation and Liability Act, the Don Plant facilities and the surrounding area, known as the Eastern Michaud Flats (EMF), were designated as a Superfund Site, including a portion of the proposed Federal lands to be exchanged. The BLM prepared an Environmental Assessment (EA) to analyze the proposed land exchange and issued a Decision Record/Finding of No Significant Impact (DR/FONSI) on December 21, 2007. The Shoshone-Bannock Tribes litigated the decision in District Court. In May 2011, the Court granted the tribes' motion and remanded the DR/FONSI to the BLM, ordering the agency to prepare an EIS.

The BLM's purpose is to evaluate the land exchange proposal. If approved, the proposal would improve resource management in an area containing crucial mule deer winter range and secure permanent public access within a popular recreation area. The BLM's need is to respond to the proposal pursuant to FLPMA. Simplot's purpose for the proposed land exchange is to implement legally enforceable controls as directed by the EPA and IDEQ. To meet fluoride reduction requirements from a 2016 Consent Order with the IDEQ, Simplot has proposed construction of cooling ponds adjacent to the Don Plant, which would require the acquisition of adjacent Federal lands. Additionally, this acquisition would allow Simplot to maximize the operational life of its ongoing phosphate processing operations at the Don Plant by expanding gypsum stacks onto adjacent land.

A Notice of Intent to prepare this EIS was published in the **Federal Register** on May 20, 2019 (84 FR 22893), initiating a 45-day public scoping period during which the BLM accepted comments on the proposed land exchange. Key resource issues identified during scoping include: Air quality, cultural resources, fish and wildlife, hazardous and solid wastes, lands and realty, recreation, socioeconomics, environmental justice, tribal treaty rights, visual resources, and water resources. Based on feedback from Cooperating Agencies, stakeholders, and public scoping, the BLM has developed alternatives to the Proposed Action, including a No Action Alternative, which are detailed in the Draft EIS.

The BLM will fulfill the public involvement requirements under the National Historic Preservation Act (NHPA) (54 U.S.C. 306108) as provided in 36 CFR 800.2(d)(3) through the NEPA process. Information the BLM receives about historic and cultural resources within the area potentially affected by the proposed action will assist the BLM in identifying and evaluating impacts to such resources in the context of both NEPA and Section 106 of the NHPA.

The BLM will continue consulting with Native American tribes on a government-to-government basis in accordance with Executive Order 13175 and other policies. The BLM will give tribal concerns due consideration, including impacts on Native American trust assets and potential impacts to cultural resources.

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. In your comment, you can ask to have your personal identifying information withheld from public review, but the BLM cannot guarantee that it will be able to do so.

(Authority: 40 CFR 1506.6, 40 CFR 1506.10)

John F. Ruhs,

BLM Idaho State Director.

[FR Doc. 2019–27286 Filed 12–19–19; 8:45 am]

BILLING CODE 4310–GG–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0029400; PPWOCRADN0–PCU00RP14.R50000]

Notice of Intent To Repatriate Cultural Items: San Diego Museum of Man, San Diego, CA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The San Diego Museum of Man, in consultation with the appropriate Indian Tribes or Native Hawaiian organizations, has determined that the cultural items listed in this notice meet the definition of unassociated funerary objects. Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to claim these cultural items should submit a written request to the San Diego Museum of Man. If no additional claimants come forward, transfer of control of the cultural items to the lineal descendants, Indian Tribes, or Native Hawaiian organizations stated in this notice may proceed.

DATES: Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to claim these cultural items should submit a written request with information in support of the claim to the San Diego Museum of Man at the address in this notice by January 21, 2020.

ADDRESSES: Kara Vetter, Director of Cultural Resources, San Diego Museum of Man, 1350 El Prado, Balboa Park San Diego, CA 92101, telephone (619) 239–2001 Ext. 44, email *kvetter@museumofman.org.*

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3005, of the intent to repatriate cultural items under the control of the San Diego Museum of Man, San Diego, CA, that meet the definition of unassociated funerary objects under 25 U.S.C. 3001.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American cultural items. The National Park Service is not responsible for the determinations in this notice.

History and Description of the Cultural Item(s)

Sometime in 1929, 27 cultural items were removed from site W–199 in San Diego County, CA. Malcolm J. Rogers conducted excavations on behalf of the San Diego Museum of Man in the vicinity of La Jolla, along El Paseo Grande during which a burial site containing the remains of one individual was investigated. The 27 unassociated funerary objects are: 13 chipped stone unworked flakes, three chipped stone core tools, two chipped stone cores, one chipped stone utilized flake, one chipped stone scraper, two chipped stone choppers, one unmodified shell, three soil samples, and one volcanic cobble. The human remains are not in the control of the San Diego Museum of Man.

Sometime in the 1930's and 1960's, 239 cultural items were removed from sites CA–SDI–5623 or W–202 and W–202A in San Diego County, CA, in the vicinity of Descanso Valley. Excavations conducted on two separate occasions by Malcolm J. Rogers, on behalf of the Museum of Man and Mrs. Dorothy McKenna, an independent relic hunter, documented the presence of two cremations. The cremains are currently in the control of McKenna. The 239 unassociated funerary objects are: Six unmodified faunal bone, seven ceramic decorated body sherds, 58 ceramic undecorated body sherd, three ceramic decorated rim sherds, 41 ceramic undecorated rim sherds, 13 ceramic other, six chipped stone biface, two chipped stone core, two chipped stone core tools, one chipped stone other, 58 chipped stone projectile points, five chipped stone scrapers, 17 chipped stone unworked flakes, one chipped stone utilized flake, three ecofact, five manos, two groundstone shaft straightener, three groundstone other, three modified shells, one unmodified shell, one battered stone, and one historic metal.

Sometime between 1933 and 1950, 95 cultural items were removed from sites CA–SDI–5 or W–207 and W–207A in San Diego County, CA, by Malcolm J. Rogers during excavations on behalf of the San Diego Museum of Man, in the vicinity of the San Pasqual State Monument Park. Rogers's field notes indicate that these sites comprised a cinerary urn cemetery that had been initially discovered by land-leasers in 1913. The 95 unassociated funerary objects are: 32 ceramic undecorated body sherds, 11 ceramic undecorated rim sherds, three chipped stone biface, one chipped stone chopper, one chipped stone core, one chipped stone core tool, eight chipped stone projectile points, two chipped stone unworked flake, two chipped stone utilized flake, six manos, one modified shell, two battered stone, 23 historical ceramic, and two historical glass. The human remains are not in the control of the San Diego Museum of Man.

Sites W–199, CA–SDI–5623 or (W–202 and W–202A) and CA–SDI–5 or (W–207 and W–207A) are all located within territory traditionally occupied by the Kumeyaay Nation, which is represented by the below listed Indian Tribes. Based on cultural resources collection research, geographic location, ethnographic information, oral history evidence and consultation, these unassociated funerary objects are identified as Kumeyaay.

Determinations Made by the San Diego Museum of Man

Officials of the San Diego Museum of Man have determined that:

- Pursuant to 25 U.S.C. 3001(3)(B), the 361 cultural items described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony and are believed, by a preponderance of the evidence, to have been removed from a specific burial site of a Native American individual.
- Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the unassociated funerary objects and the Campo Band of Diegueno Mission Indians of the Campo Indian Reservation, California; Capitan Grande Band of Diegueno Mission Indians of California (Barona Group of Capitan Grande Band of Mission Indians of the Barona Reservation, California; Viejas (Baron Long) Group of Capitan Grande Band of Mission Indians of the Viejas Reservation, California); Ewiiaapaayp Band of Kumeyaay Indians, California; Iipay Nation of Santa Ysabel, California (previously listed as the Santa Ysabel Band of Diegueno Mission Indians of the Santa Ysabel Reservation); Inaja Band of Diegueno Indians of the Inaja and

Cosmit Reservation, California; Jamul Indian Village of California; La Posta Band of Diegueno Mission Indians of the La Posta Indian Reservation, California; Manzanita Band of Diegueno Mission Indians of the Manzanita Reservation, California; Mesa Grande Band of Diegueno Mission Indians of the Mesa Grande Reservation, California; San Pasqual Band of Diegueno Mission Indians of California; and the Sycuan Band of the Kumeyaay Nation, (hereafter referred to as ''The Tribes'').

Additional Requestors and Disposition

Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to claim these cultural items should submit a written request with information in support of the claim to Kara Vetter, Director of Cultural Resources, San Diego Museum of Man, 1350 El Prado, Balboa Park San Diego, CA 92101, telephone (619) 239–2001 Ext. 44, email *kvetter@museumofman.org,* by January 21, 2020. After that date, if no additional claimants have come forward, transfer of control of the unassociated funerary objects to The Tribes may proceed.

The San Diego Museum of Man is responsible for notifying The Tribes that this notice has been published.

Dated: November 26, 2019.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2019–27489 Filed 12–19–19; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

Bureau of Safety and Environmental Enforcement

[Docket ID BSEE–2019–0005; 201E1700D2 ET1SF0000.EAQ000 EEEE500000; OMB Control Number 1014–0006]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Sulphur Operations

AGENCY: Bureau of Safety and Environmental Enforcement, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Bureau of Safety and Environmental Enforcement (BSEE) proposes to renew an information collection.

DATES: Interested persons are invited to submit comments on or before January 21, 2020.

ADDRESSES: Send written comments on this information collection request (ICR) to the Office of Management and Budget's Desk Officer for the Department of the Interior by email at *OIRA_Submission@omb.eop.gov;* or via facsimile to (202) 395–5806. Please provide a copy of your comments to the Bureau of Safety and Environmental Enforcement; Regulations and Standards Branch; ATTN: Nicole Mason; 45600 Woodland Road, Sterling, VA 20166; or by email to *kye.mason@bsee.gov.* Please reference OMB Control Number 1014–0006 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Nicole Mason by email at *kye.mason@bsee.gov,* or by telephone at (703) 787–1607. You may also view the ICR at *http://www.reginfo.gov/public/do/PRAMain.*

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.

A **Federal Register** notice with a 60-day public comment period soliciting comments on this collection of information was published on July 23, 2019 (84 FR 35419). No comments were received.

We are again soliciting comments on the proposed ICR that is described below. We are especially interested in public comments addressing the following issues: (1) Is the collection necessary to the proper functions of BSEE; (2) Will this information be processed and used in a timely manner; (3) Is the estimate of burden accurate; (4) How might BSEE enhance the quality, utility, and clarity of the information to be collected; and (5) How might BSEE 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. 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 regulations at 30 CFR part 250, subpart P, concern the regulatory requirements for Sulphur Operations in the Outer Continental Shelf (OCS) and are the subject of this collection. This request also covers any related Notices to Lessees and Operators (NTLs) that BSEE issues to clarify, supplement, or provide additional guidance on some aspects of our regulations.

The BSEE uses the information collected under the Subpart P regulations to ensure that operations on the OCS are carried out in a safe and pollution-free manner, do not interfere with the rights of other users on the OCS, and balance the protection and development of OCS resources. Specifically, we use the information collected to:

- Ascertain that a discovered sulphur deposit can be classified as capable of production in paying quantities.
- ensure accurate and complete measurement of production to determine the amount of sulphur royalty payments due the United States; and that the sale locations are secure, production has been measured accurately, and appropriate follow-up actions are initiated.
- ensure the adequacy and safety of firefighting systems; the drilling unit is fit for the intended purpose; and the adequacy of casing for anticipated conditions.
- review drilling, well-completion, well-workover diagrams and procedures, as well as production operation procedures to ensure the safety of the proposed sulphur drilling, well-completion, well-workover and proposed production operations.
- monitor environmental data during sulphur operations in offshore areas where such data are not already available to provide a valuable source of information to evaluate the performance of drilling rigs under various weather and ocean conditions. This information is necessary to make reasonable determinations regarding safety of operations and environmental protection.

Title of Collection: 30 CFR part 250, subpart P, *Oil and Gas and Sulphur Operations in the OCS—Sulphur Operations.*

OMB Control Number: 1014–0006.

Form Number: None.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: Potential respondents comprise Federal OCS oil, gas, and sulphur lessees/operators and holders of pipeline rights-of-way.

Total Estimated Number of Annual Respondents: Not all potential respondents will submit information in any given year and some may submit multiple times.

Total Estimated Number of Annual Responses: 510.

Estimated Completion Time per Response: Varies from 15 minutes to 12 hours, depending on activity.

Total Estimated Number of Annual Burden Hours: 897.

Respondent's Obligation: Most responses are mandatory, while others are required to obtain or retain benefits.

Frequency of Collection: On occasion and varies by section.

Total Estimated Annual Nonhour Burden Cost: None.

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*).

Amy White,

Acting Chief, Regulations and Standards Branch.

[FR Doc. 2019–27547 Filed 12–19–19; 8:45 am]

BILLING CODE 4310–VH–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–611 and 731–TA–1428 (Final)]

Aluminum Wire and Cable From China; Determinations

On the basis of the record [1] developed in the subject investigations, the United States International Trade Commission (''Commission'') determines, pursuant to the Tariff Act of 1930 (''the Act''), that an industry in the United States is materially injured by reason of imports of aluminum wire and cable from China, provided for in subheading 8544.49.90 of the Harmonized Tariff Schedule of the United States, that have been found by the U.S. Department of Commerce (''Commerce'') to be sold in the United States at less than fair value (''LTFV''), and to be subsidized by the government of China.

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

Background

The Commission, pursuant to sections 705(b) and 735(b) of the Act (19 U.S.C. 1671d(b) and 19 U.S.C. 1673d(b)), instituted these investigations effective September 21, 2018, following receipt of petitions filed with the Commission and Commerce by Encore Wire Corporation, McKinney, Texas, and Southwire Company, LLC, Carrollton, Georgia. The final phase of the investigations was scheduled by the Commission following notification of preliminary determinations by Commerce that imports of aluminum wire and cable from China were subsidized within the meaning of section 703(b) of the Act (19 U.S.C. 1671b(b)) and sold at LTFV within the meaning of 733(b) of the Act (19 U.S.C. 1673b(b)). Notice of the scheduling of the final phase of the Commission's investigations and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** on June 28, 2019 (84 FR 31101). The hearing was held in Washington, DC, on October 17, 2019, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission made these determinations pursuant to sections 705(b) and 735(b) of the Act (19 U.S.C. 1671d(b) and 19 U.S.C. 1673d(b)). It completed and filed its determinations in these investigations on December 16, 2019. The views of the Commission are contained in USITC Publication 5001 (December 2019), entitled *Aluminum Wire and Cable from China: Investigation Nos. 701–TA–611 and 731–TA–1428 (Final).*

By order of the Commission.

Issued: December 16, 2019.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2019–27437 Filed 12–19–19; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—V2I–3 Consortium

Notice is hereby given that, on November 27, 2019, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), V2I–3 Consortium (''V2I–3 Consortium'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the identities of the parties to the venture and (2) the nature and objectives of the venture. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Pursuant to Section 6(b) of the Act, the identities of the parties to the venture are: Ford Motor Company, Dearborn, MI; General Motors Holdings LLC, Detroit, MI; Hyundai-Kia America Technical Center, Inc., Superior Township, MI; Nissan Technical Center N.A., Farmington Hills, MI; and Volkswagen Group of America, Inc., Auburn Hills, MI.

The general area of V2I–3 Consortium's planned activity is to fund and conduct multiple research projects limited to specific areas with specifically-defined technical goals which the participants believe will speed the development of emerging crash avoidance, crash mitigation, and automated vehicle and driver information systems. V2I–3 Consortium's objectives are to gain further knowledge and understanding of connected vehicle interactions and/or applications for vehicles that are intended to transform surface transportation safety, mobility, and environmental performance through a connected vehicle environment.

Suzanne Morris,

Chief, Premerger and Division Statistics Unit, Antitrust Division.

[FR Doc. 2019–27517 Filed 12–19–19; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Telemanagement Forum

Notice is hereby given that, on November 25, 2019, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), TeleManagement Forum (''The Forum'') filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Specifically, the following entities have become members of The Forum: Passionate About OSS, Melbourne, AUSTRALIA; ITEA Technologies LLC, Richardson, TX; Zhongguancun Sifang Model Service Industry Technology Strategic Alliance, Beijing, PEOPLE'S REPUBLIC OF CHINA; Skytel, Ulaanbaatar, MONGOLIA; Fujian Newland Software Engineering Co., Ltd., Fuzhou, PEOPLE'S REPUBLIC OF CHINA; DATASPARK PTE LTD, Singapore, SINGAPORE; Beijing Tianyuan DIC Information Technology Co. Ltd., Beijing, PEOPLE'S REPUBLIC OF CHINA; Millicom International Cellular S.A., Luxembourg, LUXEMBOURG; Futurewei Technologies, Inc., Santa Clara, CA; Macellan, Montreal, CANADA; VETRO FiberMap, Portland, ME; Embrix Inc., Irving, TX; Extended Systems Inc., McCall, ID; Wavenet International (PVT) Limited, Colombo, SRI LANKA; VMware, Inc., Palo Alto, CA; Vector Communications Ltd, Auckland, NEW ZEALAND; Alepo USA, Austin, TX; Mariner Partners, Saint John, CANADA; Minima Global, London, UNITED KINGDOM; and TalkTalk Group, London, UNITED KINGDOM.

Also, the following members have changed their names: Torry Harris Business Solutions Pvt Ltd to Torry Harris Integrated Solutions Pvt Ltd, Bangalore, INDIA; Nethys SA—Betv/VOO to VOO SA, Liege, BELGIUM; AsiaInfo, Inc. to AsiaInfo Technologies Limited, Haidian District, PEOPLE'S REPUBLIC OF CHINA; OgilvyOne Worldwide S.A. to FIWARE, Madrid, SPAIN; and Bulb Technologies Inc. to Bulb Technologies Ltd., Zagreb, CROATIA.

In addition, the following parties have withdrawn as parties to this venture: BlueTechnology Corp, Taipei City, TAIWAN ROC; CableLabs, Inc., Louisville, CO; Civimetrix Telecom, Magog, CANADA; Fair Isaac Corporation, San Diego, CA; FRiENDi GROUP, Dubai internet City, UNITED ARAB EMIRATES; Fundação Para Inovações Tecnológicas FITec, Recife, BRAZIL; FusionLayer, Inc., Espoo, FINLAND; Ipronto Communications B.V., Rotterdam, NETHERLANDS; Isoton Pty Ltd, Adelaide, AUSTRALIA; Liverpool John Moores University—School of Computing & Maths, Liverpool, UNITED KINGDOM; NaviParking, Gliwice, POLAND; Ontix, London, UNITED KINGDOM; Qualycloud, Paris, FRANCE; Quob Park Estate, Wickham, UNITED KINGDOM; Savvi AU Pty Ltd, Melbourne, AUSTRALIA; Sinefa, Bulleen, AUSTRALIA; Smart Social City, Madrid, SPAIN; Truphone Ltd, London, UNITED KINGDOM; Ushacomm© (Redtech Network India Private Limited), Kolkata, INDIA; and Zambia Telecommunications Company, Lusaka, ZAMBIA.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and The Forum intends to file additional written notifications disclosing all changes in membership.

On October 21, 1988, The Forum filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on December 8, 1988 (53 FR 49615).

The last notification was filed with the Department on September 16, 2019. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on October 30, 2019 (84 FR 58174).

Suzanne Morris,

Chief, Premerger and Division Statistics Unit, Antitrust Division.

[FR Doc. 2019–27518 Filed 12–19–19; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OJP (OJJDP) Docket No. 1771]

Meeting of the Federal Advisory Committee on Juvenile Justice

AGENCY: Office of Juvenile Justice and Delinquency Prevention, DOJ.

ACTION: Notice of meeting.

SUMMARY: The Office of Juvenile Justice and Delinquency Prevention has scheduled a meeting of the Federal Advisory Committee on Juvenile Justice (FACJJ).

DATES: Tuesday January 7, 2020 at 1:00 p.m.–2:00 p.m. ET.

ADDRESSES: The meeting will take place remotely via webinar.

FOR FURTHER INFORMATION CONTACT: Visit the website for the FACJJ at *www.facjj.ojp.gov* or contact Elizabeth Wolfe, Designated Federal Official (DFO), OJJDP, by telephone at (202) 598–9310, email at *elizabeth.wolfe@ojp.usdoj.gov;* or Maegen Barnes, Senior Program Manager/Federal Contractor, by telephone (732) 948–8862, email at *maegen.barnes@bixal.com,* or fax at (866) 854–6619. Please note that the above phone/fax numbers are not toll free.

SUPPLEMENTARY INFORMATION: The Federal Advisory Committee on Juvenile Justice (FACJJ), established pursuant to Section 3(2)A of the Federal Advisory Committee Act (5 U.S.C. App.2), will meet to carry out its advisory functions under Section 223(f)(2)(C–E) of the Juvenile Justice and Delinquency Prevention Act of 2002. The FACJJ is composed of representatives from the states and territories. FACJJ member duties include: Reviewing Federal policies regarding juvenile justice and delinquency prevention; advising the OJJDP Administrator with respect to particular functions and aspects of OJJDP; and advising the President and Congress with regard to State perspectives on the operation of OJJDP and Federal legislation pertaining to juvenile justice and delinquency prevention. More information on the FACJJ may be found at *www.facjj.ojp.gov.*

FACJJ meeting agendas are available on *www.facjj.ojp.gov.* Agendas will generally include: (a) Opening remarks and introductions; (b) Presentations and discussion; and (c) member announcements.

The meeting will be available online via Adobe Connect, a video conferencing platform. Members of the public who wish to participate must register in advance of the meeting online at FACJJ Meeting Registration, no later than Friday January 3, 2020. Should issues arise with online registration, or to register by fax or email, the public should contact Maegen Barnes, Senior Program Manager/Federal Contractor (see above for contact information).

Interested parties may submit written comments and questions in advance to Elizabeth Wolfe (DFO) for the FACJJ, at the contact information above. If faxing, please follow up with Maegen Currie, Senior Program Manager/Federal Contractor (see above for contact information) in order to assure receipt of submissions. All comments and questions should be submitted no later than 5:00 p.m. ET on Friday January 3, 2020.

The FACJJ will limit public statements if they are found to be duplicative. Written questions submitted by the public while in attendance will also be considered by the FACJJ.

Elizabeth Wolfe,

Training and Outreach Coordinator, Office of Juvenile Justice and Delinquency Prevention.

[FR Doc. 2019–27476 Filed 12–19–19; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Notice Requirements of the Health Care Continuation Coverage Provisions

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting the Employee Benefits Security Administration (EBSA) sponsored information collection request (ICR) titled, ''Notice Requirements of the Health Care Continuation Coverage Provisions,'' to the Office of Management and Budget (OMB) for review and approval for continued use, without change, in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before January 21, 2020.

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the *RegInfo.gov* website at *http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201909-1210-006* (this link will only become active on the day following publication of this notice) or by contacting Frederick Licari by telephone at 202–693–8073, TTY 202–693–8064, (these are not toll-free numbers) or by email at *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request by mail to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–EBSA, Office of Management and Budget, Room 10235, 725 17th Street NW, Washington, DC 20503; by Fax: 202–395–5806 (this is not a toll-free number); or by email: *OIRA_submission@omb.eop.gov.* Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor—OASAM, Office of the Chief Information Officer, Attn: Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW, Washington, DC 20210; or by email: *DOL_PRA_PUBLIC@dol.gov.*

FOR FURTHER INFORMATION CONTACT: Frederick Licari by telephone at 202–693–8073, TTY 202–693–8064, (these are not toll-free numbers) or by email at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: This ICR seeks to extend PRA authority for the Notice Requirements of the Health Care Continuation Coverage Provisions information collection. The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) provides that under certain circumstances participants and beneficiaries of group health plans that satisfy the definition of qualified beneficiaries under COBRA may elect to continue group health coverage temporarily following events known as qualifying events that would otherwise result in loss of coverage. COBRA provides that the Secretary of Labor (the Secretary) has the authority under section 608 of the Employee Retirement Income Security Act of 1974 (ERISA) to carry out the provisions of Part 6 of title I of ERISA. The Conference Report that accompanied COBRA authorized the Secretary to issue regulations implementing the notice and disclosure requirements of COBRA. Included in the ICR are two model notices that the Department believes will help reduce costs for service providers in preparing and delivering notices to comply with the regulations.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB under the PRA approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1210–0123.

OMB authorization for an ICR cannot be for more than three (3) years without renewal, and the current approval for this collection is scheduled to expire on December 31, 2019. The DOL seeks to extend PRA authorization for this information collection for three (3) more years, without any change to existing requirements. The DOL notes that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on March 27, 2019 (84 FR 11573).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within thirty-(30) days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1210–0123. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility:
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Agency: DOL–EBSA.

Title of Collection: Notice Requirements of the Health Care Continuation Coverage Provisions.

OMB Control Number: 1210–0123.

Affected Public: Private Sector: Businesses or other for-profits; Not-for-profit institutions.

Total Estimated Number of Respondents: 660,653.

Total Estimated Number of Responses: 18,128,968.

Total Estimated Annual Time Burden: 0 hours.

Total Estimated Annual Other Costs Burden: $37,133,409.

Authority: 44 U.S.C. 3507(a)(1)(D).

Dated: December 16, 2019.

Frederick Licari,

Departmental Clearance Officer.

[FR Doc. 2019–27483 Filed 12–19–19; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Model Employer Children's Health Insurance Program Notice

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting the Employee Benefits Security Administration (EBSA) sponsored information collection request (ICR) titled, ''Model Employer Children's Health Insurance Program Notice,'' to the Office of Management and Budget (OMB) for review and approval for continued use, without change, in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before January 21, 2020.

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the *RegInfo.gov* website at *http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201909-1210-008* (this link will only become active on the day following publication of this notice) or by contacting Frederick Licari by telephone at 202–693–8073, TTY 202–693–8064, (these are not toll-free numbers) or by email at *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request by mail to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–EBSA, Office of Management and Budget, Room 10235, 725 17th Street NW, Washington, DC 20503; by Fax: 202–395–5806 (this is not a toll-free number); or by email: *OIRA_submission@omb.eop.gov.* Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor—OASAM, Office of the Chief Information Officer, Attn: Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW, Washington, DC 20210; or by email: *DOL_PRA_PUBLIC@dol.gov.*

FOR FURTHER INFORMATION CONTACT: Frederick Licari by telephone at 202–693–8073, TTY 202–693–8064, (these are not toll-free numbers) or by email at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: This ICR seeks to extend PRA authority for the Model Employer Children's Health Insurance Program Notice information collection. The Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA, Pub. L. 111–3), was signed into law on February 4, 2009. Under ERISA, an employer that maintains a group health plan in a State that provides medical assistance under a State Medicaid plan under title XIX of the Social Security Act (SSA), or child health assistance under a State child health plan under title XXI of the SSA, in the form of premium assistance for the purchase of coverage under a group health plan, is required to make certain disclosures. Specifically, the employer is required to notify each employee of potential opportunities currently available in the State in which the employee resides for premium assistance under Medicaid and CHIP for health coverage of the employee or the employee's dependents. ERISA section 701(f)(3)(B)(i)(II) requires the Department of Labor to provide employers with model language for the Employer CHIP Notice to enable them to timely comply with this requirement.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB under the PRA approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1210–0137.

OMB authorization for an ICR cannot be for more than three (3) years without renewal, and the current approval for this collection is scheduled to expire on December 31, 2019. The DOL seeks to extend PRA authorization for this information collection for three (3) more years, without any change to existing requirements. The DOL notes that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on March 27, 2019 (84 FR 11573).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within thirty-(30) days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1210–0137. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility:
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Agency: DOL–EBSA.

Title of Collection: Model Employer Children's Health Insurance Program Notice.

OMB Control Number: 1210–0137.

Affected Public: Private Sector: Businesses or other for-profits; Not-for-profit institutions; Farms; State, Local, and Tribal governments.

Total Estimated Number of Respondents: 6,197,922.

Total Estimated Number of Responses: 198,845,095.

Total Estimated Annual Time Burden: 721,891.

Total Estimated Annual Other Costs Burden: $17,325,373.

Authority: 44 U.S.C. 3507(a)(1)(D).

Dated: December 16, 2019.

Frederick Licari,

Departmental Clearance Officer.

[FR Doc. 2019–27484 Filed 12–19–19; 8:45 am]

BILLING CODE 4510–29–P

NATIONAL CREDIT UNION ADMINISTRATION

Submission for OMB Review; Comment Request

AGENCY: National Credit Union Administration (NCUA).

ACTION: Notice.

SUMMARY: The National Credit Union Administration (NCUA) 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.

DATES: Comments should be received on or before January 21, 2020 to be assured of consideration.

ADDRESSES: Send comments regarding the burden estimates, or any other aspect of the information collections,

including suggestions for reducing the burden, to (1) Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for NCUA, New Executive Office Building, Room 10235, Washington, DC 20503, or email at *OIRA_Submission@OMB.EOP.gov* and (2) NCUA PRA Clearance Officer, 1775 Duke Street, Suite 6032, Alexandria, VA 22314, or email at *PRAComments@ncua.gov.*

FOR FURTHER INFORMATION CONTACT: Copies of the submission may be obtained by contacting Dawn Wolfgang at (703) 548–2279, emailing *PRAComments@ncua.gov,* or viewing the entire information collection request at *www.reginfo.gov.*

SUPPLEMENTARY INFORMATION:

OMB Number: 3133–0130.

Type of Review: Extension of a currently approval collection.

Title: Written Reimbursement Policy, 12 CFR 701.33.

Abstract: Federal Credit Unions (FCUs) may reimburse its board members for reasonable and proper costs incurred in conducting their official responsibilities only if the reimbursement is in accordance with the written reimbursement policies and procedures established by the FCU's board of directors. Access to this plan, and documentation related to its implementation is necessary for NCUA examiners to verify compliance with this requirement.

Affected Public: Private Sector: Not-for-profit institutions.

Estimated Total Annual Burden Hours: 1,668.

By Gerard Poliquin, Secretary of the Board, the National Credit Union Administration, on December 17, 2019.

Dated: December 17, 2019.

Dawn D. Wolfgang,

NCUA PRA Clearance Officer.

[FR Doc. 2019–27530 Filed 12–19–19; 8:45 am]

BILLING CODE 7535–01–P

POSTAL SERVICE

Product Change—Priority Mail and First-Class Package Service Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 20, 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 16, 2019, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & First-Class Package Service Contract 139 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2020–77, CP2020–76.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2019–27432 Filed 12–19–19; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87766; File No. SR–MRX–2019–26]

Self-Regulatory Organizations; Nasdaq MRX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Options 3, Section 3 To Extend Through June 30, 2020 or the Date of Permanent Approval

December 16, 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 12, 2019, Nasdaq MRX, LLC (''MRX'' 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 a proposal to amend Options 3, Section 3 (Minimum Trading Increments) to extend through June 30, 2020 or the date of permanent approval, if earlier, the Penny Pilot Program in options classes in certain issues (''Penny Pilot'' or ''Pilot'').

The text of the proposed rule change is available on the Exchange's website at *http://nasdaqmrx.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

The purpose of this filing is to amend Options 3, Section 3 to extend the Penny Pilot through June 30, 2020 or the date of permanent approval, if earlier.[3]

Under the Penny Pilot, the minimum price variation for all participating options classes, except for options overlying the PowerShares QQQ Trust (''QQQQ''), the SPDR S&P 500 Exchange Traded Fund (''SPY'') and the iShares Russell 2000 Index Fund (''IWM''), is $0.01 for all quotations in options series that are quoted at less than $3 per contract and $0.05 for all quotations in options series that are quoted at $3 per contract or greater. Options overlying QQQQ, SPY and IWM are quoted in $0.01 increments for all options series. The Penny Pilot is currently scheduled to expire on December 31, 2019.[4] The Exchange now proposes to extend the time period of the Penny Pilot through June 30, 2020 or the date of permanent approval, if earlier.

This filing does not propose any substantive changes to the Penny Pilot Program; all classes currently participating in the Penny Pilot will remain the same and all minimum increments will remain unchanged. The Exchange believes the benefits to public customers and other market participants who will be able to express their true prices to buy and sell options have been demonstrated to outweigh the potential increase in quote traffic.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The options exchanges in the U.S. that have pilot programs similar to the Penny Pilot (together ''pilot programs'') are currently working on a proposal for permanent approval of the respective pilot programs.

[4] *See* Securities Exchange Act Release No. 86147 (June 19, 2019), 84 FR 29922 (June 25, 2019) (SR–MRX–2019–13).

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[5] in general, and furthers the objectives of Section 6(b)(5) of the Act,[6] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

In particular, the proposed rule change, which extends the Penny Pilot for an additional six months through June 30, 2020 or the date of permanent approval, if earlier, will enable public customers and other market participants to express their true prices to buy and sell options for the benefit of all market participants. This is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. To the contrary, this proposal is pro-competitive because it allows Penny Pilot issues to continue trading on the Exchange.

Moreover, the Exchange believes that the proposed rule change will allow for further analysis of the Pilot and a determination of how the Pilot should be structured in the future; and will serve to promote regulatory clarity and consistency, thereby reducing burdens on the marketplace and facilitating investor protection.

The Pilot is an industry-wide initiative supported by all other option exchanges. The Exchange believes that extending the Pilot will allow for continued competition between market participants on the Exchange trading similar products as their counterparts on other exchanges, while at the same time allowing the Exchange to continue to compete for order flow with other exchanges in option issues trading as part of the Pilot.

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(5).

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

The Exchange filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act [7] and Rule 19b–4(f)(6) [8] thereunder. 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 [9] and Rule 19b–4(f)(6) [10] thereunder.

A proposed rule changed filed under Rule 19b-4(f)(6) [11] normally does not become operative prior to 30 days after the date of filing. However, pursuant to Rule 19b–4(f)(6),[12] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because doing so will allow the Pilot Program to continue without interruption in a manner that is consistent with the Commission's prior approval of the extension and expansion of the Pilot Program.[13] Accordingly, the Commission designates the proposed rule change as operative upon filing with the Commission.[14]

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(6).

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) 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 just shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[11] 17 CFR 240.19b–4(f)(6).

[12] 17 CFR 240.19b–4(f)(6)(iii).

[13] *See* Securities Exchange Act Release No. 61061 (November 24, 2009), 74 FR 62857 (December 1, 2009) (SR–NYSEArca–2009–44).

[14] For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

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–MRX–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–MRX–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–MRX–2019–26 and should be submitted on or before January 10, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2019–27461 Filed 12–19–19; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87763; File No. SR–NYSEArca–2019–91]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Permit the Continued Listing and Trading of Shares Under NYSE Arca Rule 8.600–E of the Cambria Core Equity ETF, a Series of Cambria ETF Trust

December 16, 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, NYSE Arca, Inc. (''NYSE Arca'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II 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 permit the continued listing and trading of shares under NYSE Arca Rule 8.600–E of the Cambria Core Equity ETF, a series of Cambria ETF Trust, following its reorganization into the Core Alternative ETF, a series of Listed Funds Trust, notwithstanding that its investments do not meet the requirements of Commentary .01(d)(2) to Rule 8.600–E. 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 permit the continued listing and trading of shares (''Shares'') under NYSE Arca Rule 8.600–E (''Managed Fund Shares'')[4] of the Cambria Core Equity ETF, a series of Cambria ETF Trust (the ''Cambria Trust''), following its reorganization into the Core Alternative ETF (the ''Fund''), which will be a series of the Listed Funds Trust (the ''LF Trust'' or ''Trust''). Shares of the Cambria Core Equity ETF commenced trading on the Exchange on May 24, 2017, pursuant to the generic listing criteria in Commentary .01 to NYSE Arca Rule 8.600–E.

The LF Trust has filed a combined prospectus and proxy statement (the ''Proxy Statement'') with the Commission on Form N–14 describing a reorganization plan (''Reorganization'')[5] pursuant to which, following approval of the Cambria Core Equity ETF's shareholders, all or substantially all of the assets and all of the stated liabilities included in the financial statements of the Cambria Core Equity ETF would be transferred to the Fund. According to the Proxy Statement, the investment objective of the Fund will be the same as that of the Cambria Core Equity ETF following implementation of the Reorganization. Following shareholder approval and closing of the Reorganization, investors in the Cambria Core Equity ETF will receive shares of beneficial interest of the Fund with an aggregate net asset value equal to the aggregate net asset value of the Shares of the Cambria Core Equity ETF calculated as of the close of business on the business day before the closing of the Reorganization. The closing date of the Reorganization and the first day of trading of the Fund under its new name is expected to be on or about December 18, 2019.

The Shares are offered by the LF Trust, which is registered with the Commission as an open-end management investment company consisting of multiple investment series.[6] The Fund is a series of the LF Trust. U.S. Bancorp Fund Services, LLC, doing business as U.S. Bank Global Fund Services, LLC, will be the administrator (the ''Administrator'') for the Trust. U.S. Bank N.A. will serve as the custodian for the Fund.[7] Core Alternative Capital, LLC (the ''Adviser'') will be the investment adviser to the Fund.

As discussed below, the Fund does not currently meet the requirements of Commentary .01(d)(2) to Rule 8.600–E. The Exchange proposes to permit the listing and trading of Shares of the Fund notwithstanding that the Fund's investments do not meet requirements of Commentary .01(d)(2) to Rule 8.600–E.

Commentary .06 to Rule 8.600–E provides that, if the investment adviser to the investment company issuing Managed Fund Shares is affiliated with a broker-dealer, such investment adviser shall erect and maintain a ''fire wall''

[15] 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] A Managed Fund Share is a security that represents an interest in an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1) (''1940 Act'') organized as an open-end investment company or similar entity that invests in a portfolio of securities selected by its investment adviser consistent with its investment objectives and policies. In contrast, an open-end investment company that issues Investment Company Units, listed and traded on the Exchange under NYSE Arca Rule 5.2–E(j)(3), seeks to provide investment results that correspond generally to the price and yield performance of a specific foreign or domestic stock index, fixed income securities index or combination thereof.

[5] *See* registration statement on Form N–14 under the 1933 Act, dated September 27, 2019 (File No. 333–233973) (''Proxy Statement'').

[6] The Trust is registered under the 1940 Act. On August 23, 2019, the Trust filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') a post-effective amendment to its registration statement on Form N–1A under the Securities Act of 1933 (15 U.S.C. 77a), and under the 1940 Act relating to the Fund (File Nos. 333–215588 and 811–23226) (''Registration Statement''). Description of the operation of the Trust and of the Fund and Shares herein is based, in part, on the Registration Statement. There are no permissible holdings for the Fund that are not described in this proposal. The Commission has issued an order granting certain exemptive relief to the Cambria Trust under the Investment Company Act of 1940 (15 U.S.C. 80a–1) (''1940 Act''). *See* Investment Company Act Release No. 30340 (January 4, 2013)) (File No. 812–13959). The LF Trust intends to operate in conformity with such order following the implementation of the Reorganization.

[7] The Administrator to the Cambria Core Equity ETF was SEI Investments Global Funds Services and the custodian to the Cambria Core Equity ETF was Brown Brothers Harriman & Co.

between the investment adviser and the broker-dealer with respect to access to information concerning the composition and/or changes to such investment company portfolio.[8] In addition, Commentary .06 further requires that personnel who make decisions on the investment company's portfolio composition must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the applicable investment company portfolio.

The Adviser is not a registered broker-dealer and is not affiliated with a broker-dealer. In addition, Adviser personnel who make decisions regarding a Fund's portfolio are subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the Fund's portfolio. In the event that (a) the Adviser becomes registered as a broker-dealer or newly affiliated with a broker-dealer, or (b) any new adviser or sub-adviser is a registered broker-dealer or becomes affiliated with a broker-dealer, it will implement and maintain a fire wall with respect to its relevant personnel or such broker-dealer affiliate, as applicable, regarding access to information concerning the composition and/or changes to the portfolio, and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding such portfolio.

Principal Investments of the Fund

According to the Registration Statement, the Fund is an actively managed exchange-traded fund (''ETF'') that seeks capital appreciation and capital preservation with a low correlation to the broader U.S. equity market. To achieve its investment objective, the Fund uses a combination of several strategies to produce capital appreciation while reducing risk exposure across market conditions.

Under normal market conditions,[9] at least 80% of the value of the Fund's net assets will be invested in exchange-traded equity securities that tend to offer current dividends and/or exchange traded index call and put options on the S&P 500 Index (''S&P 500 Index Options''). According to the Registration Statement, writing index call options reduces the Fund's volatility, provides steady cash flow and is an important source of the Fund's return. The Fund's purchase of index put options also protects the Fund from a significant market decline that may occur over a short period of time.

Non-Principal Investments

In addition to the principal investments described above, the Fund may invest in fixed income securities issued by various U.S. public-sector or corporate entities and obligations issued or guaranteed by the U.S. Government.

The Fund may also hold cash and/or cash equivalents.[10]

Application of Generic Listing Requirements

The Exchange submits this proposal in order to list and trade Shares of the Fund and to allow the Fund to hold listed derivatives, in particular call and put options on the S&P 500 Index, in a manner that does not comply with Commentary .01(d)(2) to Rule 8.600–E.[11] Otherwise, the Fund will comply with all other listing requirements of the Generic Listing Standards[12] for Managed Fund Shares on an initial and continued listing basis.[13]

The market for S&P 500 Index Options is highly liquid.[14] In September 2019, approximately 1.35 million options contracts on the S&P 500 Index were traded per day, which is more than $430 billion in notional volume traded on a daily basis. The Exchange believes that the liquidity in the S&P 500 Index Options markets mitigates the concerns that Commentary .01(d)(2) to Rule 8.600–E is intended to address and that such liquidity would prevent the Shares from being susceptible to manipulation.

In addition, the Exchange believes that sufficient protections are in place to protect against market manipulation of the Shares and S&P 500 Index Options for several reasons: (i) The diversity, liquidity, and market cap of the securities underlying the S&P 500 Index; (ii) the significant liquidity in the market for S&P 500 Index Options; and (iii) surveillance by the Exchange, options exchanges[15] and the Financial Industry Regulatory Authority (''FINRA'') designed to detect violations of the federal securities laws and self-

[8] An investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940 (the ''Advisers Act''). As a result, the Adviser and its related personnel are subject to the provisions of Rule 204A–1 under the Advisers Act relating to codes of ethics. This Rule requires investment advisers to adopt a code of ethics that reflects the fiduciary nature of the relationship to clients as well as compliance with other applicable securities laws. Accordingly, procedures designed to prevent the communication and misuse of non-public information by an investment adviser must be consistent with Rule 204A–1 under the Advisers Act. In addition, Rule 206(4)–7 under the Advisers Act makes it unlawful for an investment adviser to provide investment advice to clients unless such investment adviser has (i) adopted and implemented written policies and procedures reasonably designed to prevent violation, by the investment adviser and its supervised persons, of the Advisers Act and the Commission rules adopted thereunder; (ii) implemented, at a minimum, an annual review regarding the adequacy of the policies and procedures established pursuant to subparagraph (i) above and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person) responsible for administering the policies and procedures adopted under subparagraph (i) above.

[9] The term ''normal market conditions'' is defined in NYSE Arca Rule 8.600–E(c)(5).

[10] For purposes of this filing, cash equivalents include the securities included in Commentary .01(c) to NYSE Arca Rule 8.600–E.

[11] Commentary .01(d)(2) to Rule 8.600–E provides that ''the aggregate gross notional value of listed derivatives based on any five or fewer underlying reference assets shall not exceed 65% of the weight of the portfolio (including gross notional exposures), and the aggregate gross notional value of listed derivatives based on any single underlying reference asset shall not exceed 30% of the weight of the portfolio (including gross notional exposures).'' The Fund does not meet the generic listing standards because its fails to meet the requirement of Commentary .01(d)(2) that prevents the aggregate gross notional value of listed derivatives based on any single underlying reference asset from exceeding 30% of the weight of the portfolio (including gross notional exposures) and the requirement that the aggregate gross notional value of listed derivatives based on any five or fewer underlying reference assets shall not exceed 65% of the weight of the portfolio (including gross notional exposures).

[12] For purposes of this proposal, the term ''Generic Listing Standards'' means the generic listing rules for Managed Fund Shares under Commentary .01 to Rule 8.600–E.

[13] The Exchange notes that this proposed rule change is similar to previous rule changes involving Managed Fund Shares with similar exposures to listed derivatives based on a single underlying reference asset. *See* Securities Exchange Act Release No. 87556 (November 18, 2019), 84 FR 64589 (November 22, 2019) (SR–NYSEArca–2019–82); Securities Exchange Act Release No. 86773 (August 27, 2019), 84 FR 46051 (September 3, 2019) (SR–CboeBZX–2019–077); Securities Exchange Act Release No. 83146 (May 1, 2018), 83 FR 20103 (May 7, 2018) (SR–CboeBZX–2018–029) (permitted up to 50% of the weight of its portfolio including gross notional exposure in S&P 500 Index options); Securities Exchange Act Release No. 80529 (April 26, 2017), 82 FR 20506 (May 2, 2017) (SR–BatsBZX–2017–14). *See also* Securities Exchange Act Release Nos. 82906 (March 20, 2018), 83 FR 12992 (March 26, 2018) (SR–CboeBZX–2017–012) (order approving the listing and trading of the LHA Market State Tactical U.S. Equity ETF); 83679 (July 20, 2018), 83 FR 35505 (July 26, 2018) (SR–BatsBZX–2017–72) (Notice of Filing of Amendment No. 4 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 4 Thereto, to List and Trade Shares of the Innovator S&P 500 Buffer ETF Series, Innovator S&P 500 Power Buffer ETF Series, and Innovator S&P 500 Ultra Buffer ETF Series Under Rule 14.11(i)).

[14] S&P 500 Index options are traded on the Cboe Exchange, Inc. (''Cboe Options''). The Exchange, Cboe Options and all other national securities exchanges are members of the Intermarket Surveillance Group (''ISG'').

[15] The Exchange and all nine U.S. options exchanges are members of the Options Regulatory Surveillance Authority, which was established in 2006 to provide efficiencies in looking for insider trading and serves as a central organization to facilitate cooperation in insider trading investigations for the U.S. options exchanges.

regulatory organization (''SRO'') rules. The Exchange has in place a surveillance program for transactions in ETFs to ensure the availability of information necessary to detect and deter potential manipulations and other trading abuses, thereby making the Shares less readily susceptible to manipulation. Further, the Exchange believes that because the S&P 500 Index Options in the Fund's portfolio will be acquired in extremely liquid and highly regulated markets,[16] the Shares are less readily susceptible to manipulation.

As noted above, S&P 500 Index Options are among the most liquid options in the world and derive their value from the actively traded S&P 500 Index components. The contracts are cash-settled with no delivery of stocks or ETFs, and trade in competitive auction markets with price and quote transparency. The Exchange believes the highly regulated options markets and the broad base and scope of the S&P 500 Index make securities that derive their value from that index less susceptible to market manipulation in view of market capitalization and liquidity of the S&P 500 Index components, price and quote transparency, and arbitrage opportunities.

The Exchange believes that the liquidity of the markets for securities in the S&P 500 Index and S&P 500 Index Options is sufficiently great to deter fraudulent or manipulative acts associated with the Fund's Share price. Coupled with the extensive surveillance programs of the Exchange and other SROs described herein, the Exchange does not believe that trading in the Shares would present manipulation concerns.

Availability of Information

The Fund's website (*https://www.corealtfunds.com*) will include the Fund's prospectus that may be downloaded. The Fund's website will include ticker and exchange information, along with additional quantitative information updated on a daily basis, including, for the Fund: (1) The prior business day's net asset value (''NAV'') per Share and the market closing price or mid-point of the bid/ask spread at the time of calculation of such NAV per Share (the ''Bid/Ask Price''),[17] and a calculation of the premium or discount of the market closing price or Bid/Ask Price against such NAV per Share; and (2) a table showing the number of days of such premium or discount for the most recently completed calendar year, and the most recently completed calendar quarters since that year (or the life of Fund, if shorter). On each business day, before commencement of trading in Shares in the Core Trading Session[18] on the Exchange, the Fund will disclose on its website the Disclosed Portfolio as defined in NYSE Arca Rule 8.600–E(c)(2) (the ''Disclosed Portfolio'') that forms the basis for the Fund's calculation of NAV at the end of the business day.

On a daily basis, the Fund will disclose the information required under NYSE Arca Rule 8.600–E(c)(2) to the extent applicable. The website information will be publicly available at no charge.

Investors can also obtain the Trust's Statement of Additional Information (''SAI''), the Fund's Shareholder Reports, and the Fund's Forms N–CSR and Forms N–CEN. The Fund's SAI and Shareholder Reports will be available free upon request from the Trust, and those documents and the Form N–CSR, Form N–PX, Form N–PORT and Form N–CEN may be viewed on-screen or downloaded from the Commission's website at *www.sec.gov*.

Quotation and last sale information for the Shares and other U.S. exchange traded equities will be available via the Consolidated Tape Association (''CTA'') high-speed line. In addition, the Portfolio Indicative Value as defined in NYSE Arca Rule 8.600–E(c)(3) (the ''PIV'')), will be widely disseminated by one or more major market data vendors at least every 15 seconds during the Core Trading Session.

The intra-day, closing and settlement prices of S&P 500 Index Options will be readily available from the Options Price Reporting Authority (''OPRA''), Cboe Options' website, automated quotation systems, published or other public sources, or online information services such as Bloomberg or Reuters. Additionally, FINRA's Trade Reporting and Compliance Engine (''TRACE'') will be a source of price information for certain fixed income securities to the extent transactions in such securities are reported to TRACE. For fixed income securities that are not reported to TRACE, (i) intraday price quotations will generally be available from broker-dealers and trading platforms (as applicable) and (ii) price information will be available from feeds from market data vendors, published or other public sources, or online information services.

Price information regarding U.S. government securities and cash equivalents generally may be obtained from brokers and dealers who make markets in such securities or through nationally recognized pricing services through subscription agreements.

Quotation and last sale information for equity securities of non-U.S. companies will be available from the exchanges on which they trade and from major market data vendors, as applicable.

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of the Fund.[19] Trading in Shares of the Fund will be halted if the circuit breaker parameters in NYSE Arca Rule 7.12–E have been reached. Trading also may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. Trading in the Fund's Shares also will be subject to Rule 8.600–E(d)(2)(D) (''Trading Halts'').

Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. Shares will trade on the NYSE Arca Marketplace from 4 a.m. to 8 p.m., E.T. in accordance with NYSE Arca Rule 7.34–E (Early, Core, and Late Trading Sessions). The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. As provided in NYSE Arca Rule 7.6–E, the minimum price variation (''MPV'') for quoting and entry of orders in equity securities traded on the NYSE Arca Marketplace is $0.01, with the exception of securities that are priced less than $1.00 for which the MPV for order entry is $0.0001.

With the exception of the requirements of Commentary .01(d)(2) (with respect to listed derivatives) as described above, the Shares of the Fund will conform to the initial and continued listing criteria under NYSE

[16] All exchange-listed securities that the Fund may hold will trade on a market that is a member of the ISG and the Fund will not hold any non-exchange-listed equities or options. For a list of the current members of ISG, *see www.isgportal.org. See also* notes 14 and 15, *supra.*

[17] The Bid/Ask Price of the Fund's Shares will be determined using the mid-point of the highest bid and the lowest offer on the Exchange as of the time of calculation of the Fund's NAV. The records relating to Bid/Ask Prices will be retained by the Fund and its service providers.

[18] The Core Trading Session begins for each security at 9:30 a.m. Eastern time and ends at the conclusion of Core Trading Hours or the Core Closing Auction, whichever comes later. *See* NYSE Arca Rule 7.34–E. ''Core Trading Hours'' is defined as the hours of 9:30 a.m. Eastern time through 4:00 p.m. (Eastern Time) or such other hours as may be determined by the Exchange from time to time. See Rule 1.1(j).

[19] *See* NYSE Arca Rule 7.12–E.

Arca Rule 8.600–E. Consistent with Commentary .06 of NYSE Arca Rule 8.600–E, the Adviser will implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material non-public information regarding the actual components of the Fund's portfolio. The Exchange represents that, for initial and continued listing, the Fund will be in compliance with Rule 10A–3 [20] under the Act, as provided by NYSE Arca Rule 5.3–E. The Exchange will obtain a representation from the issuer of the Shares that the NAV per Share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time.

Surveillance

The Exchange believes that its surveillance procedures are adequate to properly monitor the trading of the Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws. The Exchange represents that trading in the Shares will be subject to the existing trading surveillances, administered by FINRA on behalf of the Exchange, or by regulatory staff of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws. The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and federal securities laws applicable to trading on the Exchange.[21]

The surveillances referred to above generally focus on detecting securities trading outside their normal patterns, which could be indicative of manipulative or other violative activity. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations.

The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares, exchange traded equity securities, and S&P 500 Index Options with other markets and other entities that are members of the ISG, and the Exchange or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading in such securities from such markets and other entities. The Exchange may obtain information regarding trading in such securities from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement. In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

All statements and representations made in this filing regarding (a) the description of the portfolio or reference assets, (b) limitations on portfolio holdings or reference assets, or (c) the applicability of Exchange listing rules specified in this rule filing shall constitute continued listing requirements for listing the Shares of the Fund on the Exchange.

The issuer must notify the Exchange of any failure by the Fund to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing requirements. If the Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under NYSE Arca Rule 5.5–E(m).

Information Bulletin

Prior to the commencement of trading, the Exchange will inform its Equity Trading Permit Holders [22] in an Information Bulletin (''Bulletin'') of the special characteristics and risks associated with trading the Shares. Specifically, the Bulletin will discuss the following: (1) The procedures for purchases and redemptions of Shares in creation unit aggregations (and that Shares are not individually redeemable); (2) NYSE Arca Rule 9.2–E(a), which imposes a duty of due diligence on its Equity Trading Permit Holders to learn the essential facts relating to every customer prior to trading the Shares; (3) the risks involved in trading the Shares during the Early and Late Trading Sessions when an updated PIV will not be calculated or publicly disseminated; (4) how information regarding the PIV and the Disclosed Portfolio is disseminated; (5) the requirement that Equity Trading Permit Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (6) trading information.

In addition, the Bulletin will reference that the Fund is subject to various fees and expenses described in the Registration Statement. The Bulletin will discuss any exemptive, no-action, and interpretive relief granted by the Commission from any rules under the Act. The Bulletin will also disclose that the NAV for the Shares will be calculated after 4:00 p.m., Eastern time each trading day.

2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(5) [23] that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest.

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, 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 in that the Shares will meet each of the initial and continued listing criteria in Commentary .01 to NYSE Arca Rule 8.600–E, with the exception of Commentary .01(d)(2) to NYSE Arca Rule 8.600–E, which requires that the aggregate gross notional value of listed derivatives based on any five or fewer underlying reference assets shall not exceed 65% of the weight of the portfolio (including gross notional exposures), and the aggregate gross notional value of listed derivatives based on any single underlying reference asset shall not exceed 30% of the weight of the portfolio (including gross notional exposures).[24] Commentary .01(d)(2) to

[20] 17 CFR 240.10A–3.

[21] FINRA conducts cross-market surveillances on behalf of the Exchange pursuant to a regulatory services agreement. The Exchange is responsible for FINRA's performance under this regulatory services agreement.

[22] An ''ETP Holder'' means a sole proprietorship, partnership, corporation, limited liability company or other organization in good standing that is a registered broker-dealer and has been issued an Equity Trading Permit (''ETP'') by the Exchange. *See* Rules 1.1(n) and (o).

[23] 15 U.S.C. 78f(b)(5).

[24] As noted above, the Exchange is submitting this proposal because the Fund would not meet the requirements of Commentary .01(d)(2) to Rule 8.600–E which prevents the aggregate gross notional value of listed derivatives based on any single underlying reference asset from exceeding 30% of the weight of the portfolio (including gross notional exposures) and the aggregate gross notional value of listed derivatives based on any five or fewer underlying reference assets from exceeding 65% of the weight of the portfolio (including gross notional exposures).

NYSE Arca Rule 8.600–E is intended to ensure that a fund is not subject to manipulation by virtue of significant exposure to a manipulable underlying reference asset by establishing concentration limits among the underlying reference assets for listed derivatives held by a particular fund. The Exchange notes that this proposed rule change is similar to previous rule changes involving Managed Fund Shares with similar exposures to a single underlying reference asset.[25]

The market for S&P 500 Index Options is highly liquid. In September 2019, approximately 1.35 million options contracts on the S&P 500 Index were traded per day, which is more than $430 billion in notional volume traded on a daily basis. The Exchange believes that the liquidity in the S&P 500 Index Options markets mitigates the concerns that Commentary .01(d)(2) to Rule 8.600–E is intended to address and that such liquidity would prevent the Shares from being susceptible to manipulation.

In addition, the Exchange believes that sufficient protections are in place to protect against market manipulation of the Shares and S&P 500 Index Options for several reasons: (i) The diversity, liquidity, and market cap of the securities underlying the S&P 500 Index; (ii) the significant liquidity in the market for S&P 500 Index Options; and (iii) surveillance by the Exchange, options exchanges and FINRA designed to detect violations of the federal securities laws and SRO rules. The Exchange has in place a surveillance program for transactions in ETFs to ensure the availability of information necessary to detect and deter potential manipulations and other trading abuses, thereby making the Shares less readily susceptible to manipulation. Further, the Exchange believes that because the S&P 500 Index Options in the Fund's portfolio will be acquired in extremely liquid and highly regulated markets, the Shares are less readily susceptible to manipulation.

The Exchange believes that its surveillance procedures are adequate to properly monitor the trading of the Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws. The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares, exchange-traded options and equities with other markets and other entities that are members of the ISG, and the Exchange or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading in such securities and financial instruments from such markets and other entities. The Exchange may obtain information regarding trading in such securities and financial instruments from markets and other entities that are members of ISG. In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

As noted above, S&P 500 Index Options are highly liquid and derive their value from the actively traded S&P 500 Index components. The Exchange believes the highly regulated options markets and the broad base and scope of the S&P 500 Index make securities that derive their value from the S&P 500 Index less susceptible to market manipulation in view of market capitalization and liquidity of the components of the S&P 500 Index, price and quote transparency, and arbitrage opportunities.

The Exchange believes that the liquidity of the markets for securities in the S&P 500 Index, S&P 500 Index Options, and other related derivatives is sufficiently great to deter fraudulent or manipulative acts associated with the Fund's Shares price. The Exchange also believes that such liquidity is sufficient to support the creation and redemption mechanism. Coupled with the extensive surveillance programs of the SROs described above, the Exchange does not believe that trading in the Fund's Shares would present manipulation concerns.

The Exchange represents that, except as described above, the Fund will meet and be subject to all other requirements of the Generic Listing Standards and other applicable continued listing requirements for Managed Fund Shares under Rule 8.600–E, including those requirements regarding the Disclosed Portfolio, PIV, suspension of trading or removal, trading halts, disclosure, and firewalls. The Trust is required to comply with Rule 10A–3 under the Act for the initial and continued listing of the Shares of the Fund.

For the above reasons, the Exchange believes that the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purpose of the Act. The Exchange notes that the proposed rule change will permit the listing and trading of an additional type of Managed Fund Shares that will enhance competition among market participants, to the benefit of investors and the marketplace.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

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

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[26] and Rule 19b–4(f)(6) thereunder.[27]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act[28] normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)(iii)[29] 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 proposal may become operative upon filing. The Exchange states that waiver of the operative delay would permit the Fund to immediately employ its index options strategy, which the Exchange believes will allow the Fund to adapt to changing market environments and shifts in the underlying holdings of the Fund. The Exchange states that the proposal is generally consistent with previous rule changes involving Managed Fund Shares with similar exposures to listed derivatives based on a single underlying reference asset.[30] In addition, the Exchange represents that the closing date of the Reorganization and the first day of trading of the Fund under its new name is expected to be on or about December 18, 2019. The Commission believes that the proposal raises no new or novel regulatory issues

[25] *See* note 13, *supra*.

[26] 15 U.S.C. 78s(b)(3)(A).

[27] 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.

[28] 17 CFR 240.19b–4(f)(6).

[29] 17 CFR 240.19b–4(f)(6)(iii).

[30] *See supra* note 13.

and waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission designates the proposed rule change to be operative upon filing.[31]

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–NYSEArca–2019–91 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–NYSEArca-2019–91. 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–NYSEArca–2019–91 and should be submitted on or before January 10, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[32]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2019–27459 Filed 12–19–19; 8:45 am]

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[31] 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).

[32] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87761; File No. SR–NYSEAMER–2019–41]

Self-Regulatory Organizations; NYSE American LLC; Order Approving a Proposed Rule Change Regarding the Applicability and Functionality of Certain Order Types on the Exchange

December 16, 2019.

I. Introduction

On October 22, 2019, NYSE American LLC (''Exchange'') filed with the Securities and Exchange Commission (''Commission'') pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend its rules to clarify the applicability and functionality of certain order types on the Exchange. The proposed rule change was published for comment in the **Federal Register** on November 7, 2019.[3] The Commission received no comment letters on the proposed rule change. This order approves the proposed rule change.

II. Description of the Proposal

The Exchange proposes to amend Rule 900.3NY (Orders Defined) to clarify the applicability and functionality of certain order types. Specifically, the Exchange proposes to amend the definitions of Stop Orders, Stop Limit Orders and All-or None (''AON'') Orders, as set forth in Rule 900.3NY(d), which describes Contingency Orders or Working Orders. The Exchange states it is not proposing to change or alter any obligations, rights, policies or practices. Rather, the Exchange states that its proposal is designed to reduce potential investor confusion as to the functionality and applicability of certain order types presently available on the Exchange.[4]

Proposed Changes to Order Type Definitions

Rule 900.3NY (the ''Rule'') contains certain definitions of options order types available on the Exchange. Paragraph (d) of the Rule defines Contingency Orders or Working Orders as orders that are ''contingent upon a condition being satisfied or an order with a conditional or undisplayed price and/or size.'' The Exchange proposes to add language regarding the handling of such orders to state that Contingency Orders and Working Orders are maintained in the Working Order File of the Consolidated Book until they are eligible for execution and/or display.[5] As discussed below, the Exchange also proposes to amend the definitions of Stop Orders, Stop Limit Orders and AON Orders, which are Contingency Orders/Working Orders.

Rule 900.3NY(d)(1)–(2): Stop Orders and Stop Limit Orders. A Stop Order is an order that becomes a Market Order when the market for a particular option contract reaches a specified price.[6] A Stop Limit Order is an order that becomes a Limit Order when the market for a particular option contract reaches a specified price.[7] Stop Orders and Stop Limit Orders (collectively, ''Stop Orders'' herein unless otherwise specified) track the price of an option and are generally used to limit losses as prices move up, in the case of buy orders, or down in the case of sell orders. In each case, the ''triggering event,'' which converts the order type (to a Market Order or Limit Order, as applicable) occurs once the option

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 87442 (November 1, 2019), 84 FR 60125 (''Notice'').

[4] *See* Notice, *supra* note 3, 84 FR at 60126.

[5] *See* Rule 900.3NY(d). *See* Rule 964NY(b)(2)(E) (regarding priority of orders in the Working Order File once eligible for execution and stating that such orders ''do not have any priority or standing until they are eligible for execution and/or display'') and Rule 964NY(a) (providing, in relevant part, that the Exchange will display ''all non-marketable limit orders in the Display Order Process, unless indicated otherwise'').

[6] *See* Rule 900.3NY(d)(1).

[7] *See* Rule 900.3NY(d)(2).

trades or is quoted at, or above for a buy (below for a sell), the specified stop price.[8] Thus, Stop Orders to buy (sell) may be triggered as the price of an option rises (falls). The current rule provides that a Stop Order to buy (sell) will be rejected if, at the time of arrival, the stop price is below (above) the bid (offer).[9] The Exchange proposes to modify the description of Stop Orders as follows. First, the Exchange proposes to revise the first sentence describing each order type (*i.e.,* Rule 900.3NY(d)(1), (2)) to state that the order type converts to a Market or Limit Order, respectively—or ''is triggered''—when the market for a particular option contract reaches a specified price.[10] The Exchange also proposes to modify Rule 900.3NY(d)(1), (2) to combine into one sentence the description of both buy and sell Stop Orders without modifying functionality. The current rule addresses buy and sell Stop Orders in two sentences and the Exchange believes the proposed change would make it easier to navigate. Specifically, proposed Rule 900.3NY(d)(1), (2) would provide that a Stop Order (or Stop Limit Order) ''to buy (sell) is triggered'' such that it becomes a Market Order or Limit Order, respectively, ''when the option contract trades at a price equal to or greater (less) than the specified 'stop' price on the Exchange or another Market Center or when the Exchange bid (offer) is quoted at a price equal to or greater (less) than the stop price.'' [11]

The Exchange also proposes to address the display and standing of each type of Stop Order for which information is currently contained only in paragraph (d)(1) of Rule 900.3NY.[12] Specifically, the Exchange proposes to modify its rules to reflect that each type of Stop Order ''is not displayed and has no standing in any Order Process in the Consolidated Book, unless or until it is triggered (*i.e.,* same-side incoming interest trades or quotes at a price equal to or better than the stop price).'' [13] The Exchange additionally proposes to add new rule text to clarify that ''[a]fter the triggering event,'' a Stop Order (per Rule 900.3NY(d)(1)) becomes a new Market Order, and a Stop Limit Order (per Rule 900.3NY(d)(2)) becomes a new Limit Order, and each converted order is processed accordingly.[14]

Finally, the Exchange proposes to delete the last two sentences in the description of each type of Stop Order, which provides for the rejection of such orders to buy (sell) if entered with a stop price below the bid (or above the offer). The Exchange states that this language is not accurate because the Exchange does not reject Stop Orders so priced, but instead would execute such orders once triggered.[15] This proposed change would reflect current Exchange functionality.[16]

Rule 900.3NY(d)(4): AON Orders. An AON Order is a Market or Limit Order that is to be executed in its entirety or not at all.[17] The Exchange proposes to make clear that an AON Order that does not execute on arrival will not be displayed or routed to another Market Center (*i.e.,* AON Orders may only be executed on the Exchange) and would have no standing in any Order Process in the Consolidated Book.[18] Further, the Exchange proposes to clarify that AON Orders are not eligible to execute against incoming interest but rather may execute solely against interest resting in the Consolidated Book when sufficient size is available.[19] Finally, the Exchange proposes to specify that the System monitors the Consolidated Book for AON Order execution opportunities.[20]

III. Discussion and Commission's Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act [21] and the rules and regulations thereunder applicable to a national securities exchange.[22] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[23] which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating 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, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission notes that the Exchange represents it is not proposing to change or alter any obligations, rights, policies or practices. The Commission notes that the proposal would delete inaccurate language regarding Stop Orders and clarify the descriptions regarding the functionality of Contingency Orders, Working Orders, Stop Orders, and AON Orders. In addition, the proposal would make organizational and non-substantive changes to the rule text. The Commission believes this should add transparency and clarity to the Exchange's rules, without altering current functionality, to the benefit of investors, market participants, and the public in general.

For the reasons discussed above, the Commission believes that the proposed rule change is consistent with the Act.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[24] that the proposed rule change (SR–NYSEAMER–2019–41) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[25]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2019–27457 Filed 12–19–19; 8:45 am]

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[8] *See* Rule 900.3NY(d)(1), (2).

[9] *Id.*

[10] *See* proposed Rule 900.3NY(d)(1), (2).

[11] *See* proposed Rule 900.3NY(d)(1), (2). Consistent with this proposed change to address both buy and sell Stop Orders and Stop Limit Orders in one sentence, the Exchange proposes to delete as unnecessary the sentences in the current definitions that describe the functionality for sell Stop Orders and sell Stop Limit Orders. *See id.*

[12] *See* Rule 900.3NY(d)(1) (which provides that ''Stop Orders (including Stop Limit Orders) shall not have standing in any Order Process in the Consolidated Book and shall not be displayed'').

[13] *See* proposed Rule 900.3NY(d)(1), (2). The Exchange notes that this proposed text modifies the existing text in paragraph (d)(1) and is new text for paragraph (d)(2) of the Rule. *See id.*

[14] *See* proposed Rule 900.3NY(d)(1), (2). *See also* Rule 900.3NY(a), (b) (defining Market Order and Limit Order, respectively).

[15] *See* Notice, *supra* note 3, 84 FR at 60126.

[16] *See* proposed Rule 900.3NY(d)(1), (2).

[17] *See* Rule 900.3NY(d)(4).

[18] *See* proposed Rule 900.3NY(d)(4). *See also* Rule 964NY(b)(2)(E) (regarding priority orders in the Working Order File and noting that such orders (*i.e.,* AON Orders) have no priority or standing until eligible for execution and/or display).

[19] *See* proposed Rule 900.3NY(d)(4).

[20] *See id.*

[21] 15 U.S.C. 78(f).

[22] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[23] 15 U.S.C. 78f(b)(5).

[24] 15 U.S.C. 78s(b)(2).

[25] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87759; File No. SR–CboeBZX–2019–047]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing of Amendment Nos. 4 and 5, and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment Nos. 4 and 5, To Adopt BZX Rule 14.11(k) To Permit the Listing and Trading of Managed Portfolio Shares

December 16, 2019.

I. Introduction

On June 6, 2019, Cboe BZX Exchange, Inc. (''Exchange'' or ''BZX'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to adopt BZX Rule 14.11(k) to permit the listing and trading of Managed Portfolio Shares, which are shares (''Shares'') of actively managed exchange-traded funds for which the portfolio is disclosed in accordance with standard mutual fund disclosure rules. The proposed rule change was published for comment in the **Federal Register** on June 25, 2019.[3] On August 2, 2019, pursuant to Section 19(b)(2) of the Exchange Act,[4] the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.[5] On September 20, 2019, the Exchange filed Amendment No. 1 to the proposed rule change, which replaced and superseded the proposed rule change as originally filed. On September 23, 2019, the Exchange filed Amendment No. 2 to the proposed rule change, which replaced and superseded the proposed rule change as amended by Amendment No. 1.[6] On September 23, 2019, the Commission published Amendment No. 2 for notice and comment and instituted proceedings under Section 19(b)(2)(B) of the Exchange Act [7] to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 2.[8] On November 6, 2019, the Exchange filed Amendment No. 3 to the proposed rule change, which replaced and superseded the proposed rule change as amended by Amendment No. 2.[9] On November 21, 2019, the Exchange filed Amendment No. 4 to the proposed rule change, which replaced and superseded the proposed rule change as amended by Amendment No. 3.[10] On December 4, 2019, the Exchange filed partial Amendment No. 5 to the proposed rule change, which amended the proposed rule change as amended by Amendment No. 4.[11] The Commission has received no comments on the proposed rule change. The Commission is publishing this notice to solicit comments on Amendment Nos. 4 and 5 from interested persons, and is approving the proposed rule change, as modified by Amendment Nos. 4 and 5, on an accelerated basis.

II. Summary of the Exchange's Description of the Proposed Rule Change, as Modified by Amendment Nos. 4 and 5 [12]

The Exchange proposes to adopt new BZX Rule 14.11(k), which would govern the listing and trading of ''Managed Portfolio Shares.'' [13]

A. Key Features of Managed Portfolio Shares

The Exchange proposes to define the term ''Managed Portfolio Share'' as a security that: (a) Represents an interest in an investment company registered under the Investment Company Act of 1940 (''Investment Company'') organized as an open-end management investment company, that invests in a portfolio of securities selected by the Investment Company's investment adviser consistent with the Investment Company's investment objectives and policies; (b) is issued in a Creation Unit,[14] or multiples thereof, in return for a designated portfolio of instruments (and/or an amount of cash) with a value equal to the next determined net asset value and delivered to the ''Authorized Participant'' (as defined in the Investment Company's Form N–1A filed with the Commission) through a Confidential Account; [15] (c) when aggregated into a Redemption Unit,[16] or

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 86157 (June 19, 2019), 84 FR 29892.

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 86157, 84 FR 39046 (August 8, 2019).

[6] Amendments No. 1 and No. 2 are available on the Commission's website at *https://www.sec.gov/comments/sr-cboebzx-2019-047/srcboebzx2019047.htm.*

[7] 15 U.S.C. 78s(b)(2)(B).

[8] *See* Securities Exchange Act Release No. 87062, 84 FR 51193 (September 27, 2019).

[9] Amendment No. 3 is available on the Commission's website at *https://www.sec.gov/comments/sr-cboebzx-2019-047/srcboebzx2019047-6402382-198409.pdf.*

[10] In Amendment No. 4, the Exchange (a) revised the circumstances under which the Exchange will consider the suspension of trading in, and will commence delisting proceedings for, a series of Managed Portfolio Shares to include instances where the Exchange has halted trading in a series of Managed Portfolio Shares pursuant to proposed BZX Rule 14.11(k)(4)(B)(iii)(a), and such issue persists past the trading day in which it occurred; (b) revised its proposed rule pertaining to trading halts to provide that the Exchange may consider all relevant factors in exercising its discretion to halt trading in a series of Managed Portfolio Shares, and that trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the series of Managed Portfolio Shares inadvisable; (c) stated that the Exchange believes that the ability to access portfolio information for a series of Managed Portfolio Shares on an as needed basis pursuant to the proposed rule will provide it with sufficient information to perform the necessary regulatory functions associated with listing and trading series of Managed Portfolio Shares on the Exchange; (d) discussed why the Exchange believes the proposed rule relating to trading halts is consistent with the Exchange Act and clarified how the Exchange would assess the need to halt trading upon receipt of certain information, or a request to halt trading, from the Investment Company (as defined below) issuing a series of Managed Portfolio Shares or its agent; and (e) made other technical, clarifying, and conforming changes. Amendment No. 4 is available on the Commission's website at *https://www.sec.gov/comments/sr-cboebzx-2019-047/srcboebzx2019047-6463150-199308.pdf.*

[11] In partial Amendment No. 5, the Exchange clarified that the portfolio holdings for a series of Managed Portfolio Shares would be disclosed within at least 60 days following the end of every fiscal (rather than calendar) quarter. Partial Amendment No. 5 is available on the Commission's website at *https://www.sec.gov/comments/sr-cboebzx-2019-047/srcboebzx2019047-6511364-200228.pdf.*

[12] For a complete description of the Exchange's proposal, as amended, *see* Amendment No. 4, *supra* note 10, and partial Amendment No. 5, *supra* note 11.

[13] The Exchange states that the basis of the proposal is the amended application for exemptive relief under the Investment Company Act of 1940 (''1940 Act'') filed on April 4, 2019 (''1940 Act Application''). The notice for the 1940 Act Application was published on April 8, 2019 (''1940 Act Notice'') (File No. 812–14405) and a subsequent order granting exemptive relief under the 1940 Act to Precidian Funds LLC (''Precidian''), Precidian ETFs Trust and Precidian ETF Trust II, and Foreside Fund Services, LLC was issued on May 20, 2019 (''1940 Act Order'' and, collectively, with the 1940 Act Application and the 1940 Act Notice, ''Exemptive Relief'').

[14] Proposed BZX Rule 14.11(k)(3)(F) defines a ''Creation Unit'' as a specified minimum number of Managed Portfolio Shares issued by an Investment Company at the request of an Authorized Participant in return for a designated portfolio of instruments and/or cash.

[15] Proposed BZX Rule 14.11(k)(3)(D) defines a ''Confidential Account'' as an account owned by an Authorized Participant and held with an AP Representative (as defined below) on behalf of the Authorized Participant. The account will be established and governed by contractual agreement between the AP Representative and the Authorized Participant solely for the purposes of creation and redemption, while keeping confidential the Creation Basket constituents of each series of Managed Portfolio Shares, including from the Authorized Participant. The books and records of the Confidential Account will be maintained by the AP Representative on behalf of the Authorized Participant.

[16] Proposed BZX Rule 14.11(k)(3)(G) defines a ''Redemption Unit'' as a specified minimum

Continued

multiples thereof, may be redeemed for a designated portfolio of instruments (and/or an amount of cash) with a value equal to the next determined net asset value delivered to the Confidential Account for the benefit of the Authorized Participant; and (d) the portfolio holdings for which are disclosed within at least 60 days following the end of every fiscal quarter.

According to the Exchange, while Investment Companies issuing Managed Portfolio Shares would be actively-managed, and in that respect would be similar to those issuing Managed Fund Shares,[17] Managed Portfolio Shares would differ from Managed Fund Shares in the following material respects.

- Series of Managed Fund Shares are required to disseminate their ''Disclosed Portfolio'' at least once daily.[18] By contrast, the portfolio for a series of Managed Portfolio Shares would be disclosed only quarterly.[19]
- In connection with the creation of Shares in Creation Units or the redemption of Shares in Redemption Units, the delivery or receipt of any portfolio securities in kind would be effected through an AP Representative[20] in a Confidential Account established for the benefit of the creating or redeeming Authorized Participant without disclosing the identity of the securities to the Authorized Participant. To protect the identity and weightings of the portfolio holdings, a series of Managed Portfolio Shares would sell and redeem Shares in Creation Units and Redemption Units to Authorized Participants only through an AP Representative. As such, on each business day, before commencement of trading in Shares on the Exchange, each series of Managed Portfolio Shares will provide to the relevant AP Representative the names and quantities of the instruments comprising a Creation Basket, *i.e.,* the Deposit Instruments or ''Redemption Instruments'', and the estimated ''Balancing Amount'' (if any),[21] for that day (as further described below). This information will permit Authorized Participants to purchase Creation Units or redeem Redemption Units through an in-kind transaction with the fund, as described below.
- For each series of Managed Portfolio Shares, a ''Verified Intraday Indicative Value'' (''VIIV'')[22] would be widely disseminated by a Reporting Authority[23] and/or by one or more major market-data vendors every second during the Exchange's Regular Trading Hours.[24] The dissemination of the VIIV will allow investors to determine the estimated intra-day value of the underlying portfolio of a series of Managed Portfolio Shares and will provide a close estimate of that value throughout the trading day.[25]

B. Proposed Listing Rules

The proposed listing rule provides that the Exchange will consider for trading, whether by listing or pursuant to unlisted trading privileges, Managed Portfolio Shares that meet the criteria of BZX Rule 14.11(k),[26] and that the Exchange will file separate proposals under Section 19(b) of the Exchange Act before the listing and trading Shares of a series of Managed Portfolio Shares.[27] Further, transactions in Managed Portfolio Shares will occur only during Regular Trading Hours.[28]

The Exchange will implement and maintain written surveillance procedures for Managed Portfolio Shares and, as part of these surveillance procedures, the Investment Company's investment adviser will, upon request by the Exchange or Financial Industry Regulatory Authority, Inc. (''FINRA''), on behalf of the Exchange, make available to the Exchange or FINRA the daily portfolio holdings of each series of Managed Portfolio Shares.[29]

Moreover, according to the proposal, if the investment adviser to the Investment Company issuing Managed Portfolio Shares is registered as a broker-dealer or is affiliated with a broker-dealer, such investment adviser will erect and maintain a ''fire wall'' between the investment adviser and personnel of the broker-dealer or broker-dealer affiliate, as applicable, with respect to access to information concerning the composition of and/or changes to such Investment Company portfolio and/or the Creation Basket.[30] Any person related to the investment adviser or Investment Company who makes decisions pertaining to the Investment Company's portfolio composition or has access to information regarding the Investment Company's portfolio composition or changes thereto or the Creation Basket, must be subject to procedures designed

number of Managed Portfolio Shares that may be redeemed to an Investment Company at the request of an Authorized Participant in return for a portfolio of instruments and/or cash.

[17] Managed Fund Shares are Shares of actively-managed Investment Companies listed and traded under BZX Rule 14.11(i).

[18] BZX Rule 14.11(i)(3)(B) defines the term ''Disclosed Portfolio'' as the identities and quantities of the securities and other assets held by the Investment Company that will form the basis for the Investment Company's calculation of net asset value (''NAV'') at the end of the business day. BZX Rule 14.11(i)(4)(B)(ii)(a) requires that the Disclosed Portfolio be disseminated at least once daily and be made available to all market participants at the same time.

[19] The Exchange states that the portfolio of a series of Managed Portfolio Shares would be disclosed at least quarterly in accordance with normal disclosure requirements otherwise applicable to open-end investment companies registered under the 1940 Act. *See* Amendment No. 4, *supra* note 10, at 16.

[20] Proposed BZX Rule 14.11(k)(3)(C) defines an ''AP Representative'' as an unaffiliated broker-dealer with which an Authorized Participant has signed an agreement to establish a Confidential Account for the benefit of such Authorized Participant that will deliver or receive, on behalf of the Authorized Participant, all consideration to or from the Investment Company in a creation or redemption. An AP Representative will not be permitted to disclose the Creation Basket to any person, including the Authorized Participants. Proposed BZX Rule 14.11(k)(3)(E) defines the ''Creation Basket'' as, on any given business day, the names and quantities of the specified instruments (and/or an amount of cash) that are required for an AP Representative to deposit in-kind on behalf of an Authorized Participant in exchange for a Creation Unit and the names and quantities of the specified instruments (and/or an amount of cash) that will be transferred in-kind to an AP Representative on behalf of an Authorized Participant in exchange for a Redemption Unit, which will be identical and will be transmitted to each AP Representative before the commencement of trading.

[21] The Balancing Amount is the cash amount necessary for the applicable fund to receive or pay to compensate for the difference between the value of the securities delivered as part of a redemption and the NAV, to the extent that such values are different.

[22] Proposed BZX Rule 14.11(k)(3)(B) defines the ''Verified Intraday Indicative Value'' as the indicative value of a Managed Portfolio Share based on all of the holdings of a series of Managed Portfolio Shares as of the close of business on the prior business day and, for corporate actions, based on the applicable holdings as of the opening of business on the current business day, priced and disseminated in one second intervals during Regular Trading Hours by the Reporting Authority.

[23] Proposed BZX Rule 14.11(k)(3)(H) defines the term ''Reporting Authority'' in respect of a particular series of Managed Portfolio Shares as the Exchange, the exchange that lists a particular series of Managed Portfolio Shares (if the Exchange is trading such series pursuant to unlisted trading privileges), an institution, or a reporting service designated by the Investment Company as the official source for calculating and reporting information relating to such series, including, the NAV, the VIIV, or other information relating to the issuance, redemption or trading of Managed Portfolio Shares. A series of Managed Portfolio Shares may have more than one Reporting Authority, each having different functions.

[24] As defined in BZX Rule 1.5(w), the term ''Regular Trading Hours'' means the time between 9:30 a.m. and 4:00 p.m. Eastern Time.

[25] *See* Amendment No. 4, *supra* note 10, at 17.

[26] *See* proposed BZX Rule 14.11(k)(1). Proposed BZX Rule 14.11(k)(2) provides that BZX Rule 14.11(k) is applicable only to Managed Portfolio Shares and that, except to the extent inconsistent with BZX Rule 14.11(k), or unless the context otherwise requires, the rules and procedures of the Exchange's Board of Directors shall be applicable to the trading on the Exchange of such securities. Proposed BZX Rule 14.11(k)(2) also provides that Managed Portfolio Shares are included within the definition of ''security'' or ''securities'' as such terms are used in the Rules of the Exchange.

[27] *See* proposed BZX Rule 14.11(k)(2)(A).

[28] *See* proposed BZX Rule 14.11(k)(2)(B).

[29] *See* proposed BZX Rule 14.11(k)(2)(C).

[30] *See* proposed BZX Rule 14.11(k)(2)(D).

to prevent the use and dissemination of material nonpublic information regarding the applicable Investment Company portfolio or changes thereto or the Creation Basket.[31]

Furthermore, any person or entity, including an AP Representative, custodian, Reporting Authority, distributor, or administrator, who has access to information regarding the Investment Company's portfolio composition or changes thereto or the Creation Basket, must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the applicable Investment Company portfolio or changes thereto or the Creation Basket.[32] And if any such person or entity is registered as a broker-dealer or affiliated with a broker-dealer, such person or entity will erect and maintain a ''fire wall'' between the person or entity and the broker-dealer with respect to access to information concerning the composition and/or changes to such Investment Company portfolio or Creation Basket.[33]

Finally, proposed BZX Rule 14.11(k)(5) sets forth certain provisions relating to limitation of Exchange liability in connection with the issuance of Managed Portfolio Shares, and proposed BZX Rule 14.11(k)(6) sets forth provisions relating to prospectus delivery requirements under Section 24(d) of the 1940 Act.

Proposed Initial and Continued Listing Criteria

Proposed BZX Rule 14.11(k)(4)(A) sets forth initial listing criteria applicable to Managed Portfolio Shares. Each series of Managed Portfolio Shares will be listed and traded on the Exchange subject to application of the following initial listing criteria: (a) For each series, the Exchange will establish a minimum number of Managed Portfolio Shares required to be outstanding at the time of commencement of trading on the Exchange; (b) the Exchange will obtain a representation from the Investment Company that issues each series of Managed Portfolio Shares that the NAV per share for the series will be calculated daily and that the NAV will be made available to all market participants at the same time; and (c) all Managed Portfolio Shares shall have a stated investment objective, which shall be adhered to under Normal Market Conditions.[34]

Proposed BZX Rule 14.11(k)(4)(B) sets forth continued listing criteria for Managed Portfolio Shares. First, as discussed above, the VIIV for Managed Portfolio Shares must be widely disseminated by the Reporting Authority and/or by one or more major market data vendors in one second intervals during Regular Trading Hours, and must be disseminated to all market participants at the same time.[35]

In addition, the Exchange will consider the suspension of trading in, and will commence delisting proceedings under BZX Rule 14.12 for, a series of Managed Portfolio Shares under any of the following circumstances: (a) If, following the initial twelve-month period after commencement of trading on the Exchange of a series of Managed Portfolio Shares, there are fewer than 50 beneficial holders of the series of Managed Portfolio Shares for 30 or more consecutive trading days; (b) if the Exchange has halted trading in a series of Managed Portfolio Shares because the VIIV is interrupted pursuant to proposed BZX Rule 14.11(k)(4)(B)(iii)(b) and such interruption persists past the trading day in which it occurred or is no longer available; (c) if the Exchange has halted trading in a series of Managed Portfolio Shares because the NAV with respect to such series of Managed Portfolio Shares is not disseminated to all market participants at the same time, the holdings of such series of Managed Portfolio Shares are not made available on at least a quarterly basis as required under the 1940 Act, or such holdings are not made available to all market participants at the same time pursuant to proposed BZX Rule 14.11(k)(4)(B)(iii)(b) and such issue persists past the trading day in which it occurred; (d) if the Exchange has halted trading in a series of Managed Portfolio Shares pursuant to BZX Rule 14.11(k)(4)(B)(iii)(a) and such issue persists past the trading day in which it occurred; (e) if the Investment Company issuing the Managed Portfolio Shares has failed to file any filings required by the Commission or if the Exchange is aware that the Investment Company is not in compliance with the conditions of any applicable exemptive order or no-action relief granted by the Commission or Commission staff to the Investment Company with respect to the series of Managed Portfolio Shares; (f) if any of the continued listing requirements set forth in proposed BZX Rule 14.11(k) are not continuously maintained; (g) if any of the applicable Continued Listing Representations[36] for the issue of Managed Portfolio Shares are not continuously met; or (h) if such other event shall occur or condition exists which, in the opinion of the Exchange, makes further dealings on the Exchange inadvisable.[37]

Proposed BZX Rule 14.11(k)(4)(B)(iii) sets forth circumstances under which the Exchange may halt trading in Managed Portfolio Shares. The Exchange may consider all relevant factors in exercising its discretion to halt trading in a series of Managed Portfolio Shares.[38] Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the series of Managed Portfolio Shares inadvisable, including: (a) The extent to which trading is not occurring in the securities and/or the financial instruments comprising the portfolio; or (b) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present (any such halt pursuant to proposed BZX Rule 14.11(k)(4)(B)(iii)(a), a ''Discretionary Halt'').[39]

In addition, if the Exchange becomes aware that: (a) The VIIV of a series of Managed Portfolio Shares is not being calculated or disseminated in one second intervals, as required; (b) the NAV with respect to a series of Managed Portfolio Shares is not disseminated to all market participants at the same time; (c) the holdings of a series of Managed Portfolio Shares are not made available on at least a quarterly basis as required under the 1940 Act; or (d) such holdings are not made available to all market participants at the same time (except as otherwise permitted under the applicable exemptive order or no-action relief granted by the Commission or Commission staff to the Investment Company with respect to the series of Managed Portfolio Shares), it will halt trading in such series until such time as the VIIV, the NAV, or the holdings are

[31] *See id.*

[32] *See* proposed BZX Rule 14.11(k)(2)(E).

[33] *See id.*

[34] Proposed BZX Rule 14.11(k)(3)(I) defines ''Normal Market Conditions'' as including, but not limited to, the absence of trading halts in the applicable financial markets generally; operational issues (*e.g.,* systems failure) causing dissemination of inaccurate market information; or force majeure type events such as natural or manmade disaster, act of God, armed conflict, act of terrorism, riot or labor disruption or any similar intervening circumstance.

[35] *See* proposed BZX Rule 14.11(k)(4)(B)(i). The Exchange also proposes to amend BZX Rule 14.11(a) to state that any statements or representations regarding the VIIV specified in any filing to list a series of Managed Portfolio Shares shall constitute continued listing requirements for such securities listed on the Exchange.

[36] For the definition of the term ''Continued Listing Representation'', *see infra* note 60.

[37] *See* proposed BZX Rule 14.11(k)(4)(B)(ii).

[38] *See* proposed BZX Rule 14.11(k)(4)(B)(iii)(a).

[39] *See id.*

available, as required (any such halt pursuant to proposed BZX Rule 14.11(k)(4)(B)(iii)(b), an ''Availability of Information Halt'').[40]

Finally, proposed BZX Rule 14.11(k)(4)(B)(iv) provides that, upon termination of an Investment Company, Managed Portfolio Shares issued in connection with such entity will be removed from Exchange listing, and proposed BZX Rule 14.11(k)(4)(B)(v) provides that voting rights shall be as set forth in the applicable Investment Company prospectus and/or statement of additional information.

C. Surveillance

As discussed above, proposed BZX Rule 14.11(k)(2)(C) provides that the Exchange will implement and maintain written surveillance procedures for Managed Portfolio Shares. As part of these surveillance procedures, the Investment Company's investment adviser will, upon request, make available to the Exchange and/or FINRA, on behalf of the Exchange, the daily portfolio holdings of each series of Managed Portfolio Shares. The Exchange represents that the ability to access the information on an as needed basis will provide the Exchange with sufficient information to perform the necessary regulatory functions associated with listing and trading series of Managed Portfolio Shares on the Exchange, including the ability to monitor compliance with the initial and continued listing requirements as well as the ability to surveil for manipulation of the Shares.

The Exchange further represents that its surveillance procedures are adequate to properly monitor the trading of Managed Portfolio Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws. The Exchange states that trading of Managed Portfolio Shares through the Exchange will be subject to the Exchange's surveillance procedures for derivative products. In addition, the Exchange states that it will require the issuer of each series of Managed Portfolio Shares listed on the Exchange to represent that it will advise the Exchange of any failure by a series of Managed Portfolio Shares to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Exchange Act, the Exchange represents that it will surveil for compliance with the continued listing requirements. If a series of Managed Portfolio Shares is not in compliance with the applicable listing requirements, the Exchange represents that it will commence delisting procedures under BZX Rule 14.12.

The Exchange further states that it will implement real-time surveillances that monitor for the continued dissemination of the VIIV and that it will also have surveillances designed to alert Exchange personnel where Shares of a series of Managed Portfolio Shares are trading away from the VIIV.

The Exchange states that the Exemptive Relief restricts the investable universe for a series of Managed Portfolio Shares to include only certain instruments that trade on a U.S. exchange, contemporaneously with the Shares, and in cash and cash equivalents.[41] As such, the Exchange states that any equity instruments or futures held by a series of Managed Portfolio Shares operating under the Exemptive Relief or a substantively identical exemptive order would trade on markets that are a member of Intermarket Surveillance Group (''ISG'') or affiliated with a member of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement. While future exemptive relief applicable to Managed Portfolio Shares may expand the investable universe, the Exchange states that proposed BZX Rule 14.11(k)(2)(A) would require the Exchange to file separate proposals under Section 19(b) of the Exchange Act before listing and trading any series of Managed Portfolio Shares and any such proposal would describe the investable universe for any such series of Managed Portfolio Shares along with the Exchange's surveillance procedures applicable to such series.

The Exchange also states that it has a general policy prohibiting the distribution of material, non-public information by its employees.

D. Trading Halts

As discussed above, proposed BZX Rule 14.11(k)(4)(B)(iii) sets forth circumstances under which the Exchange may halt trading in a series of Managed Portfolio Shares, including Discretionary Halts and Availability of Information Halts. The Exchange states that the proposed Discretionary Halts provide the Exchange with the ability to halt trading in a series of Managed Portfolio Shares when it determines that trading in the Shares is inadvisable. This could be based on the Exchange's own analysis of market conditions being detrimental to a fair and orderly market and/or information provided by the Investment Company or its agent. The Exchange states that there are certain circumstances related to the trading and dissemination of information related to the underlying holdings of a series of Managed Portfolio Shares, such as the extent to which trading is not occurring in the securities and/or financial instruments comprising the portfolio, that the Exchange may not be in a position to know or become aware of as expeditiously as the Investment Company or its agent. In addition, the Exchange notes that there are certain circumstances in which the Exemptive Relief provides that the Investment Company or their agent will request that the Exchange halt trading in the applicable series of Managed Portfolio Shares.[42] The Exchange states that any such requests will be one of many factors considered in order to determine whether to halt trading in a series of Managed Portfolio Shares and that the Exchange retains sole discretion in determining whether trading should be halted. The Exchange further states that, upon receipt of information and/or a request from the Investment Company, the Exchange would consider the information and/or circumstances leading to the request as well as other factors both specific to such issue of Managed Portfolio Shares and the broader market in determining whether trading in the series of Managed Portfolio Shares is inadvisable and that halting trading is necessary in order to maintain a fair and orderly market.

With respect to the proposed Availability of Information Halt relating to dissemination of VIIV, the Exchange notes that the Commission has already determined that the requirement that the VIIV be disseminated every second is appropriate.[43] With respect to the proposed Availability of Information halts relating to dissemination of NAV and portfolio holdings, the Exchange

[40] *See* proposed BZX Rule 14.11(k)(4)(B)(iii)(b).

[41] *See* Amendment No. 4, *supra* note 10, at 27–88 (citing to the 1940 Act Notice, *supra* note 13, at 12, n. 24).

[42] Specifically, the Exemptive Relief provides that the Investment Company or their agent will request that the Exchange halt trading in the applicable series of Managed Portfolio Shares where: (a) The intraday indicative values calculated by the calculation engine(s) differ by more than 25 basis points for 60 seconds in connection with pricing of the VIIV; or (b) holdings representing 10% or more of a series of Managed Portfolio Shares' portfolio have become subject to a trading halt or otherwise do not have readily available market quotations. *See* 1940 Act Application, *supra* note 13, at 22–23, 29. As described in the Exemptive Relief, each series of Managed Portfolio Shares would employ two separate calculation engines to provide two independently calculated sources of intraday indicative values, and a pricing verification agent to compare the two data streams from the calculation engines on a real time basis. *See* 1940 Act Application, *supra* note 13, at 22–23.

[43] *See* Amendment No. 4, supra note 10 at 45, n. 39 (citing to 1940 Application, *supra* note 13, at 4 and 1940 Act Notice, *supra* note 13, at 11).

states that such halts are generally consistent with, and designed to address the same concerns about asymmetry of information as, BZX Rule 14.11(i)(4)(iv), which relates to trading halts in Managed Fund Shares.[44] In addition, the Exchange states that the quarterly disclosure of portfolio holdings is a fundamental component of Managed Portfolio Shares that allows market participants to better understand the strategy of the funds and to monitor how closely trading in the funds is tracking the value of the underlying portfolio. It further states that when such information is not being disclosed as required, trading in the shares is inadvisable and it is necessary and appropriate to halt trading.

E. Availability of Information

The Exchange represents that Form N–PORT requires reporting of a series of Managed Portfolio Shares' complete portfolio holdings on a position-by-position basis on a quarterly basis within 60 days after fiscal quarter end, and that investors can obtain a fund's Statement of Additional Information (SAI), its Shareholder Reports, its Form N–CSR, filed twice a year, and its Form N–CEN, filed annually. The Exchange represents that a series of Managed Portfolio Shares' SAI and Shareholder Reports are available free upon request from the Investment Company, and those documents and the Form N–PORT, Form N–CSR, and Form N–CEN may be viewed on-screen or downloaded from the Commission's website at *www.sec.gov*.

The Exchange represents that information regarding market price and trading volume of a series of Managed Portfolio Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services, and information regarding the previous day's closing price and trading volume information for a series of Managed Portfolio Shares will be published daily in the financial section of newspapers. Quotation and last sale information for a series of Managed Portfolio Shares will be available via the Consolidated Tape Association high-speed line. In addition, the VIIV will be widely disseminated by the Reporting Authority and/or one or more major market data vendors in one second intervals during Regular Trading Hours.

F. Trading Rules

The Exchange deems Managed Portfolio Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. Managed Portfolio Shares will trade on the Exchange only during Regular Trading Hours as provided in proposed BZX Rule 14.11(k)(2)(B). As provided in BZX Rule 11.11(a), the minimum price variation for quoting and entry of orders in securities traded on the Exchange is $0.01, with the exception of securities that are priced less than $1.00, for which the minimum price variation for order entry is $0.0001.

G. Information Circular

Prior to the commencement of trading of a series of Managed Portfolio Shares, the Exchange will inform its members in an Information Circular (''Circular'') of the special characteristics and risks associated with trading the Shares. Specifically, the Circular will discuss the following: (a) The procedures for purchases and redemptions of the Managed Portfolio Shares; (b) BZX Rule 3.7, which imposes suitability obligations on Exchange members with respect to recommending transactions in the Managed Portfolio Shares to customers; (c) how information regarding the VIIV is disseminated; (d) the requirement that members deliver a prospectus to investors purchasing newly issued Managed Portfolio Shares prior to or concurrently with the confirmation of a transaction; (e) trading information; and (f) that the portfolio holdings of the Managed Portfolio Shares are not disclosed on a daily basis.

In addition, the Circular will reference that the series of Managed Portfolio Shares is subject to various fees and expenses described in the applicable registration statement. The Circular will discuss any exemptive, no-action, and interpretive relief granted by the Commission from any rules under the Exchange Act. The Circular will also disclose that the NAV for the Managed Portfolio Shares will be calculated after 4:00 p.m., Eastern Time each trading day.

III. Discussion and Commission Findings

After careful review, the Commission finds that the Exchange's proposal to adopt BZX Rule 14.11(k) to permit the listing and trading of Managed Portfolio Shares is consistent with the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange.[45] In particular, the Commission finds that the proposed rule change, as modified by Amendment Nos. 4 and 5, is consistent with Section 6(b)(5) of the Exchange Act,[46] which requires, among other things, that the Exchange's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

Pursuant to the Exemptive Relief,[47] Managed Portfolio Shares would be required to publicly disclose the portfolio holdings information on a quarterly, rather than daily, basis, within at least 60 days following the end of every fiscal quarter. Although Managed Portfolio Shares would, in this regard, be different from other types of exchange-traded funds currently listed and traded on the Exchange, for reasons described below, the Commission believes that BZX Rule 14.11(k) is sufficiently designed to be consistent with the Exchange Act and to help prevent fraudulent and manipulative acts and practices and to maintain a fair and orderly market for Managed Portfolio Shares. Further, the Commission notes that the proposed listing and trading rules for Managed Portfolio Shares, where appropriate, are similar to existing Exchange rules relating to exchange-traded funds, including Managed Fund Shares.[48]

The Commission finds that the Exchange's proposal contains adequate rules and procedures to govern the listing and trading of Managed Portfolio Shares on the Exchange. Prior to listing

[44] BZX Rule 14.11(i)(4)(iv) provides that ''[i]f the Intraday Indicative Value of a series of Managed Fund Shares is not being disseminated as required, the Exchange may halt trading during the day in which the interruption to the dissemination of the Intraday Indicative Value occurs. If the interruption to the dissemination of the Intraday Indicative Value persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption. In addition, if the Exchange becomes aware that the net asset value or the Disclosed Portfolio with respect to a series of Managed Fund Shares is not disseminated to all market participants at the same time, it will halt trading in such series until such time as the net asset value or the Disclosed Portfolio is available to all market participants.''

[45] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[46] 15 U.S.C. 78f(b)(5).

[47] *See supra* note 13.

[48] The proposed rules relating to limitation of liability (proposed BZX Rule 14.11(k)(5)), disclosures (proposed BZX Rule 14.11(k)(6)), termination (proposed BZX Rule 14.11(k)(4)(B)(iv)), and voting (proposed BZX Rule 14.11(k)(4)(B)(v)) are substantively similar or identical to existing provisions for Managed Fund Shares. *See* BZX Rule 14.11(i)(5), BZX Rule 14.11(i)(6), BZX Rule 14.11(i)(4)(B)(v), and BZX Rule 14.11(i)(4)(B)(vi), respectively.

and/or trading on the Exchange, the Exchange must file a separate proposed rule change pursuant to Section 19(b) of the Exchange Act for each series of Managed Portfolio Shares.[49] All such securities listed and/or traded under proposed BZX Rule 14.11(k) will be subject to the full panoply of BZX rules and procedures that currently govern the trading of equity securities on the Exchange.

For the initial listing of each series of Managed Portfolio Shares under proposed BZX Rule 14.11(k), the Exchange must establish a minimum number of Managed Portfolio Shares required to be outstanding at the commencement of trading. In addition, the Exchange must obtain a representation from the issuer of Managed Portfolio Shares that the NAV per share will be calculated daily and that the NAV will be made available to all market participants at the same time. Moreover, all Managed Portfolio Shares must have a stated investment objective, which must be adhered to under Normal Market Conditions. These requirements are identical to the initial listing requirements that currently apply to Managed Fund Shares.[50]

Although the portfolio holdings of the Managed Portfolio Shares are not publicly disclosed on a daily basis, the Commission believes that the proposed continued listing standards and trading rules under proposed BZX Rule 14.11(k) are adequate to ensure transparency of key values and information regarding the securities. The Commission notes that, for continued listing of each series of Managed Portfolio Shares, the VIIV will be widely disseminated by the Reporting Authority and/or one or more major market data vendors in one second intervals during Regular Trading Hours, and will be disseminated to all market participants at the same time. Further, transactions in Managed Portfolio Shares would be permitted only during Regular Trading Hours, when one second VIIVs would be available. In addition, like all other registered management investment companies, each series of Managed Portfolio Shares would be required to publicly disclose its portfolio holdings information on a quarterly basis, within at least 60 days following the end of every fiscal quarter.[51] Moreover, the Exchange represents that a series of Managed Portfolio Shares' Statement of Additional Information and shareholder reports will be available for free upon request from the Investment Company, and that those documents and the Form N–PORT, Form N–CSR, and Form N–CEN may be viewed on-screen or downloaded from the Commission's website at *www.sec.gov.*

The Commission finds that the Exchange's rules with respect to trading halts under proposed BZX Rule 14.11(k) should also help ensure the availability of key values and information relating to Managed Portfolio Shares. For instance, if the Exchange becomes aware that the VIIV of a series of Managed Portfolio Shares is not being calculated or disseminated in one second intervals, as required, the Exchange will halt trading in such series until the VIIV is available as required.[52] If the interruption of the VIIV persists past the trading day in which it occurred or the VIIV is no longer available, the Exchange will consider the suspension of trading in the series of Managed Portfolio Shares, and will commence delisting proceedings under BZX Rule 14.12.[53] In addition, if the Exchange becomes aware that the NAV with respect to a series of Managed Portfolio Shares is not being disseminated to all market participants at the same time, the holdings of a series of Managed Portfolio Shares are not made available on at least a quarterly basis as required under the 1940 Act, or such holdings are not available to all market participants at the same time (except as otherwise permitted under the applicable exemptive order or no-action relief granted by the Commission or Commission staff to the Investment Company with respect to the series of Managed Portfolio Shares), the Exchange will halt trading until the NAV or the holdings are available as required.[54] If any of these issues persists past the trading day in which it occurs, the Exchange will consider the suspension of trading in the series of Managed Portfolio Shares, and will commence delisting proceedings under BZX Rule 14.12.[55]

The Commission also finds that the Exchange's rules with respect to trading halts and suspensions under proposed BZX Rule 14.11(k) are designed to help maintain a fair and orderly market. According to the proposal, the Exchange may consider all relevant factors in exercising its discretion to halt trading in a series of Managed Portfolio Shares. Further, trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the series of Managed Portfolio Shares inadvisable.[56] These may include the extent to which trading is not occurring in the securities and/or the financial instruments comprising the portfolio, or whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. If such issue persists past the trading day in which it occurred, the Exchange will consider the suspension of trading in, and will commence delisting proceedings for, a series of Managed Portfolio Shares.

Other provisions of the Exchange's rule pertaining to suspension are substantially consistent with provisions that currently exist for Managed Fund Shares. Those provisions state that the Exchange will consider the suspension of trading in, and will commence delisting proceedings under BZX Rule 14.12 for, a series of Managed Portfolio Shares if: (a) Following the initial twelve-month period after commencement of trading on the Exchange of a series of Managed Portfolio Shares, there are fewer than 50 beneficial holders of the series of the Managed Portfolio Shares for 30 or more consecutive trading days;[57] (b) the Investment Company issuing the Managed Portfolio Shares has failed to file any required filings with the Commission, or if the Exchange becomes aware that the Investment Company is not in compliance with the conditions of any applicable exemptive order or no-action relief granted by the Commission or Commission staff to the Investment Company with respect to the series of Managed Portfolio Shares;[58] (c) any of the continued listing requirements set forth in BZX Rule 14.11(k) are not continuously maintained;[59] (d) any of the applicable Continued Listing Representations[60] for the issue of Managed Portfolio Shares are not continuously met;[61] or (e) such other event shall occur or condition exists which, in the opinion of the Exchange, makes further dealings of the

[49] *See* proposed BZX Rule 14.11(k)(2)(A).

[50] *See* BZX Rule 14.11(i)(4)(A).

[51] *See* proposed BZX Rule 14.11(k)(3)(A). *See also* Rules 30e–1; 30d–1; and 30b1–5 under the 1940 Act.

[52] *See* proposed BZX Rule 14.11(k)(4)(B)(iii)(b).

[53] *See* proposed BZX Rule 14.11(k)(4)(B)(ii)(b).

[54] *See* proposed BZX Rule 14.11(k)(4)(B)(iii)(b).

[55] *See* proposed BZX Rule 14.11(k)(4)(B)(ii)(c).

[56] *See* proposed BZX Rule 14.11(k)(4)(B)(iii)(a).

[57] *See* proposed BZX Rule 14.11(k)(4)(B)(ii)(a).

[58] *See* proposed BZX Rule 14.11(k)(4)(B)(ii)(e).

[59] *See* proposed BZX Rule 14.11(k)(4)(B)(ii)(f).

[60] As proposed to be amended, BZX Rule 14.11(a) defines ''Continued Listing Representations'' as any of the statements or representations regarding the index composition, the description of the portfolio or reference assets, limitations on portfolio holdings or reference assets, dissemination and availability of index, reference asset, intraday indicative values, and VIIV (as applicable), or the applicability of Exchange listing rules specified in any filing to list a series of Other Securities (as defined in BZX Rule 14.11(a)).

[61] *See* proposed BZX Rule 14.11(k)(3)(B)(ii)(g).

Managed Portfolio Shares on the Exchange inadvisable.[62]

Finally, the Commission believes that the requirements of proposed BZX Rule 14.11(k) are consistent with the Exchange Act and, more specifically, are reasonably designed to help prevent fraudulent and manipulative acts and practices. The Commission notes that, because Managed Portfolio Shares would not publicly disclose on a daily basis information pertaining to the portfolio holdings, it is vital that such information be kept confidential and not be subject to misuse. Accordingly, to help ensure that the portfolio information be kept confidential and the Shares not be susceptible to fraud or manipulation, proposed BZX Rule 14.11(k)(2)(D) requires that, if the investment adviser to the Investment Company issuing Managed Portfolio Shares is registered as a broker-dealer or is affiliated with a broker-dealer, such investment adviser must erect a ''fire wall'' between such investment adviser and personnel of the broker-dealer or broker-dealer affiliate, as applicable, with respect to access to information concerning the composition of and/or changes to such Investment Company's portfolio and/or the Creation Basket. Further, the Rule also requires that any person related to the investment adviser or Investment Company who makes decisions pertaining to the Investment Company's portfolio composition or has access to information regarding the Investment Company's portfolio composition or changes thereto or the Creation Basket must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the applicable Investment Company portfolio or changes thereto or the Creation Basket. In addition, proposed BZX Rule 14.11(k)(2)(E) provides that any person or entity, including an AP Representative, custodian, Reporting Authority, distributor, or administrator, who has access to information regarding the Investment Company's portfolio composition or changes thereto or the Creation Basket, must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the applicable Investment Company portfolio or changes thereto or the Creation Basket. Moreover, if any such person or entity is registered as a broker-dealer or affiliated with a broker-dealer, such person or entity must erect and maintain a ''fire wall'' between the person or entity and the broker-dealer with respect to access to information concerning the composition and/or changes to such Investment Company portfolio or Creation Basket. The proposed rules also require that the Exchange will implement and maintain surveillance procedures. Finally, to ensure that the Exchange has the appropriate information to monitor and surveil its market, BZX Rule 14.11(k) requires that the Investment Company's investment adviser will upon request by the Exchange or FINRA, on behalf of the Exchange, make available to the Exchange or FINRA the daily portfolio holdings of each series of Managed Portfolio Shares.[63]

For the reasons discussed above, the Commission finds that proposed BZX Rule 14.11(k) for Managed Portfolio Shares is consistent with Section 6(b)(5) of the Exchange Act.

IV. Solicitation of Comments on Amendment Nos. 4 and 5 to the Proposed Rule Change

Interested persons are invited to submit written data, views, and arguments concerning whether Amendment Nos. 4 and 5 are consistent with the Exchange Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CboeBZX–2019–047 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–CboeBZX–2019–047. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CboeBZX–2019–047, and should be submitted on or before January 10, 2020.

V. Accelerated Approval of Proposed Rule Change, as Modified by Amendment Nos. 4 and 5

The Commission finds good cause to approve the proposed rule change, as modified by Amendment Nos. 4 and 5, prior to the thirtieth day after the date of publication of notice of the filing of Amendment Nos. 4 and 5 in the **Federal Register**. In Amendment No. 4, the Exchange revised the circumstances under which it proposed to halt trading in, consider the suspension of trading in, and commence delisting proceedings for, a series of Managed Portfolio Shares. Amendment Nos. 4 and 5 also provide other clarifications and additional information to the proposed rule change.[64] The changes and additional information in Amendment Nos. 4 and 5 assist the Commission in finding that the proposal is consistent with the Exchange Act. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Exchange Act,[65] to approve the proposed rule change, as modified by Amendment Nos. 4 and 5, on an accelerated basis.

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act[66] that the proposed rule change (SR–CboeBZX–2019–047), as modified by Amendment Nos. 4 and 5, be, and hereby is, approved on an accelerated basis.

[62] *See* proposed BZX Rule 14.11(k)(3)(B)(ii)(h).

[63] *See* proposed BZX Rule 14.11(k)(2)(C).

[64] *See supra* notes 10 and 11.

[65] 15 U.S.C. 78s(b)(2).

[66] 15 U.S.C. 78s(b)(2).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[67]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2019–27455 Filed 12–19–19; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87752; File No. SR–ISE–2019–33]

Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Options 3, Section 3 To Extend Through June 30, 2020 or the Date of Permanent Approval

December 16, 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 12, 2019, Nasdaq ISE, LLC (''ISE'' 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 Options 3, Section 3 (Minimum Trading Increments) to extend through June 30, 2020 or the date of permanent approval, if earlier, the Penny Pilot Program in options classes in certain issues (''Penny Pilot'' or ''Pilot'').

The text of the proposed rule change is available on the Exchange's website at *http://ise.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

The purpose of this filing is to amend Options 3, Section 3 to extend the Penny Pilot through June 30, 2020 or the date of permanent approval, if earlier.[3]

Under the Penny Pilot, the minimum price variation for all participating options classes, except for options overlying the PowerShares QQQ Trust (''QQQQ''), the SPDR S&P 500 Exchange Traded Fund (''SPY'') and the iShares Russell 2000 Index Fund (''IWM''), is $0.01 for all quotations in options series that are quoted at less than $3 per contract and $0.05 for all quotations in options series that are quoted at $3 per contract or greater. Options overlying QQQQ, SPY and IWM are quoted in $0.01 increments for all options series. The Penny Pilot is currently scheduled to expire on December 31, 2019.[4] The Exchange now proposes to extend the time period of the Penny Pilot through June 30, 2020 or the date of permanent approval, if earlier.

This filing does not propose any substantive changes to the Penny Pilot Program; all classes currently participating in the Penny Pilot will remain the same and all minimum increments will remain unchanged. The Exchange believes the benefits to public customers and other market participants who will be able to express their true prices to buy and sell options have been demonstrated to outweigh the potential increase in quote traffic.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[5] in general, and furthers the objectives of Section 6(b)(5) of the Act,[6] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

In particular, the proposed rule change, which extends the Penny Pilot for an additional six months through June 30, 2020 or the date of permanent approval, if earlier, will enable public customers and other market participants to express their true prices to buy and sell options for the benefit of all market participants. This is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. To the contrary, this proposal is pro-competitive because it allows Penny Pilot issues to continue trading on the Exchange.

Moreover, the Exchange believes that the proposed rule change will allow for further analysis of the Pilot and a determination of how the Pilot should be structured in the future; and will serve to promote regulatory clarity and consistency, thereby reducing burdens on the marketplace and facilitating investor protection.

The Pilot is an industry-wide initiative supported by all other option exchanges. The Exchange believes that extending the Pilot will allow for continued competition between market participants on the Exchange trading similar products as their counterparts on other exchanges, while at the same time allowing the Exchange to continue to compete for order flow with other exchanges in option issues trading as part of the Pilot.

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

The Exchange filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act[7] and Rule 19b–4(f)(6)[8] thereunder. Because the foregoing proposed rule change does not: (i)

[67] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The options exchanges in the U.S. that have pilot programs similar to the Penny Pilot (together ''pilot programs'') are currently working on a proposal for permanent approval of the respective pilot programs.

[4] *See* Securities Exchange Act Release No. 86179 (June 21, 2019), 84 FR 30784 (June 27, 2019) (SR–ISE–2019–19).

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(5).

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(6).

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 [9] and Rule 19b–4(f)(6) [10] thereunder.

A proposed rule changed filed under Rule 19b–4(f)(6) [11] normally does not become operative prior to 30 days after the date of filing. However, pursuant to Rule 19b–4(f)(6),[12] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because doing so will allow the Pilot Program to continue without interruption in a manner that is consistent with the Commission's prior approval of the extension and expansion of the Pilot Program.[13] Accordingly, the Commission designates the proposed rule change as operative upon filing with the Commission.[14]

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–ISE–2019–33 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–ISE–2019–33. 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–ISE–2019–33 and should be submitted on or before January 10, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2019–27448 Filed 12–19–19; 8:45 am]

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[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) 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 just shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[11] 17 CFR 240.19b–4(f)(6).

[12] 17 CFR 240.19b–4(f)(6)(iii).

[13] *See* Securities Exchange Act Release No. 61061 (November 24, 2009), 74 FR 62857 (December 1, 2009) (SR–NYSEArca–2009–44)

[14] For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87757; File No. SR–CboeEDGA–2019–012]

Self-Regulatory Organizations; Cboe EDGA Exchange, Inc.; Notice of Designation of Longer Period for Commission Action on Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Introduce a Liquidity Provider Protection Delay Mechanism on EDGA

December 16, 2019.

On June 7, 2019, Cboe EDGA Exchange, Inc. (''EDGA'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] a proposal to introduce an intentional, asymmetric delay mechanism on EDGA. The proposed rule change was published for comment in the **Federal Register** on June 26, 2019.[3] On August 5, 2019, pursuant to Section 19(b)(2) of the Exchange Act,[4] the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved.[5] The Commission received twenty-one comment letters from eighteen commenters, including a response from the Exchange, in response to the Notice.[6] On September 24, 2019, the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 86168 (June 20, 2019), 84 FR 30282 (''Notice'').

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 86567, 84 FR 39385 (Aug. 9, 2019). The Commission designated September 24, 2019, as the date by which it should approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule change.

[6] *See* Letters from: R.T. Leuchtkafer, dated July 12, 2019; Steve Crutchfield, Head of Market Structure, CTC Trading Group, LLC, dated July 15, 2019; Tyler Gellasch, Executive Director, Healthy Markets, dated July 16, 2019; Larry Tabb, Founder and Research Chairman, TABB Group, dated July 16, 2019; Stephen John Berger, Managing Director, Global Head of Government and Regulatory Policy, Citadel Securities, dated July 16, 2019; Mehmet Kinak, Vice President & Global Head of Systematic Trading & Market Structure, and Jonathan D. Siegel, Vice President & Senior Legal Counsel (Legislative & Regulatory Affairs), T. Rowe Price, dated July 16, 2019; Adam Nunes, Head of Business Development, Hudson River Trading LLC, dated July 16, 2019; Joanna Mallers, Secretary, FIA Principal Traders Group, dated July 16, 2019; Ray Ross, Chief Technology Officer, Clearpool, dated July 16, 2019; Eric Swanson, CEO, XTX Markets LLC (Americas), dated July 16, 2019; John Thornton, Co-Chair, Hal S. Scott, President, and R. Glenn Hubbard, Co-Chair, Committee on Capital Markets Regulation,

Continued

Commission instituted proceedings to determine whether to approve or disapprove the proposed rule changes.[7] The Commission received twelve additional comments in response to the Notice and OIP.[8]

Section 19(b)(2) of the Act[9] provides that, after initiating 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 26, 2019.[10] December 23, 2019 is 180 days from that date, and February 21, 2020 is 240 days from that date.

The Commission finds it appropriate to designate a longer period within which to issue an order approving or disapproving the proposed rule change so that it has sufficient time to consider the proposed rule change, the issues raised in the comment letters that have been submitted in connection therewith, and the Exchange's response to comments. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[11] designates February 21, 2020 as the date by which the Commission should either approve or disapprove the proposed rule change (File No. SR–CboeEDGA–2019–012).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2019–27453 Filed 12–19–19; 8:45 am]

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dated July 16, 2019; Kirsten Wegner, Chief Executive Officer, Modern Markets Initiative, dated July 17, 2019; Theodore R. Lazo, Managing Director and Associate General Counsel, SIFMA, dated July 18, 2019; Eric Swanson, CEO, XTX Markets LLC (Americas), dated July 31, 2019; Mark D. Epley, Executive Vice President & Managing Director, General Counsel, and Jennifer W. Han, Associate General Counsel, Managed Funds Association, dated August 2, 2019; Hubert De Jesus, Managing Director, Global Head of Market Structure and Electronic Trading, and Joanne Medero, Managing Director, Global Public Policy, Black Rock, dated August 2, 2019; Rich Steiner, Head of Client Advocacy and Market Innovation, RBC Capital Markets, dated August 15, 2019; Adrian Griffiths, Assistant General Counsel, Cboe Global Markets, dated August 22, 2019; R.T. Leuchtkafer, dated August 23, 2019; R.T. Leuchtkafer, dated September 9, 2019; Joshua Mollner, Assistant Professor, Kellogg School of Management, Northwestern University, and Markus Baldauf, Assistant Professor, Sauder School of Business, University of British Columbia, dated September 12, 2019 available at *https://www.sec.gov/comments/sr-cboeedga-2019-012/srcboeedga2019012.htm.*

[7] *See* Securities Exchange Act Release No. 87096, 84 FR 51657 (September 30, 2019) (''OIP'').

[8] *See* Letters from: Eric Swanson, CEO, XTX Markets LLC (Americas), dated October 18, 2019; Tom Quaadman, Executive Vice President, Center for Capital Markets Competitiveness, U.S. Chamber of Commerce (dated October 18, 2019); R.T. Leuchtkafer, dated October 21, 2019; Doug Clark, Chairman, and James Toes, President & CEO, Security Traders Association, dated October 21, 2019; Joanna Mallers, Secretary, FIA Principal Traders Group, dated October 21, 2019; Ray Ross, Chief Technology Officer, Clearpool, dated Oct. 21, 2019; Tyler Gellasch, Executive Director, Healthy Markets Association, dated Oct. 21, 2019; Dorothy Donohue, Deputy General Counsel, Investment Company Institute, dated Oct. 21, 2019; Tim Lang, Chief Executive Officer, ACS Execution Services, dated Oct. 21, 2019; Stephen John Berger, Managing Director, Global Head of Government and Regulatory Policy, Citadel Securities, dated October 21, 2019; Mark D. Epley, Executive Vice President & Managing Director, General Counsel, and Jennifer W. Han, Associate General Counsel, Managed Funds Association, dated October 22, 2019; Steve Crutchfield, Head of Market Structure, CTC Trading Group, LLC, dated October 28, 2019 available at *https://www.sec.gov/comments/srcboeedga-2019-012/srcboeedga2019012.htm.*

[9] 15 U.S.C. 78s(b)(2).

[10] *See* Notice, *supra* note 3.

[11] 15 U.S.C. 78s(b)(2).

[12] 17 CFR 200.30–3(a)(57).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87754; File No. SR–BX–2019–046]

Self-Regulatory Organizations; Nasdaq BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend Through June 30, 2020 or The Date of Permanent Approval, if Earlier, the Penny Pilot Program

December 16, 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 12, 2019, Nasdaq BX, Inc. (''BX'' 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 Options 3, Section 3 (Minimum Increments) to extend through June 30, 2020 or the date of permanent approval, if earlier, the Penny Pilot Program in options classes in certain issues (''Penny Pilot'' or ''Pilot'').

The text of the proposed rule change is available on the Exchange's website at *http://nasdaqbx.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

The purpose of this filing is to amend Options 3, Section 3 to extend the Penny Pilot through June 30, 2020 or the date of permanent approval, if earlier.[3]

Under the Penny Pilot, the minimum price variation for all participating options classes, except for options overlying the PowerShares QQQ Trust (''QQQQ''), the SPDR S&P 500 Exchange Traded Fund (''SPY'') and the iShares Russell 2000 Index Fund (''IWM''), is $0.01 for all quotations in options series that are quoted at less than $3 per contract and $0.05 for all quotations in options series that are quoted at $3 per contract or greater. Options overlying QQQQ, SPY and IWM are quoted in $0.01 increments for all options series. The Penny Pilot is currently scheduled to expire on December 31, 2019.[4] The Exchange now proposes to extend the time period of the Penny Pilot through June 30, 2020 or the date of permanent approval, if earlier.

This filing does not propose any substantive changes to the Penny Pilot Program; all classes currently

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The options exchanges in the U.S. that have pilot programs similar to the Penny Pilot (together ''pilot programs'') are currently working on a proposal for permanent approval of the respective pilot programs.

[4] *See* Securities Exchange Act Release No. 86137 (June 18, 2019), 84 FR 29563 (June 24, 2019) (SR–BX–2019–020).

participating in the Penny Pilot will remain the same and all minimum increments will remain unchanged. The Exchange believes the benefits to public customers and other market participants who will be able to express their true prices to buy and sell options have been demonstrated to outweigh the potential increase in quote traffic.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[5] in general, and furthers the objectives of Section 6(b)(5) of the Act,[6] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

In particular, the proposed rule change, which extends the Penny Pilot for an additional six months through June 30, 2020 or the date of permanent approval, if earlier, will enable public customers and other market participants to express their true prices to buy and sell options for the benefit of all market participants. This is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. To the contrary, this proposal is pro-competitive because it allows Penny Pilot issues to continue trading on the Exchange.

Moreover, the Exchange believes that the proposed rule change will allow for further analysis of the Pilot and a determination of how the Pilot should be structured in the future; and will serve to promote regulatory clarity and consistency, thereby reducing burdens on the marketplace and facilitating investor protection.

The Pilot is an industry-wide initiative supported by all other option exchanges. The Exchange believes that extending the Pilot will allow for continued competition between market participants on the Exchange trading similar products as their counterparts on other exchanges, while at the same time allowing the Exchange to continue to compete for order flow with other exchanges in option issues trading as part of the Pilot.

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

The Exchange filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act[7] and Rule 19b–4(f)(6)[8] thereunder. 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[9] and Rule 19b–4(f)(6)[10] thereunder.

A proposed rule changed filed under Rule 19b–4(f)(6)[11] normally does not become operative prior to 30 days after the date of filing. However, pursuant to Rule 19b–4(f)(6),[12] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because doing so will allow the Pilot Program to continue without interruption in a manner that is consistent with the Commission's prior approval of the extension and expansion of the Pilot Program.[13] Accordingly, the Commission designates the proposed rule change as operative upon filing with the Commission.[14]

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–BX–2019–046 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–X–2019–046. 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

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(5).

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(6).

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) 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 just shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[11] 17 CFR 240.19b–4(f)(6).

[12] 17 CFR 240.19b–4(f)(6)(iii).

[13] *See* Securities Exchange Act Release No. 61061 (November 24, 2009), 74 FR 62857 (December 1, 2009) (SR–NYSEArca–2009–44)

[14] For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

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–BX–2019–046 and should be submitted on or before January 10, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2019–27450 Filed 12–19–19; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87758; File No. SR–NYSEArca–2019–71]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Approving a Proposed Rule Change Regarding the Applicability and Functionality of Certain Order Types on the Exchange

December 16, 2019.

I. Introduction

On October 22, 2019, NYSE Arca, Inc. (''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (''Commission'') pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend its rules to clarify the applicability and functionality of certain order types on the Exchange. The proposed rule change was published for comment in the **Federal Register** on November 7, 2019.[3] The Commission received no comment letters on the proposed rule change. This order approves the proposed rule change.

II. Description of the Proposal

The Exchange proposes to amend Rule 6.62–O (Certain Types of Orders Defined) to clarify the applicability and functionality of certain order types. Specifically, the Exchange proposes to amend the definitions of Contingency Orders, Working Orders, Stop Orders, Stop Limit Orders, and All-or None (''AON'') Orders, as set forth in Rule 6.62–O(d). The Exchange states it is not proposing to change or alter any obligations, rights, policies or practices. Rather, the Exchange states that its proposal is designed to reduce potential investor confusion as to the functionality and applicability of certain order types presently available on the Exchange.[4]

Proposed Changes to Order Type Definitions

Rule 6.62–O (the ''Rule'') contains certain definitions of options order types available on the Exchange. Paragraph (d) of the Rule defines Contingency Orders or Working Orders as orders that are ''contingent upon a condition being satisfied or an order with a conditional or undisplayed price and/or size.'' The Exchange proposes to add language regarding the handling of such orders to state that Contingency Orders and Working Orders are maintained in the Working Order Process of the Consolidated Book until they are eligible for execution and/or display.[5] As discussed below, the Exchange also proposes to amend the definitions of Stop Orders, Stop Limit Orders, and AON Orders, which are Contingency Orders/Working Orders.

Rule 6.62–O(d)(1)–(2): Stop Orders and Stop Limit Orders. A Stop Order is an order that becomes a Market Order when the market for a particular option contract reaches a specified price.[6] A Stop Limit Order is an order that becomes a Limit Order when the market for a particular option contract reaches a specified price.[7] Stop Orders and Stop Limit Orders (collectively, ''Stop Orders'' herein unless otherwise specified) track the price of an option and are generally used to limit losses as prices move up, in the case of buy orders, or down in the case of sell orders. In each case, the ''triggering event,'' which converts the order type (to a Market Order or Limit Order, as applicable) occurs once the option trades or is (locally) quoted at, or above for a buy (below for a sell), the specified stop price.[8] Thus, Stop Orders to buy (sell) may be triggered as the price of an option rises (falls). The current rule provides that a Stop Order to buy (sell) will be rejected if, at the time of arrival, the stop price is below (above) the bid (offer).[9]

The Exchange proposes to modify the description of Stop Orders as follows. First, the Exchange proposes to revise the first sentence describing each order type (*i.e.,* Rule 6.62–O(d)(1), (2)) to state that the order type converts to a Market or Limit Order, respectively—or ''is triggered''—when the market for a particular option contract reaches a specified price.[10] The Exchange also proposes to modify Rule 6.62–O(d)(1), (2) to combine into one sentence the description of both buy and sell Stop Orders without modifying functionality. The current rule addresses buy and sell Stop Orders in two sentences, and the Exchange believes the proposed change would make it easier to navigate. Specifically, proposed Rule 6.62–O(d)(1), (2) would provide that a Stop Order (or Stop Limit Order) ''to buy (sell) is triggered'' such that it becomes a Market Order or Limit Order, respectively, ''when the option contract trades at a price equal to or greater (less) than the specified 'stop' price on the Exchange or another Market Center or when the Exchange bid (offer) is quoted at a price equal to or greater (less) than the stop price.'' [11]

The Exchange also proposes to address the display and standing of each type of Stop Order for which information is currently contained only in paragraph (d)(1) of Rule 6.62–O.[12] Specifically, the Exchange proposes to modify its rules to reflect that each type of Stop Order ''is not displayed and has no standing in any Order Process in the Consolidated Book, unless or until it is triggered (*i.e.,* same-side incoming interest trades or quotes at a price equal to or better than the stop price).'' [13] The Exchange additionally proposes to add new rule text to clarify that ''[a]fter the triggering event,'' a Stop Order (per Rule 6.62–O(d)(1)) becomes a new Market Order, and a Stop Limit Order (per Rule 6.62–O(d)(2)) becomes a new Limit

[15] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 87443 (November 1, 2019), 84 FR 60128 (''Notice'').

[4] *See* Notice, *supra* note 3, 84 FR at 60128.

[5] *See* proposed Rule 6.62–O(d).

[6] *See* Rule 6.62–O(d)(1).

[7] *See* Rule 6.62–O(d)(2).

[8] *See* Rule 6.62–O(d)(1), (2).

[9] *Id.*

[10] *See* proposed Rule 6.62–O(d)(1), (2).

[11] *See* proposed Rule 6.62–O(d)(1), (2). Consistent with this proposed change to address both buy and sell Stop Orders and Stop Limit Orders in one sentence, the Exchange proposes to delete as unnecessary the sentences in the current definitions that describe the functionality for sell Stop Orders and sell Stop Limit Orders. *See id.* For internal consistency, the Exchange also proposes to replace references to NYSE Arca with the ''Exchange.'' *See id.*

[12] *See* Rule 6.62–O(d)(1) (which provides that ''Stop Orders (including Stop Limit Orders) shall not have standing in any Order Process in the Consolidated Book and shall not be displayed'').

[13] *See* proposed Rule 6.62–O(d)(1), (2). The Exchange notes that this proposed text modifies the existing text in paragraph (d)(1) and is new text for paragraph (d)(2) of the Rule. *See id.*

Order, and each converted order is processed accordingly.[14]

Finally, the Exchange proposes to delete the last two sentences in the description of each type of Stop Order, which provides for the rejection of such orders to buy (sell) if entered with a stop price below the bid (or above the offer).[15] The Exchange states that this language is not accurate because the Exchange does not reject Stop Orders so priced, but instead would execute such orders once triggered.[16] This proposed change would reflect current Exchange functionality.[17]

Rule 6.62–O(d)(4): AON Orders. An AON Order is a Market or Limit Order that is to be executed in its entirety or not at all.[18] The Exchange proposes to make clear that an AON Order that does not execute on arrival will not be displayed or routed to another Market Center (*i.e.,* AON Orders may only be executed on the Exchange) and would have no standing in any Order Process in the Consolidated Book.[19] Further, the Exchange proposes to clarify that AON Orders are not eligible to execute against incoming interest but rather may execute solely against interest resting in the Consolidated Book when sufficient size is available.[20] Finally, the Exchange proposes to specify that the System monitors the Consolidated Book for AON Order execution opportunities.[21]

Rule 6.76A–O: Order Execution. Current Rule 6.76A–O(b)(1)(A) provides that ''[a]n incoming marketable bid or offer shall be matched against orders within the Working Order Process in the order of their ranking, at the price of the displayed portion (or in the case of an All-or-None Order, or at the limit price), for the total amount of option contracts available at that price or for the size of the incoming bid or offer, whichever is smaller.'' [22] The Exchange proposes to add ''of Reserve Orders'' to make clear that reference to ''the price of the displayed portion'' refers to such orders.[23] In addition, the Exchange proposes to amend and reorganize the language regarding AON Orders to provide that incoming interest is ''matched against orders within the Working Order Process in the order of their ranking, at the price of the displayed portion of Reserve Orders, or at the limit price of AON Orders, for the total amount of option contracts available at that price or for the size of the incoming bid or offer, whichever is smaller.'' [24]

III. Discussion and Commission's Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act [25] and the rules and regulations thereunder applicable to a national securities exchange.[26] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[27] which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating 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, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission notes that the Exchange represents it is not proposing to change or alter any obligations, rights, policies or practices. The Commission notes that the proposal would delete inaccurate language regarding Stop Orders and clarify the descriptions regarding the functionality of Contingency Orders, Working Orders, Stop Orders, and AON Orders. In addition, the proposal would make organizational and non-substantive changes to the rule text. The Commission believes this should add transparency and clarity to the Exchange's rules, without altering current functionality, to the benefit of investors, market participants, and the public in general.

For the reasons discussed above, the Commission believes that the proposed rule change is consistent with the Act.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[28] that the proposed rule change (SR–NYSEArca–2019–71) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[29]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2019–27454 Filed 12–19–19; 8:45 am]

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[14] *See* proposed Rule 6.62–O(d)(1), (2). *See also* Rule 6.62–O(a), (b) (defining Market Order and Limit Order, respectively).

[15] *See* proposed Rule 6.62–O(d)(1), (2).

[16] *See* Notice, *supra* note 3, 84 FR at 60129.

[17] *See id.*

[18] *See* Rule 6.62–O(d)(4).

[19] *See* proposed Rule 6.62–O(d)(4). *See also* Rule 6.76–O(a)(2)(C) (providing that AON Orders within the Working Order Process are ''ranked based on the specified limit price and the time of order entry'').

[20] *See* proposed Rule 6.62–O(d)(4).

[21] *See id.*

[22] *See* Rule 6.76A–O(b)(1)(A).

[23] *See* proposed Rule 6.76A–O(b)(1)(A).

[24] *See id.*

[25] 15 U.S.C. 78(f).

[26] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[27] 15 U.S.C. 78f(b)(5).

[28] 15 U.S.C. 78s(b)(2).

[29] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87765; File No. SR–CBOE–2019–117]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating To Amend Rule 5.72 To Eliminate the Requirement That Leg Prices Be Submitted Prior to the Time a Complex FLEX Order is Represented in an Open Outcry FLEX Auction

December 16, 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 December 6, 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 and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [3] and Rule 19b–4(f)(6) thereunder.[4] 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

Cboe Exchange, Inc. (the ''Exchange'' or ''Cboe Options'') proposes to amend Rule 5.72. The text of the proposed rule change is provided below.

(additions are *italics;* deletions are [bracketed])

* * * * *

Rules of Cboe Exchange, Inc.

* * * * *

Rule 5.72. FLEX Trading

(a) No change.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

(b) *FLEX Orders.* A FLEX Option series is only eligible for trading if a FLEX Trader (the ''Submitting FLEX Trader'') (i) submits a FLEX Order for that series into an electronic FLEX Auction pursuant to paragraph (c) of this Rule, (ii) represents the FLEX Order in an open outcry FLEX Auction pursuant to paragraph (d) of this Rule, or (iii) submits the FLEX Order to a FLEX AIM or SAM Auction pursuant to Rule 5.73 or 5.74, respectively.

(1) No change.

(2) *Complex FLEX Order.* A FLEX Order for a FLEX Option complex strategy submitted to the System must satisfy the criteria for a complex FLEX Order set forth in Rule 5.70(b) and include size, side of the market, *and* a net debit or credit price[, and a bid or offer price for each leg of the FLEX Order, which leg prices must add together to equal the net price]. Additionally, each leg of the FLEX Option complex strategy must include all terms for a FLEX Option series set forth in Rule 4.21 (including that a non-FLEX Option series with identical terms is not listed for trading), subject to the order entry requirements set forth in Rule 5.7.

(A) A complex FLEX Order submitted into the System for an electronic FLEX Auction pursuant to paragraph (c) below must include a bid or offer price for each leg, which leg prices must add together to equal the net price.

(B) A complex FLEX Order submitted into the System prior to representation in an open outcry FLEX Auction pursuant to paragraph (d) below may include a bid or offer price on one or more of the legs (subject to a FLEX Trader's responsibilities pursuant to Rule 5.91 and Chapter 9). The execution leg prices must be entered or modified, as necessary, via PAR following execution of the order, which prices must add together to equal the net execution price.

* * * * *

The text of the proposed rule change is also available on the Exchange's website (*http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 5.72(b) regarding the information required in a FLEX Order [5] for a FLEX Option complex strategy submitted to the System for execution in an open outcry FLEX Auction.[6] A FLEX Option series is only eligible for trading if a FLEX Trader (the ''Submitting FLEX Trader'') submits a FLEX Order for that series into an electronic FLEX Auction pursuant to Rule 5.72(c) or represents the FLEX Order in an open outcry FLEX Auction pursuant to Rule 5.72(d).[7] Currently, Rule 5.72(b) provides that a FLEX Order for a FLEX Option complex strategy submitted to the System must satisfy the criteria for a complex FLEX Order set forth in Rule 5.70(b) [8] and include size, side of the market, a net debit or credit price, and a bid or offer price for each leg of the FLEX Order, which leg prices must add together to equal that net price. This applies to complex FLEX Orders submitted for both electronic and open outcry execution.

The proposed rule change removes the requirement that a FLEX Order submitted into the System prior to representation in an open outcry FLEX Auction include leg prices at the time of order submission.[9] Specifically, proposed Rule 5.72(b)(2)(B) states a complex FLEX Order submitted into the System prior to representation in an open outcry FLEX Auction pursuant to paragraph (d) of Rule 5.72 may include a bid or offer price on one or more of the legs (subject to a FLEX Trader's responsibilities pursuant to Rule 5.91 (which describes responsibilities of a floor broker) and Chapter 9 (which describes obligations on Trading Permit Holders that do business with the public)). The execution leg prices must be entered or modified, as necessary, via PAR following execution of the order, which prices must add together to equal the net execution price.

When a floor broker (which is the Submitting FLEX Trader with respect to open outcry FLEX trading) receives an order from a customer, the floor broker must systematize the terms of that order, including any limit price (which is the net price with respect to a complex order).[10] As noted above, current Rule 5.72(b)(2) requires a Submitting FLEX Trader (*i.e.,* a floor broker with respect to open outcry trading) to systematize prices of all legs of a complex order upon submission. The Exchange imposed this requirement for both electronic and open outcry FLEX orders for consistency within the Rules.

Additionally, the Exchange believed this requirement to be appropriate due to the lack of electronic leg markets in FLEX options. In the non-FLEX market, there is no requirement to systematize leg prices upon submission of a complex order. In a non-FLEX market, there is a book and a national best bid or offer, and as a result, the System has a benchmark to use to determine execution leg prices based on the net

[5] A ''FLEX Order'' is an order submitted in a FLEX Option. *See* Rule 5.70(a). A ''FLEX Option'' means a flexible exchange option. *See* Rule 1.1.

[6] *See* Rule 5.72(d) for a description of the open outcry FLEX Auction process.

[7] *See* Rule 5.72(b). A FLEX Option series may also be eligible for trading if the Submitting FLEX Trader submits the FLEX Order to a FLEX Automated Improvement Mechanism auction or FLEX Solicitation Auction Mechanism auction pursuant to Rule 5.73 or 5.74, respectively.

[8] Rule 5.70(b) requires each leg of a complex FLEX Order to: (1) be for a FLEX Option series authorized for FLEX trading with the same underlying equity security or index; (2) must have the same exercise style (American or European); and (3) for a FLEX Index Option, may have a different settlement type (a.m.-settled or p.m.-settled), except each leg must have the same settlement type if designated as Asian-settled or Cliquet-settled.

[9] The proposed rule change has no impact on complex FLEX Orders submitted for electronic execution. The proposed rule change moves the requirement that a complex FLEX Order submitted into the System for an electronic FLEX Auction pursuant to Rule 5.72(c) include a bid or offer price for each leg, which leg prices must add together to equal the net price, to proposed Rule 5.72(b)(2)(A).

[10] *See* Rule 5.7(f) (which requires systemization of the terms of an order, which would include the limit price if a limit order); *see also* Rule 5.6(b) (which defines a ''limit order'' as an order to buy or sell a stated number of option contracts at a specified price or better). Customers that trade complex limit orders generally only provide a limit price for the net price, as they are ultimately looking for execution of the entire package to occur at a certain price (or better). However, it is possible (although uncommon) that a customer may provide a limit price for one or more of the legs, which the floor broker would also be required to systematize upon entry as a term of the order. In addition to the definition of a limit order, which may not trade at a price worse than the limit price, floor brokers are required to use due diligence to execute an order at the best prices available, as well as in accordance with the rules (including the definition of a limit order) and general floor broker responsibilities. *See* Rule 5.91(a); *see also* Rule 5.91(c) (which provides that an order entrusted to a floor broker is considered not held, which (as defined in Rule 5.6(c)) gives a floor broker discretion as to the price and time at which an order is to be executed, subject to a client's specified instruction).

execution price of a complex order (which leg prices may not be outside of the best prices of orders and quotes in the book for those legs). This is not the case in the FLEX market, in which there is no market in the leg series of complex orders that the System can use to calculate appropriate execution prices of the legs of a complex strategy (for which there are countless combinations of prices). Therefore, the Exchange believed requiring the leg prices to be input upon submission of a complex FLEX order would provide the System with this benchmark information to use when determining leg execution prices based on the net execution price. Because of the automatic execution of an electronic FLEX order following the electronic FLEX auction, which auction is based on the net execution price, the Exchange continues to believe the requirement to input leg prices upon submission of an order to an electronic FLEX auction is appropriate. However, in open outcry FLEX trading (as well as open outcry non-FLEX trading), the FLEX auction process functions as a price negotiation through which the net execution price, as well as the leg execution prices (that add up to that net execution price) are determined. Since the open outcry FLEX Auction process can be used to determine leg prices for a complex FLEX order after the parties agree to a net execution price, the Exchange believes it is reasonable to permit a Submitting FLEX Trader to input leg prices into the System either upon submission of a complex FLEX Order (and adjusted as necessary following execution), or only following execution. If a Submitting FLEX Trader includes leg prices in a complex FLEX Order upon submission of the order, the execution prices of those legs may be modified following the auction (subject to any limit price for a leg as instructed by a customer), as long as they add up to the net execution price.

The proposed rule change permits a Submitting FLEX Trader to continue to input those leg prices upon submission of the order and modify them as necessary following execution, or input them after execution. The proposed rule change is not modifying how complex FLEX Orders may be executed in open outcry, or the execution information that must be provided to the Exchange. Any leg prices input upon systematization of an order are visible only to the FLEX Trader on its PAR workstation. Prior to representing a complex order to the trading crowd, a FLEX Trader will generally request a market from the trading crowd. FLEX Traders (generally market-makers) in the trading crowd will respond with a market for the net price. Market-makers price the orders and the legs based on their own pricing models—they do not know the net limit price or the leg price of the systematized order, as a floor broker does not announce the leg prices when it represents the order on the trading floor. Once the crowd agrees on a net price, it then negotiates prices for the legs, which the Submitting FLEX Trader will input (or update, if applicable) into the order record on its PAR workstation. Therefore, whether a FLEX Trader inputs leg prices before an execution (and modifies them as necessary after execution to reflect floor negotiations during the open outcry auction (if necessary), or only inputs the execution leg prices after execution, has no impact on the open outcry FLEX auction or the prices at which FLEX complex orders (and the prices of the legs of those orders) trade. The proposed rule change is merely modifying the time at which FLEX Traders may provide the information to the Exchange.

The Exchange will issue an Exchange Notice announcing the implementation date for the proposed rule change, which date the Exchange expects to be within the next two weeks. This will permit the Exchange to implement the proposed rule change within its system and provide sufficient notice of the change and its related requirements to Trading Permit Holders.

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.[11] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[12] 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 the Section 6(b)(5)[13] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes the proposed rule change will remove impediments to and perfect the mechanism of a free and open market by providing Submitting FLEX Traders with the flexibility to input leg prices of complex strategies either upon entry of a complex FLEX Order or following execution. The Exchange believes this may lead to more efficient open outcry executions on behalf of a floor broker's customer, as a Submitting FLEX Trader will not be required to take the time to input leg prices upon submission of the order and then modify them after execution to reflect these negotiations, which ultimately benefits investors (as further discussed below). As noted above, because any leg prices of a complex FLEX order input upon systematization are only known to the Submitting FLEX Trader and not known to any other person in the trading crowd, the Exchange believes the proposed rule change will have no impact on the manner in which complex FLEX Orders are negotiated and executed in open outcry. The proposed rule change is not modifying how complex FLEX Orders may be executed in open outcry, or the information that Submitting FLEX Traders must provide to the Exchange. The proposed rule change is merely modifying the time at which Submitting FLEX Traders may provide certain information to the Exchange.

The Exchange believes the proposed rule change will protect investors, because it will permit a floor broker to request a market and execute a customer's order in open outcry in a more timely fashion. FLEX orders may include a substantial number of legs (they regularly include more than ten legs, but may include up to 100 legs). Inputting leg prices for a large number of legs may be a time-consuming exercise (and as noted above, it is ultimately unnecessary prior to an open outcry FLEX auction[14] given the negotiations that occur during such an auction), which may delay execution of the customer's order and potentially miss an opportunity for execution at prices based on then-current market conditions. While the proposed rule change has virtually no impact on other members of the trading crowd, the proposed rule change provides a floor

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(5).

[13] *Id.*

[14] This is subject to a floor broker's general obligation to adhere to its customers' instructions. *See supra* note 10.

broker with flexibility that may result in a timelier execution of its customer's FLEX order.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act, because it will apply to all Submitting FLEX Traders that represent complex FLEX Orders (*i.e.,* floor brokers) in open outcry in the same manner. All Submitting FLEX Traders will have the option to input leg prices on a complex FLEX Order upon submission of the order to an open outcry FLEX Auction, or following execution of that FLEX Order. As noted above, because the remainder of the trading crowd does not currently know the leg prices systematized by the Submitting FLEX Trader, the proposed rule change will have virtually no impact on other market participants. The proposed rule change is not modifying the information that FLEX Traders must provide to the Exchange—it is merely modifying the time at which FLEX Traders may provide the information to the Exchange. The Exchange believes applying the proposed rule change to open outcry FLEX auctions but not electronic FLEX auctions is reasonable given the ability for the trading crowd to negotiate the leg prices in open outcry, while the System has no ability to price the legs based on the net execution price without an electronic leg market.

The Exchange does not believe that 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, because it relates solely to the timing of the input of leg prices of FLEX Orders that may be executed on the Exchange. The proposed rule change merely provides Submitting FLEX Traders with flexibility regarding when they may input leg prices for complex FLEX Orders submitted for open outcry execution—either upon submission of the order or following execution of the order. The proposed rule change will have no impact on how, or the prices at which, a complex FLEX Order may execute in an open outcry FLEX Auction.

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

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 [15] and Rule 19b–4(f)(6) thereunder.[16]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act [17] normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)(iii) [18] 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 proposal may become operative upon filing. The Exchange stated that it believes, among other things, that waiver of the operative delay will permit FLEX Traders to take advantage of the proposed flexibility and the potential for more efficient open outcry FLEX executions as soon as possible, which it believes will ultimately benefit customers of floor brokers.

The Commission believes that waiver of the operative delay is appropriate because, as the Exchange stated, the rule change is not modifying the information that a Submitting FLEX Trader must provide to Exchange, but only the time at which such information may be provided to the Exchange and is not changing the way a FLEX Order is executed in an open outcry FLEX auction. The rule proposal also makes clear that if one or more of the legs is submitted with a limit price the Submitting FLEX Trader must enter the leg prices upon entry of the terms of the order. For these reasons, the Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission designates the proposed rule change to be operative upon filing.[19]

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–2019–117 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–2019–117. 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

[15] 15 U.S.C. 78s(b)(3)(A).

[16] 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.

[17] 17 CFR 240.19b–4(f)(6).

[18] 17 CFR 240.19b–4(f)(6)(iii).

[19] 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).

those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2019–117 and should be submitted on or before January 10, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2019–27460 Filed 12–19–19; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87760; File No. SR–BX–2019–045]

Self-Regulatory Organizations; Nasdaq BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to the Exchange's Transaction Fees and Credits and Qualified Market Maker Program, at Equity 7, Section 118

December 16, 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 11, 2019, Nasdaq BX, Inc. (''BX'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend: (i) The Exchange's transaction fees and credits, at Equity 7, Section 118(a); and (ii) its Qualified Market Maker Program, at Equity 7, Section 118(f), as described further below.

The text of the proposed rule change is available on the Exchange's website at *http://nasdaqbx.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

The Exchange operates on the ''taker-maker'' model, whereby it generally pays credits to members that take liquidity and charges fees to members that provide liquidity. Currently, the Exchange has a schedule, at Equity 7, Section 118(a), which consists of several different credits that it provides for orders in securities priced at $1 or more per share that access liquidity on the Exchange and several different charges that it assesses for orders in such securities that add liquidity on the Exchange. It also has a program, at Equity 7, Section 118(f), to reward those of its members that make significant contributions to the market.

Over the course of the last few months, the Exchange has experimented with various reformulations of its pricing schedule with the aim of increasing activity on the Exchange, improving market quality, and increasing market share.[3] Although these changes have met with some success, the Exchange has yet to achieve the results it desires. Accordingly, the Exchange proposes to again restate its pricing schedule, in large part, in a further attempt to improve the attractiveness of the market to new and existing participants.

Description of the Changes

Credits for Accessing Liquidity Through the Exchange

The Exchange proposes to eliminate its schedule of existing credits (except as described below) and replace it with a new schedule of credits for orders in securities that remove liquidity from the Exchange (the ''New Credits''). Generally speaking, the proposed New Credits will be higher than the existing credits for orders in Tape C and lower than the existing credits for orders in securities in Tapes A and B.[4] The proposed New Credits for orders in securities in all Tapes also will no longer be tied to threshold levels of liquidity removal activity in securities in Tape C. The Exchange believes that higher overall credits for orders in securities in Tape C will incentivize members to increase their liquidity removal activity in securities in Tape C. Meanwhile, eliminating the Tape C removal activity requirement from the qualifying criteria for credits for orders in securities in all Tapes will render those credits easier for members to attain, even as the amounts of those credits decrease for securities in Tapes A and B.

Specifically, the Exchange proposes to adopt the following New Credits:

- A $0.0029 per share executed credit for orders in securities in Tapes A and B and a $0.0028 per share executed credit for orders in securities in Tape C that access liquidity (excluding orders with Midpoint pegging and excluding orders that receive price improvement and execute against an order with a

[20] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 34–87271 (October 10, 2019), 84 FR 55621 (October 17, 2019) (SR–BX–2019–035); Securities Exchange Act Release No. 34–87093 (September 24, 2019), 84 FR 57530 (October 25, 2019) (SR–BX–2019–031); Securities Exchange Act Release No. 34–86447 (July 24, 2019); 84 FR 36989 (July 30, 2019) (SR–BX–2019–026); Securities Exchange Act Release No. 34–85912 (May 22, 2019); 84 FR 24834 (May 29, 2019) (SR–BX–2019–013).

[4] Whereas the highest credit under the existing schedule (for a member that adds liquidity equal to or exceeding an average daily volume of 50,000 shares in a month) is $0.0031 per share executed for orders in securities in Tapes A and B and the lowest credit is $0.0018 per share executed, the top such credit in the proposed schedule will be $0.0029 per share executed and the lowest credit will be $0.0015 per share executed. And whereas the highest credit under the existing schedule (for a member that adds liquidity equal to or exceeding an average daily volume of 50,000 shares in a month) is $0.0017 per share executed for orders in securities in Tape C and the lowest credit is $0.0005 per share executed, the top such credit in the proposed schedule will be $0.0028 per share executed and the lowest will be $0.0014 per share executed.

Non-displayed price) entered by a member: (i) Whose combined liquidity removing and adding activities equal to or exceed 0.225% of total Consolidated Volume during a month; and (ii) adds liquidity equal to or exceeding an average daily volume of 50,000 shares in a month.

- A $0.0026 per share executed credit for orders in securities in Tapes A and B and a $0.0025 per share executed credit for orders in securities in Tape C that access liquidity (excluding orders with Midpoint pegging and excluding orders that receive price improvement and execute against an order with a Non-displayed price) entered by a member that: (i) Accesses liquidity equal to or exceeding 0.08% of total Consolidated Volume during a month; and (ii) adds liquidity equal to or exceeding an average daily volume of 50,000 shares in a month.
- A $0.0021 per share executed credit for orders in securities in Tapes A and B and a $0.0020 per share executed credit for orders in securities in Tape C that access liquidity (excluding orders with Midpoint pegging and excluding orders that receive price improvement and execute against an order with a Non-displayed price) entered by a member that: (i) Accesses liquidity equal to or exceeding 0.05% of total Consolidated Volume during a month; and (ii) adds liquidity equal to or exceeding an average daily volume of 50,000 shares in a month.
- A $0.0015 per share executed credit for orders in securities in Tapes A and B and a $0.0014 per share executed credit for orders in securities in Tape C that access liquidity (excluding orders with Midpoint pegging and excluding orders that receive price improvement and execute against an order with a Non-displayed price) entered by a member that adds liquidity equal to or exceeding an average daily volume of 50,000 shares in a month.

As noted above, the proposed New Credits will not supplant all of the existing provisions. Instead, the Exchange proposes that the following existing provisions will continue to apply to orders in securities in all Tapes:

- $0.0000 per share executed for an order that receives price improvement and executes against an order with a Non-displayed price; and
- $0.0000 per share executed for an order with Midpoint pegging that removes liquidity.

The Exchange also proposes to continue charging a fee for orders in securities in any Tape (excluding an order with midpoint pegging and excluding an order that receives price improvement and executes against an order with a non-displayed price) that removes liquidity from the Exchange and that is entered by a member that does not add at least an average daily volume of 50,000 shares to the Exchange during a month. However, the Exchange proposes to increase that fee for orders in securities in all Tapes from $0.0005 to $0.0007 per share executed.

Charges for Adding Liquidity to the Exchange

In addition to the above, the Exchange proposes to replace its existing schedule of charges for adding displayed liquidity to the Exchange (the ''New Charges''). Generally speaking, the range of the proposed New Charges will be lower than the existing charges for orders in Tapes A and B and higher for orders in Tape C.[5] The proposed New Charges for displayed orders in securities in Tapes A and B also will no longer be tied to threshold levels of liquidity adding activity in securities in Tape B and the proposed New Charges for displayed orders in securities in Tape C will no longer be tied to threshold levels of liquidity adding activity in securities in Tape C. The Exchange believes that lower overall charges for orders in securities in Tapes A and B will incentivize members to increase their liquidity adding activity in securities in Tapes A and B. Higher charges for orders that add liquidity in Tape C will help to offset the costs of providing higher credits to members with orders in securities in Tape C that remove liquidity from the Exchange.

Specifically, the Exchange proposes to delete all of the existing charges for providing liquidity in displayed orders through the Exchange (except as provided below) and replace them with the following New Charges:

- A $0.0024 per share executed charge for displayed orders entered by a member that adds liquidity equal to or exceeding 0.25% of total Consolidated Volume during a month.
- A $0.0026 per share executed charge for displayed orders entered by a member that adds liquidity equal to or exceeding 0.15% of total Consolidated Volume during a month.
- A $0.0028 per share executed charge for displayed orders entered by a member that adds liquidity equal to or exceeding 0.07% of total Consolidated Volume during a month.
- Although the Exchange will continue to charge $0.0030 per share executed for all other orders in securities in Tapes A and B, it will increase its charge for all other orders in securities in Tape C from $0.0020 to $0.0030 per share executed.

The Exchange proposes that following existing charges will continue to apply to orders in securities in all Tapes:

- A $0.0005 per share executed charge for orders with Midpoint pegging entered by a member that adds 0.02% of total Consolidated Volume of non-displayed liquidity excluding a buy (sell) order that receives an execution price that is lower (higher) than the midpoint of the NBBO.
- A $0.0015 per share executed charge for orders with Midpoint pegging entered by other member excluding a buy (sell) order that receives an execution price that is lower (higher) than the midpoint of the NBBO.
- A $0.0030 per share executed charge for a buy (sell) order with Midpoint pegging entered by a member that receives an execution price that is lower (higher) than the midpoint of the NBBO.
- A $0.0028 per share executed charge for non-displayed orders (other than orders with Midpoint pegging) entered by a member that adds liquidity equal to or exceeding 0.25% total Consolidated Volume during a month.
- A $0.0030 per share executed charge for all other non-displayed orders.
- Charges for entering BSTG, BSCN, BMOP, BTFY, BCRT, BDRK, BCST, and SCAR orders that execute in a venue other than the Nasdaq BX Equities System.

Changes to Qualified Market Maker Program

The Exchange presently has a Qualified Market Maker (''QMM'') program, at Equity 7, Section 118(f), which rewards members that make significant contributions to market quality by providing liquidity at the national best bid and offer (''NBBO'') in a large number of securities for a significant portion of the day. In particular, the existing QMM program provides a member with a reduced transaction fee of $0.0016 per share executed for all of its displayed orders in securities priced at $1 or more if the member: (i) Quotes at the NBBO at least 25% of the time during market hours in an average of at least 400 securities per day during a month; and (ii) provides

[5] Whereas under the existing pricing schedule, the Exchange charges between $0.0025 and $0.0029 per share executed for displayed orders in securities in Tapes A and B, and between $0.0012 and $0.0017 per share executed for displayed orders in securities in Tape C, that add liquidity to the Exchange equal to or exceeding certain volume thresholds each month, the proposed schedule will charge fees for such displayed orders in securities in all three Tapes ranging from $0.0024 to $0.0028 per share executed.

add volume during a month of at least 0.125% of total Consolidated Volume.

The Exchange now proposes to replace the existing QMM program with one that will provide QMMs with two tiers of discounts off of their regular fees for displayed orders priced at $1 or more that add liquidity to the Exchange. The amount of the new discounts will vary depending upon the number of securities in which the QMM quotes at the NBBO and the extent to which the QMM adds liquidity as a percentage of total Consolidated Volume. First, if a QMM quotes at the NBBO at least 25% of the time during market hours in an average of at least 400 securities per day, and if it provides add volume of at least 0.07% of total Consolidated Volume during a month, then the QMM will be entitled to receive a discount of $0.0001 per share executed. Second, if a QMM quotes at the NBBO at least 25% of the time during market hours in an average of at least 750 securities per day, and if it provides add volume of at least 0.15% of total Consolidated Volume during a month, then the QMM will be entitled to receive a discount of $0.0002 per share executed. These discounts will not be cumulative. The Exchange intends for its new QMM program to provide greater incentives to members to increase their contributions to market quality.

Applicability to and Impact on Participants

The proposed rule change is a broad restatement of the Exchange's schedule of credits and charges. The Exchange has designed the restated schedule to specifically increase liquidity removal activity on the Exchange for orders in securities in Tape C, to increase liquidity adding activity in Tapes A and B, and to thereby improve the overall quality and attractiveness of the Nasdaq BX market. The Exchange intends to accomplish this objective by providing overall higher credits to those participants that engage in large volumes of liquidity removal activity on the Exchange in securities in Tape C and by charging lower overall fees to those participants that add liquidity to the Exchange in securities in Tapes A and B. The Exchange also intends to provide greater incentives to members to act as QMMs and to contribute significantly to the improvement of the market.

Those participants that act as net removers of liquidity from the Exchange in securities in Tape C will benefit directly from the proposed rule change through the receipts of higher credits. Those participants that act as net adders of liquidity to the Exchange in securities in Tapes A and B will also benefit from lower charges and indirectly from any improvement in the overall quality of the market. However, net liquidity adders in securities in Tape C and net removers of liquidity in securities in Tapes A and B will bear the costs of these proposals. The Exchange notes that its proposal is not otherwise targeted at or expected to be limited in its applicability to a specific segment(s) of market participants nor will it apply differently to different types of market participants.

Members will not be impacted directly by the replacement of the existing QMM program because no member currently qualifies for that program.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[6] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[7] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The proposal is also consistent with Section 11A of the Act relating to the establishment of the national market system for securities.

The Proposal is Reasonable

The Exchange's proposed change to its schedule of credits and charges is reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for equity securities transaction services that constrain its pricing determinations in that market. The fact that this market is competitive has long been recognized by the courts. In *NetCoalition* v. *Securities and Exchange Commission,* the D.C. Circuit stated as follows: ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . .''[8]

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, 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.''[9]

Numerous indicia demonstrate the competitive nature of this market. For example, clear substitutes to the Exchange exist in the market for equity security transaction services. The Exchange is only one of several equity venues to which market participants may direct their order flow, and it represents a small percentage of the overall market. It is also only one of several taker-maker exchanges. Competing equity exchanges offer similar tiered pricing structures to that of the Exchange, including schedules of rebates and fees that apply based upon members achieving certain volume thresholds.[10]

Within this environment, market participants can freely and often do shift their order flow among the Exchange and competing venues in response to changes in their respective pricing schedules.[11] Separately, the Exchange has provided the SEC staff with multiple examples of instances where

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(4) and (5).

[8] *NetCoalition* v. *SEC,* 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

[9] Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[10] CBOE EDGA provides a standard rebate for liquidity removers of $0.00180 per share executed (or between $0.0022 and $0.0028 per share executed if a member qualifies for a volume tier), and a standard charge of $0.0030 per share executed for liquidity adders (or between $0.0022 and $0.0026 if a member qualifies for a volume tier). NYSE National has a standard charge of $0.0005 per share executed for liquidity removers ($0.0025 and $0.0030 rebate if a member qualifies for a volume tier) and a standard charge of $0.0028 per share executed for liquidity adders (and a range of charges from $0.0020–$0.0026 if a member qualifies for a volume tier).

[11] The Exchange perceives no regulatory, structural, or cost impediments to market participants shifting order flow away from it. In particular, the Exchange notes that these examples of shifts in liquidity and market share, along with many others, have occurred within the context of market participants' existing duties of Best Execution and obligations under the Order Protection Rule under Regulation NMS.

pricing changes by BX and other exchanges have resulted in shifts in exchange market share. Within the foregoing context, the proposal represents a reasonable attempt by the Exchange to increase its liquidity and market share relative to its competitors.

The Exchange has designed its proposed schedule of credits and charges to provide increased overall incentives to members to increase their liquidity removal and adding activity on the Exchange. An increase in liquidity removal and adding activity on the Exchange will, in turn, improve the quality of the Nasdaq BX market and increase its attractiveness to existing and prospective participants. Generally, the proposed New Credits and Charges will be comparable to, if not favorable to, those that its competitors provide.[12]

Moreover, the Exchange believes that it is reasonable to bolster its QMM program as a means of incentivizing members to act as QMMs and to increase their contributions to the improvement of the quality of the Nasdaq BX Exchange.

The Exchange notes that those participants that are dissatisfied with the New Charges or New Credits are free to shift their order flow to competing venues that offer them lower charges or higher credits.

The Proposal is an Equitable Allocation of Credits and Charges

The Exchange believes its proposal will allocate its New Credits and New Charges fairly among its market participants. It is equitable for the Exchange to increase its credits to participants whose orders remove liquidity from the Exchange as a means of incentivizing increased liquidity removal activity. Likewise, it is equitable for the Exchange to reduce charges to participants whose orders add liquidity to the Exchange as a means of incentivizing liquidity adding activity. An increase in overall liquidity removal and addition activity on the Exchange will improve the quality of the Nasdaq BX market and increase its attractiveness to existing and prospective participants.

Likewise, it is equitable for the Exchange to specifically increase credits for orders that remove liquidity from the Exchange in Tape C as a means of increasing liquidity removal activity in that Tape, and to specifically lower overall charges for orders that add liquidity to the Exchange in Tapes A and B as a means of increasing liquidity adding activity in Tapes A and B. Again, the Exchange intends for these changes to improve the overall quality and attractiveness of the Nasdaq BX market.

For similar reasons, the Exchange believes that it is equitable to increase the discounts it offers to members that qualify as QMMs if such members, in turn, increase the extent of their market improving behavior by quoting at the NBBO for a larger number of securities than is required now and by adding a higher percentage of total Consolidated Volume.

Although under the proposal, certain market participants will pay higher charges or attain lower credits than they do now, those participants will also benefit from any improvements in the quality and attractiveness of the market that the New Credits and New Charges and amended QMM program will provide. Moreover, any participant that wishes to avoid paying higher charges or receiving lower credits is free to shift their order flow to competing venues that provide more favorable pricing.

The Proposed Fee is not Unfairly Discriminatory

The Exchange believes that the proposal is not unfairly discriminatory. As an initial matter, the Exchange believes that nothing about its volume-based tiered pricing model 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 the Exchange and its competitors have long employed with the assent of the Commission. It is fair because it incentivizes customer activity that increases liquidity, enhances price discovery, and improves the overall quality of the equity markets.

The Exchange intends for its proposal to improve market quality for all members on the Exchange and by extension attract more liquidity to the market, improving market wide quality and price discovery. Although net removers of liquidity in Tape C and net adders of liquidity in Tapes A and B will benefit most from the proposal, this result is fair insofar as increased activity in securities in these Tapes will help to improve market quality and the attractiveness of the Nasdaq BX market to all existing and prospective participants. And although certain participants will bear the costs of the proposed rule change through higher charges or lower credits, this too is fair because these participants will also benefit from improvements in market quality. Moreover, any participant that does not wish to pay higher charges or receive lower credits is free to shift its order flow to a competing venue.

Finally, the Exchange believes that its proposed amendments to its QMM program are not unfairly discriminatory because the new program will be available to any member that chooses to meet its requirements. The Exchange notes that none of its members will be affected directly by the proposed amendments insofar as no member currently qualifies as a QMM under the existing program.

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.

Intramarket Competition

The Exchange does not believe that its proposal will place any category of Exchange participant at a competitive disadvantage. As noted above, all members of the Exchange will benefit from any increase in market activity that the proposal effectuates. Members may grow or modify their businesses so that they can receive the higher credits or pay lower charges. Moreover, members are free to trade on other venues to the extent they believe that the fees assessed and credits provided are not attractive. As one can observe by looking at any market share chart, price competition between exchanges is fierce, with liquidity and market share moving freely between exchanges in reaction to fee and credit changes. The Exchange notes that the tier structure is consistent with broker-dealer fee practices as well as the other industries, as described above.

Intermarket Competition

Addressing whether the proposed fee could impose a burden on competition on other SROs that is not necessary or appropriate, the Exchange believes that its proposed modifications to its schedule of credits and charges will not impose a burden on competition because the Exchange's execution services are completely voluntary and subject to extensive competition both from the other 12 live exchanges and from off-exchange venues, which include 32 alternative trading systems. The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee

[12] *See* n. 10, *supra.*

levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

The proposed restated schedule of credits and charges is reflective of this competition because, as a threshold issue, the Exchange is a relatively small market so its ability to burden intermarket competition is limited. In this regard, even the largest U.S. equities exchange by volume has less than 20% market share, which in most markets could hardly be categorized as having enough market power to burden competition. Moreover, as noted above, price competition between exchanges is fierce, with liquidity and market share moving freely between exchanges in reaction to fee and credit changes. This is in addition to free flow of order flow to and among off-exchange venues which comprised more than 37% of industry volume for the month of July 2019.

The Exchange intends for the proposed changes to its schedule of fees and credits, in the aggregate, to increase member incentives to engage in the removal and addition of liquidity on the Exchange. Similarly, the Exchange intends for its proposal to amend its QMM Program to increase incentives for members to improve the market by quoting at the NBBO meaningfully in a large number of securities and by adding a significant amount of liquidity. These changes are procompetitive and reflective of the Exchange's efforts to make it an attractive and vibrant venue to market participants.

In sum, if the changes proposed herein are unattractive to market participants, it is likely that the Exchange will lose market share as a result. Accordingly, the Exchange does not believe that the proposed changes will impair the ability of members or competing order execution venues to maintain their competitive standing in the financial markets.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[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: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) 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–BX–2019–045 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–BX–2019–045. 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–BX–2019–045 and should be submitted on or before January 10, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2019–27456 Filed 12–19–19; 8:45 am]

BILLING CODE 8011–01–P

[13] 15 U.S.C. 78s(b)(3)(A)(ii).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87753; File No. SR–GEMX–2019–19]

Self-Regulatory Organizations; Nasdaq GEMX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Options 3, Section 3 (Minimum Trading Increments)

December 16, 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 12, 2019, Nasdaq GEMX, LLC (''GEMX'' 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 Options 3, Section 3 (Minimum Trading

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Increments) to extend through June 30, 2020 or the date of permanent approval, if earlier, the Penny Pilot Program in options classes in certain issues (''Penny Pilot'' or ''Pilot'').

The text of the proposed rule change is available on the Exchange's website at *http://nasdaqgemx.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

The purpose of this filing is to amend Options 3, Section 3 to extend the Penny Pilot through June 30, 2020 or the date of permanent approval, if earlier.[3]

Under the Penny Pilot, the minimum price variation for all participating options classes, except for options overlying the PowerShares QQQ Trust (''QQQQ''), the SPDR S&P 500 Exchange Traded Fund (''SPY'') and the iShares Russell 2000 Index Fund (''IWM''), is $0.01 for all quotations in options series that are quoted at less than $3 per contract and $0.05 for all quotations in options series that are quoted at $3 per contract or greater. Options overlying QQQQ, SPY and IWM are quoted in $0.01 increments for all options series. The Penny Pilot is currently scheduled to expire on December 31, 2019.[4] The Exchange now proposes to extend the time period of the Penny Pilot through June 30, 2020 or the date of permanent approval, if earlier.

This filing does not propose any substantive changes to the Penny Pilot Program; all classes currently participating in the Penny Pilot will remain the same and all minimum increments will remain unchanged. The Exchange believes the benefits to public customers and other market participants who will be able to express their true prices to buy and sell options have been demonstrated to outweigh the potential increase in quote traffic.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[5] in general, and furthers the objectives of Section 6(b)(5) of the Act,[6] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

In particular, the proposed rule change, which extends the Penny Pilot for an additional six months through June 30, 2020 or the date of permanent approval, if earlier, will enable public customers and other market participants to express their true prices to buy and sell options for the benefit of all market participants. This is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. To the contrary, this proposal is pro-competitive because it allows Penny Pilot issues to continue trading on the Exchange.

Moreover, the Exchange believes that the proposed rule change will allow for further analysis of the Pilot and a determination of how the Pilot should be structured in the future; and will serve to promote regulatory clarity and consistency, thereby reducing burdens on the marketplace and facilitating investor protection.

The Pilot is an industry-wide initiative supported by all other option exchanges. The Exchange believes that extending the Pilot will allow for continued competition between market participants on the Exchange trading similar products as their counterparts on other exchanges, while at the same time allowing the Exchange to continue to compete for order flow with other exchanges in option issues trading as part of the Pilot.

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

The Exchange filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act[7] and Rule 19b–4(f)(6)[8] thereunder. 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[9] and Rule 19b–4(f)(6)[10] thereunder.

A proposed rule changed filed under Rule 19b–4(f)(6)[11] normally does not become operative prior to 30 days after the date of filing. However, pursuant to Rule 19b–4(f)(6),[12] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because doing so will allow the Pilot Program to continue without interruption in a manner that is consistent with the Commission's prior approval of the extension and expansion of the Pilot Program.[13] Accordingly, the Commission designates the proposed

[3] The options exchanges in the U.S. that have pilot programs similar to the Penny Pilot (together ''pilot programs'') are currently working on a proposal for permanent approval of the respective pilot programs.

[4] *See* Securities Exchange Act Release No. 86149 (June 19, 2019), 84 FR 29905 (June 25, 2019) (SR–GEMX–2019–07).

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(5).

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(6).

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) 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 just shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[11] 17 CFR 240.19b–4(f)(6).

[12] 17 CFR 240.19b–4(f)(6)(iii).

[13] *See* Securities Exchange Act Release No. 61061 (November 24, 2009), 74 FR 62857 (December 1, 2009) (SR–NYSEArca–2009–44)

rule change as operative upon filing with the Commission.[14]

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–GEMX–2019–19 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–GEMX–2019–19. 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–GEMX–2019–19 and should be submitted on or before January 10, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2019–27449 Filed 12–19–19; 8:45 am]

BILLING CODE 8011–01–P

[14] For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 33716; File No. 812–14977]

Prospect Capital Corporation, et al.

December 16, 2019.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice.

Notice of application for an order under sections 17(d) and 57(i) of the Investment Company Act of 1940 (the ''Act'') and rule 17d–1 under the Act to permit certain joint transactions otherwise prohibited by sections 17(d) and 57(a)(4) of the Act and rule 17d–1 under the Act.

SUMMARY OF APPLICATION: Applicants request an order to permit certain business development companies (''BDCs'') and closed-end management investment companies to co-invest in portfolio companies with each other and with certain affiliated investment funds and accounts.

APPLICANTS: Prospect Capital Corporation (''PSEC''), Priority Income Fund, Inc. (''PRIS''), TP Flexible Income Fund, Inc. (''FLEX''), Prospect Capital Funding LLC (''PSEC SPV Sub''), National Property REIT Corp. (''PSEC REIT Sub''), Prospect Capital Management L.P. (''PCM''), Priority Senior Secured Income Management, LLC (''PRISM''); and Prospect Flexible Income Management, LLC (''PFIM,'' and together with PCM and PRISM, the ''Existing Advisers'').

FILING DATES: The application was filed on November 16, 2018, and amended on May 31, 2019, August 26, 2019, and December 2, 2019.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on January 10, 2020, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090. Applicants: 10 East 40th Street, 42nd Floor, New York, NY 10016.

FOR FURTHER INFORMATION CONTACT: Jean E. Minarick, Senior Counsel, at (202) 551–6811 or Kaitlin C. Bottock, Branch Chief, at (202) 551–6825 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's website by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Introduction

1. The applicants request an order of the Commission under sections 17(d) and 57(i) and rule 17d–1 thereunder (the ''Order'') to permit, subject to the terms and conditions set forth in the application (the ''Conditions''), a Regulated Fund [1] and one or more other

[1] ''Regulated Funds'' means PSEC, PRIS, FLEX, the Future Regulated Funds and the BDC Downstream Funds (defined below). ''Future Regulated Fund'' means a closed-end management investment company (a) that is registered under the Act or has elected to be regulated as a BDC, (b) whose investment adviser (and sub-adviser, if any) is an Adviser, and (c) that intends to participate in the Co-investment Program.

''Adviser'' means the Existing Advisers, together with any future investment adviser that (i) controls, is controlled by, or is under common control with PCM, (ii) (a) is registered as an investment adviser under the Investment Advisers Act of 1940

Continued

Regulated Funds and/or one or more Affiliated Funds[2] to enter into Co-Investment Transactions with each other. ''Co-Investment Transaction'' means any transaction in which a Regulated Fund (or its Wholly-Owned Investment Sub (as defined below)) participated together with one or more Affiliated Funds and/or one or more other Regulated Funds in reliance on the Order. ''Potential Co-Investment Transaction'' means any investment opportunity in which a Regulated Fund (or its Wholly-Owned Investment Sub) could not participate together with one or more Affiliated Funds and/or one or more other Regulated Funds without obtaining and relying on the Order.[3]

2. The Order sought by the applicants would supersede the prior order[4] (''Prior Order'') with the result that no person will continue to rely on the Prior Order if the Order is granted.

Applicants

3. PSEC and FLEX are non-diversified, closed-end management investment companies incorporated in Maryland that have elected to be regulated as BDCs under the Act.[5] The Boards[6] of PSEC and FLEX currently consist of five directors, three of whom are Independent Directors.[7] PRIS is a non-diversified, closed-end management investment company incorporated in Maryland that is registered as an investment company under the Act. The Board of PRIS currently consists of five directors, three of whom are Independent Directors.

4. PCM, a limited partnership under the laws of the state of Delaware, is registered with the Commission as an investment adviser under the Advisers Act. PRISM, a Delaware limited liability company, is registered with the Commission as an investment adviser under the Advisers Act. PFIM, a limited liability company under the laws of the state of Delaware, is registered with the Commission as an investment adviser under the Advisers Act. PCM controls PRISM and PFIM.

5. The Advisers, and any direct or indirect, wholly- or majority-owned subsidiary of an Adviser, may hold various financial assets in a principal capacity (the ''Prospect Proprietary Accounts'').

6. Applicants state that a Regulated Fund may, from time to time, form one or more Wholly-Owned Investment Subs.[8] Such a subsidiary may be prohibited from investing in a Co-Investment Transaction with a Regulated Fund (other than its parent) or any Affiliated Fund because it would be a company controlled by its parent Regulated Fund for purposes of section 57(a)(4) and rule 17d–1. Applicants request that each Wholly-Owned Investment Sub be permitted to participate in Co-Investment Transactions in lieu of the Regulated Fund that owns it and that the Wholly-Owned Investment Sub's participation in any such transaction be treated, for purposes of the Order, as though the parent Regulated Fund were participating directly.

Applicants' Representations

A. Allocation Process

7. Applicants represent that the Advisers have established processes for ensuring compliance with the Prior Order and for allocating initial investment opportunities, opportunities for subsequent investments in an issuer and dispositions of securities holdings reasonably designed to treat all clients fairly and equitably. Further, applicants represent that these processes will be extended and modified in a manner reasonably designed to ensure that the additional transactions permitted under the Order will both (i) be fair and equitable to the Regulated Funds and the Affiliated Funds and (ii) comply with the Conditions.

8. Opportunities for Potential Co-Investment Transactions may arise when investment advisory personnel of an Adviser becomes aware of investment opportunities that may be appropriate for a Regulated Fund and one or more other Regulated Funds and/or one or more Affiliated Funds. If the requested Order is granted, the Advisers will establish, maintain and implement policies and procedures reasonably designed to ensure that, when such opportunities arise, the Advisers to the relevant Regulated Funds are promptly notified and receive the same information about the opportunity as any other Advisers considering the opportunity for their clients. In particular, consistent with Condition 1, if a Potential Co-Investment Transaction falls within the then-current Objectives and Strategies[9] and any Board-

(''Advisers Act'') or (b) is a relying adviser of an investment adviser that is registered under the Advisers Act, and that controls, is controlled by, or is under common control with, PCM, and (iii) is not a Regulated Fund or a subsidiary of a Regulated Fund.

[2] ''Affiliated Fund'' means any Prospect Proprietary Account (as defined below) and any entity (a) whose investment adviser (and sub-adviser(s), if any) are Advisers, (b) that either (i) would be an investment company but for section 3(c)(1), 3(c)(5)(C) or 3(c)(7) of the Act or (ii) relies on rule 3a–7 under the Act, (c) that is not a BDC Downstream Fund, and (d) that intends to participate in the Co-Investment Program.

''BDC Downstream Fund'' means, with respect to any Regulated Fund that is a business development company (''BDC''), an entity (i) that the BDC directly or indirectly controls, (ii) that is not controlled by any person other than the BDC (except a person that indirectly controls the entity solely because it controls the BDC), (iii) that would be an investment company but for section 3(c)(1) or 3(c)(7) of the Act, (iv) whose investment adviser (and sub-adviser, if any) is an Adviser, (v) that is not a Wholly-Owned Investment Sub and (vi) that intends to participate in the Co-Investment Program (defined below).

[3] All existing entities that currently intend to rely on the Order have been named as applicants and any existing or future entities that may rely on the Order in the future will comply with its terms and Conditions set forth in the application.

[4] Prospect Capital Corporation, *et al.,* Investment Company Act Rel. Nos. 30855 (Jan. 13, 2014) (notice) and 30909 (Feb. 10, 2014) (order) (''Prior Order'').

[5] Section 2(a)(48) defines a BDC to be any closed-end investment company that operates for the purpose of making investments in securities described in section 55(a)(1) through 55(a)(3) and makes available significant managerial assistance with respect to the issuers of such securities.

[6] ''Board'' means (i) with respect to a Regulated Fund other than a BDC Downstream Fund, the board of directors (or the equivalent) of the Regulated Fund and (ii) with respect to a BDC Downstream Fund, the Independent Party of the BDC Downstream Fund.

''Independent Party'' means, with respect to a BDC Downstream Fund, (i) if the BDC Downstream Fund has a board of directors (or the equivalent), the board or (ii) if the BDC Downstream Fund does not have a board of directors (or the equivalent), a transaction committee or advisory committee of the BDC Downstream Fund.

[7] ''Independent Director'' means a member of the Board of any relevant entity who is not an ''interested person'' as defined in section 2(a)(19) of the Act. No Independent Director of a Regulated Fund (including any non-interested member of an Independent Party) will have a financial interest in any Co-Investment Transaction, other than indirectly through share ownership in one of the Regulated Funds.

[8] ''Wholly-Owned Investment Sub'' means an entity (i) that is wholly-owned by a Regulated Fund (with such Regulated Fund at all times holding, beneficially and of record, 95% or more of the voting and economic interests); (ii) whose sole business purpose is to hold one or more investments on behalf of such Regulated Fund (and in the case of an SBIC Subsidiary, maintain a license under the Small Business Investment Act of 1958 (''SBA Act'') and issue debentures guaranteed by the Small Business Administration (''SBA'')); (iii) with respect to which such Regulated Fund's Board has the sole authority to make all determinations with respect to the entity's participation under the Conditions; and (iv) that (A) would be an investment company but for section 3(c)(1), 3(c)(5)(C), or 3(c)(7) of the Act, or (B) that qualifies as a real estate investment trust within the meaning of section 856 of the Internal Revenue Code because substantially all of its assets would consist of real properties. ''SBIC Subsidiary'' means a Wholly-Owned Investment Sub that is licensed by the SBA to operate under the SBA Act as a small business investment company. PSEC SPV Sub and PSEC REIT Sub each is a Wholly-Owned Investment Sub of PSEC.

[9] ''Objectives and Strategies'' means (i) with respect to any Regulated Fund other than a BDC Downstream Fund, its investment objectives and strategies, as described in its most current registration statement on Form N–2, other current filings with the Commission under the Securities Act of 1933 (''Securities Act'') or under the Securities Exchange Act of 1934, as amended, and

Established Criteria [10] of a Regulated Fund, the policies and procedures will require that the Adviser to such Regulated Fund receive sufficient information to allow such Adviser's investment committee to make its independent determination and recommendations under the Conditions. The Adviser to each applicable Regulated Fund will then make an independent determination of the appropriateness of the investment for the Regulated Fund in light of the Regulated Fund's then-current circumstances. If the Adviser to a Regulated Fund deems the Regulated Fund's participation in such Potential Co-Investment Transaction to be appropriate, then it will formulate a recommendation regarding the proposed order amount for the Regulated Fund.

9. Applicants state that, for each Regulated Fund and Affiliated Fund whose Adviser recommends participating in a Potential Co-Investment Transaction, the Adviser's investment committee will approve an investment amount. Prior to the External Submission (as defined below), each proposed order amount may be reviewed and adjusted, in accordance with the applicable Advisers' written allocation policies and procedures, by the applicable Adviser's investment committee.[11] The order of a Regulated Fund or Affiliated Fund resulting from this process is referred to as its ''Internal Order.'' The Internal Order will be submitted for approval by the Required Majority of any participating Regulated Funds in accordance with the Conditions.[12]

10. If the aggregate Internal Orders for a Potential Co-Investment Transaction do not exceed the size of the investment opportunity immediately prior to the submission of the orders to the underwriter, broker, dealer or issuer, as applicable (the ''External Submission''), then each Internal Order will be fulfilled as placed. If, on the other hand, the aggregate Internal Orders for a Potential Co-Investment Transaction exceed the size of the investment opportunity immediately prior to the External Submission, then the allocation of the opportunity will be made pro rata on the basis of the size of the Internal Orders.[13] If, subsequent to such External Submission, the size of the opportunity is increased or decreased, or if the terms of such opportunity, or the facts and circumstances applicable to the Regulated Funds' or the Affiliated Funds' consideration of the opportunity, change, the participants will be permitted to submit revised Internal Orders in accordance with written allocation policies and procedures that the Advisers will establish, implement and maintain.[14]

B. Follow-On Investments

11. Applicants state that from time to time the Regulated Funds and Affiliated Funds may have opportunities to make Follow-On Investments [15] in an issuer in which a Regulated Fund and one or more other Regulated Funds and/or Affiliated Funds previously have invested.

12. Applicants propose that Follow-On Investments would be divided into two categories depending on whether the prior investment was a Co-Investment Transaction or a Pre-Boarding Investment.[16] If the Regulated Funds and Affiliated Funds had previously participated in a Co-Investment Transaction with respect to the issuer, then the terms and approval of the Follow-On Investment would be subject to the Standard Review Follow-Ons described in Condition 8. If the Regulated Funds and Affiliated Funds have not previously participated in a Co-Investment Transaction with respect to the issuer but hold a Pre-Boarding Investment, then the terms and approval of the Follow-On Investment would be subject to the Enhanced-Review Follow-Ons described in Condition 9. All Enhanced Review Follow-Ons require the approval of the Required Majority. For a given issuer, the participating Regulated Funds and Affiliated Funds would need to comply with the requirements of Enhanced-Review Follow-Ons only for the first Co-Investment Transaction. Subsequent Co-Investment Transactions with respect to the issuer would be governed by the requirements of Standard Review Follow-Ons.

13. A Regulated Fund would be permitted to invest in Standard Review Follow-Ons either with the approval of the Required Majority under Condition 8(c) or without Board approval under Condition 8(b) if it is (i) a Pro Rata Follow-On Investment [17] or (ii) a Non-

its most current report to stockholders, and (ii) with respect to any BDC Downstream Fund, those investment objectives and strategies described in its disclosure documents (including private placement memoranda and reports to equity holders) and organizational documents (including operating agreements).

[10] ''Board-Established Criteria'' means criteria that the Board of a Regulated Fund may establish from time to time to describe the characteristics of Potential Co-Investment Transactions regarding which the Adviser to the Regulated Fund should be notified under Condition 1. The Board-Established Criteria will be consistent with the Regulated Fund's Objectives and Strategies. If no Board-Established Criteria are in effect, then the Regulated Fund's Adviser will be notified of all Potential Co-Investment Transactions that fall within the Regulated Fund's then-current Objectives and Strategies. Board-Established Criteria will be objective and testable, meaning that they will be based on observable information, such as industry/sector of the issuer, minimum EBITDA of the issuer, asset class of the investment opportunity or required commitment size, and not on characteristics that involve a discretionary assessment. The Adviser to the Regulated Fund may from time to time recommend criteria for the Board's consideration, but Board-Established Criteria will only become effective if approved by a majority of the Independent Directors. The Independent Directors of a Regulated Fund may at any time rescind, suspend or qualify their approval of any Board-Established Criteria, though applicants anticipate that, under normal circumstances, the Board would not modify these criteria more often than quarterly.

[11] The reason for any such adjustment to a proposed order amount will be documented in writing and preserved in the records of each Adviser.

[12] ''Required Majority'' means a required majority, as defined in section 57(o) of the Act. In the case of a Regulated Fund that is a registered closed-end fund, the Board members that make up the Required Majority will be determined as if the Regulated Fund were a BDC subject to section 57(o). In the case of a BDC Downstream Fund with a board of directors (or the equivalent), the members that make up the Required Majority will be determined as if the BDC Downstream Fund were a BDC subject to section 57(o). In the case of a BDC Downstream Fund with a transaction committee or advisory committee, the committee members that make up the Required Majority will be determined as if the BDC Downstream Fund were a BDC subject to section 57(o) and as if the committee members were directors of the fund.

[13] The Advisers will maintain records of all proposed order amounts, Internal Orders and External Submissions in conjunction with Potential Co-Investment Transactions. Each applicable Adviser will provide the Eligible Directors with information concerning the Affiliated Funds' and Regulated Funds' order sizes to assist the Eligible Directors with their review of the applicable Regulated Fund's investments for compliance with the Conditions.

''Eligible Directors'' means, with respect to a Regulated Fund and a Potential Co-Investment Transaction, the members of the Regulated Fund's Board eligible to vote on that Potential Co-Investment Transaction under section 57(o) of the Act (treating any registered investment company or series thereof as a BDC for this purpose.

[14] The Board of the Regulated Fund will then either approve or disapprove of the investment opportunity in accordance with Condition 2, 6, 7, 8 or 9, as applicable.

[15] ''Follow-On Investment'' means an additional investment in the same issuer, including, but not limited to, through the exercise of warrants, conversion privileges or other rights to purchase securities of the issuer.

[16] ''Pre-Boarding Investments'' are investments in an issuer held by a Regulated Fund as well as one or more Affiliated Funds and/or one or more other Regulated Funds that were acquired prior to participating in any Co-Investment Transaction: (i) In transactions in which the only term negotiated by or on behalf of such funds was price in reliance on one of the JT No-Action Letters (defined below); or (ii) in transactions occurring at least 90 days apart and without coordination between the Regulated Fund and any Affiliated Fund or other Regulated Fund.

[17] A ''Pro Rata Follow-On Investment'' is a Follow-On Investment (i) in which the participation of each Affiliated Fund and each Regulated Fund is proportionate to its outstanding investments in

Continued

Negotiated Follow-On Investment.[18] Applicants believe that these Pro Rata and Non-Negotiated Follow-On Investments do not present a significant opportunity for overreaching on the part of any Adviser and thus do not warrant the time or the attention of the Board. Pro Rata Follow-On Investments and Non-Negotiated Follow-On Investments remain subject to the Board's periodic review in accordance with Condition 10.

C. Dispositions

14. Applicants propose that Dispositions[19] would be divided into two categories. If the Regulated Funds and Affiliated Funds holding investments in the issuer had previously participated in a Co-Investment Transaction with respect to the issuer, then the terms and approval of the Disposition would be subject to the Standard Review Dispositions described in Condition 6. If the Regulated Funds and Affiliated Funds have not previously participated in a Co-Investment Transaction with respect to the issuer but hold a Pre-Boarding Investment, then the terms and approval of the Disposition would be subject to the Enhanced Review Dispositions described in Condition 7. Subsequent Dispositions with respect to the same issuer would be governed by Condition 6 under the Standard Review Dispositions.[20]

15. A Regulated Fund may participate in a Standard Review Disposition either with the approval of the Required Majority under Condition 6(d) or without Board approval under Condition 6(c) if (i) the Disposition is a Pro Rata Disposition[21] or (ii) the securities are Tradable Securities[22] and the Disposition meets the other requirements of Condition 6(c)(ii). Pro Rata Dispositions and Dispositions of a Tradable Security remain subject to the Board's periodic review in accordance with Condition 10.

D. Delayed Settlement

16. Applicants represent that under the terms and Conditions of the application, all Regulated Funds and Affiliated Funds participating in a Co-Investment Transaction will invest at the same time, for the same price and with the same terms, conditions, class, registration rights and any other rights, so that none of them receives terms more favorable than any other. However, the settlement date for an Affiliated Fund in a Co-Investment Transaction may occur up to ten business days after the settlement date for the Regulated Fund, and vice versa. Nevertheless, in all cases, (i) the date on which the commitment of the Affiliated Funds and Regulated Funds is made will be the same even where the settlement date is not and (ii) the earliest settlement date and the latest settlement date of any Affiliated Fund or Regulated Fund participating in the transaction will occur within ten business days of each other.

E. Holders

17. Under Condition 15, if an Adviser, its principals, or any person controlling, controlled by, or under common control with the Adviser or its principals, and the Affiliated Funds (collectively, the ''Holders'') own in the aggregate more than 25 percent of the outstanding voting shares of a Regulated Fund (the ''Shares''), then the Holders will vote such Shares as directed by an independent third party when voting on matters specified in the Condition. Applicants believe that this Condition will ensure that the Independent Directors will act independently in evaluating Co-Investment Transactions, because the ability of the Adviser or its principals to influence the Independent Directors by a suggestion, explicit or implied, that the Independent Directors can be removed will be limited significantly. The Independent Directors shall evaluate and approve any independent party, taking into account its qualifications, reputation for independence, cost to the shareholders, and other factors that they deem relevant.

Applicants' Legal Analysis

1. Section 17(d) of the Act and rule 17d–1 under the Act prohibit participation by a registered investment company and an affiliated person in any ''joint enterprise or other joint arrangement or profit-sharing plan,'' as defined in the rule, without prior approval by the Commission by order upon application. Section 17(d) of the Act and rule 17d–1 under the Act are applicable to Regulated Funds that are registered closed-end investment companies.

2. Similarly, with regard to BDCs, section 57(a)(4) of the Act generally prohibits certain persons specified in section 57(b) from participating in joint transactions with the BDC or a company controlled by the BDC in contravention of rules as prescribed by the Commission. Section 57(i) of the Act provides that, until the Commission prescribes rules under section 57(a)(4), the Commission's rules under section 17(d) of the Act applicable to registered closed-end investment companies will be deemed to apply to transactions subject to section 57(a)(4). Because the Commission has not adopted any rules under section 57(a)(4), rule 17d–1 also

the issuer or security, as appropriate, immediately preceding the Follow-On Investment, and (ii) in the case of a Regulated Fund, a majority of the Board has approved the Regulated Fund's participation in the pro rata Follow-On Investments as being in the best interests of the Regulated Fund. The Regulated Fund's Board may refuse to approve, or at any time rescind, suspend or qualify, its approval of Pro Rata Follow-On Investments, in which case all subsequent Follow-On Investments will be submitted to the Regulated Fund's Eligible Directors in accordance with Condition 8(c).

[18] A ''Non-Negotiated Follow-On Investment'' is a Follow-On Investment in which a Regulated Fund participates together with one or more Affiliated Funds and/or one or more other Regulated Funds (i) in which the only term negotiated by or on behalf of the funds is price and (ii) with respect to which, if the transaction were considered on its own, the funds would be entitled to rely on one of the JT No-Action Letters.

''JT No-Action Letters'' means SMC Capital, Inc., SEC No-Action Letter (pub. avail. Sept. 5, 1995) and Massachusetts Mutual Life Insurance Company, SEC No-Action Letter (pub. avail. June 7, 2000).

[19] ''Disposition'' means the sale, exchange or other disposition of an interest in a security of an issuer.

[20] However, with respect to an issuer, if a Regulated Fund's first Co-Investment Transaction is an Enhanced Review Disposition, and the Regulated Fund does not dispose of its entire position in the Enhanced Review Disposition, then before such Regulated Fund may complete its first Standard Review Follow-On in such issuer, the Eligible Directors must review the proposed Follow-On Investment not only on a stand-alone basis but also in relation to the total economic exposure in such issuer (*i.e.,* in combination with the portion of the Pre-Boarding Investment not disposed of in the Enhanced Review Disposition), and the other terms of the investments. This additional review would be required because such findings would not have been required in connection with the prior Enhanced Review Disposition, but they would have been required had the first Co-Investment Transaction been an Enhanced Review Follow-On.

[21] A ''Pro Rata Disposition'' is a Disposition (i) in which the participation of each Affiliated Fund and each Regulated Fund is proportionate to its outstanding investment in the security subject to Disposition immediately preceding the Disposition; and (ii) in the case of a Regulated Fund, a majority of the Board has approved the Regulated Fund's participation in pro rata Dispositions as being in the best interests of the Regulated Fund. The Regulated Fund's Board may refuse to approve, or at any time rescind, suspend or qualify, its approval of Pro Rata Dispositions, in which case all subsequent Dispositions will be submitted to the Regulated Fund's Eligible Directors.

[22] ''Tradable Security'' means a security that meets the following criteria at the time of Disposition: (i) It trades on a national securities exchange or designated offshore securities market as defined in rule 902(b) under the Securities Act; (ii) it is not subject to restrictive agreements with the issuer or other security holders; and (iii) it trades with sufficient volume and liquidity (findings as to which are documented by the Advisers to any Regulated Funds holding investments in the issuer and retained for the life of the Regulated Fund) to allow each Regulated Fund to dispose of its entire position remaining after the proposed Disposition within a short period of time not exceeding 30 days at approximately the value (as defined by section 2(a)(41) of the Act) at which the Regulated Fund has valued the investment.

applies to joint transactions with Regulated Funds that are BDCs.

3. Co-Investment Transactions are prohibited by either or both of rule 17d–1 and section 57(a)(4) without a prior exemptive order of the Commission to the extent that the Affiliated Funds and the Regulated Funds participating in such transactions fall within the category of persons described by rule 17d–1 and/or section 57(b), as modified by rule 57b–1 thereunder, as applicable, vis-à-vis each participating Regulated Fund. Each of the participating Regulated Funds and Affiliated Funds may be deemed to be affiliated persons vis-à-vis a Regulated Fund within the meaning of section 2(a)(3) by reason of common control because (i) an Adviser that is either PCM or an entity that controls, is controlled by, or under common control with PCM will be the investment adviser (and sub-adviser, if any) to each of the Regulated Funds and the Affiliated Funds; (ii) PCM is the Adviser to, and may be deemed to control PSEC; PRISM is the Adviser to, and may be deemed to control PRIS; PFIM is the Adviser to, and may be deemed to control, FLEX; and an Adviser will be the investment adviser and sub-adviser to, and may be deemed to control, any Future Regulated Fund; (iii) each BDC Downstream Fund will be deemed to be controlled by its BDC parent and/or its BDC parent's Adviser; and (iv) the Advisers are under common control. Thus, each Regulated Fund and each Affiliated Fund could be deemed to be a person related to a Regulated Fund, or BDC Downstream Fund, in a manner described by section 57(b) and related to the other Regulated Funds in a manner described by rule 17d–1; and therefore the prohibitions of rule 17d–1 and section 57(a)(4) would apply respectively to prohibit the Affiliated Funds from participating in Co-Investment Transactions with the Regulated Funds. Further, because the BDC Downstream Funds and Wholly-Owned Investment Subs are controlled by the Regulated Funds, the BDC Downstream Funds and Wholly-Owned Investment Subs are subject to section 57(a)(4) (or section 17(d) in the case of Wholly-Owned Investment Subs controlled by Regulated Funds that are registered under the Act) and thus also subject to the provisions of rule 17d–1. In addition, because the Prospect Proprietary Accounts will be controlled by an Adviser and, therefore, may be under common control with PSEC, PRIS, FLEX, the Advisers, and any Future Regulated Funds, the Prospect Proprietary Accounts could be deemed to be persons related to the Regulated Funds (or a company controlled by the Regulated Funds) in a manner described by section 17(d) or section 57(b) and also prohibited from participating in the Co-Investment Program.

4. In passing upon applications under rule 17d–1, the Commission considers whether the company's participation in the joint transaction is consistent with the provisions, policies, and purposes of the Act and the extent to which such participation is on a basis different from or less advantageous than that of other participants.

5. Applicants state that in the absence of the requested relief, in many circumstances the Regulated Funds would be limited in their ability to participate in attractive and appropriate investment opportunities. Applicants state that, as required by rule 17d–1(b), the Conditions ensure that the terms on which Co-Investment Transactions may be made will be consistent with the participation of the Regulated Funds being on a basis that it is neither different from nor less advantageous than other participants, thus protecting the equity holders of any participant from being disadvantaged. Applicants further state that the Conditions ensure that all Co-Investment Transactions are reasonable and fair to the Regulated Funds and their shareholders and do not involve overreaching by any person concerned, including the Advisers. Applicants state that the Regulated Funds' participation in the Co-Investment Transactions in accordance with the Conditions will be consistent with the provisions, policies, and purposes of the Act and would be done in a manner that is not different from, or less advantageous than, that of other participants.

Applicants' Conditions

Applicants agree that the Order will be subject to the following Conditions:

1. *Identification and Referral of Potential Co-Investment Transactions.*

(a) The Advisers will establish, maintain and implement policies and procedures reasonably designed to ensure that each Adviser is promptly notified of all Potential Co-Investment Transactions that fall within the then-current Objectives and Strategies and Board-Established Criteria of any Regulated Fund the Adviser manages.

(b) When an Adviser to a Regulated Fund is notified of a Potential Co-Investment Transaction under Condition 1(a), the Adviser will make an independent determination of the appropriateness of the investment for the Regulated Fund in light of the Regulated Fund's then-current circumstances.

2. *Board Approvals of Co-Investment Transactions.*

(a) If the Adviser deems a Regulated Fund's participation in any Potential Co-Investment Transaction to be appropriate for the Regulated Fund, it will then determine an appropriate level of investment for the Regulated Fund.

(b) If the aggregate amount recommended by the Advisers to be invested in the Potential Co-Investment Transaction by the participating Regulated Funds and any participating Affiliated Funds, collectively, exceeds the amount of the investment opportunity, the investment opportunity will be allocated among them pro rata based on the size of the Internal Orders, as described in section III.A.1.b. of the application. Each Adviser to a participating Regulated Fund will promptly notify and provide the Eligible Directors with information concerning the Affiliated Funds' and Regulated Funds' order sizes to assist the Eligible Directors with their review of the applicable Regulated Fund's investments for compliance with these Conditions.

(c) After making the determinations required in Condition 1(b) above, each Adviser to a participating Regulated Fund will distribute written information concerning the Potential Co-Investment Transaction (including the amount proposed to be invested by each participating Regulated Fund and each participating Affiliated Fund) to the Eligible Directors of its participating Regulated Fund(s) for their consideration. A Regulated Fund will enter into a Co-Investment Transaction with one or more other Regulated Funds or Affiliated Funds only if, prior to the Regulated Fund's participation in the Potential Co-Investment Transaction, a Required Majority concludes that:

(i) The terms of the transaction, including the consideration to be paid, are reasonable and fair to the Regulated Fund and its equity holders and do not involve overreaching in respect of the Regulated Fund or its equity holders on the part of any person concerned;

(ii) the transaction is consistent with:

(A) The interests of the Regulated Fund's equity holders; and

(B) the Regulated Fund's then-current Objectives and Strategies;

(iii) the investment by any other Regulated Fund(s) or Affiliated Fund(s) would not disadvantage the Regulated Fund, and participation by the Regulated Fund would not be on a basis different from, or less advantageous than, that of any other Regulated Fund(s) or Affiliated Fund(s) participating in the transaction; provided that the Required Majority

shall not be prohibited from reaching the conclusions required by this Condition 2(c)(iii) if:

(A) The settlement date for another Regulated Fund or an Affiliated Fund in a Co-Investment Transaction is later than the settlement date for the Regulated Fund by no more than ten business days or earlier than the settlement date for the Regulated Fund by no more than ten business days, in either case, so long as: (x) The date on which the commitment of the Affiliated Funds and Regulated Funds is made is the same; and (y) the earliest settlement date and the latest settlement date of any Affiliated Fund or Regulated Fund participating in the transaction will occur within ten business days of each other; or

(B) any other Regulated Fund or Affiliated Fund, but not the Regulated Fund itself, gains the right to nominate a director for election to a portfolio company's board of directors, the right to have a board observer or any similar right to participate in the governance or management of the portfolio company so long as: (x) The Eligible Directors will have the right to ratify the selection of such director or board observer, if any; (y) the Adviser agrees to, and does, provide periodic reports to the Regulated Fund's Board with respect to the actions of such director or the information received by such board observer or obtained through the exercise of any similar right to participate in the governance or management of the portfolio company; and (z) any fees or other compensation that any other Regulated Fund or Affiliated Fund or any affiliated person of any other Regulated Fund or Affiliated Fund receives in connection with the right of one or more Regulated Funds or Affiliated Funds to nominate a director or appoint a board observer or otherwise to participate in the governance or management of the portfolio company will be shared proportionately among any participating Affiliated Funds (who may, in turn, share their portion with their affiliated persons) and any participating Regulated Fund(s) in accordance with the amount of each such party's investment; and

(iv) the proposed investment by the Regulated Fund will not involve compensation, remuneration or a direct or indirect [23] financial benefit to the Advisers, any other Regulated Fund, the Affiliated Funds or any affiliated person of any of them (other than the parties to the Co-Investment Transaction), except (A) to the extent permitted by Condition 14, (B) to the extent permitted by section 17(e) or 57(k), as applicable, (C) indirectly, as a result of an interest in the securities issued by one of the parties to the Co-Investment Transaction, or (D) in the case of fees or other compensation described in Condition 2(c)(iii)(B)(z).

3. *Right to Decline.* Each Regulated Fund has the right to decline to participate in any Potential Co-Investment Transaction or to invest less than the amount proposed.

4. *General Limitation.* Except for Follow-On Investments made in accordance with Conditions 8 and 9 below,[24] a Regulated Fund will not invest in reliance on the Order in any issuer in which a Related Party has an investment.[25]

5. *Same Terms and Conditions.* A Regulated Fund will not participate in any Potential Co-Investment Transaction unless (i) the terms, conditions, price, class of securities to be purchased, date on which the commitment is entered into and registration rights (if any) will be the same for each participating Regulated Fund and Affiliated Fund and (ii) the earliest settlement date and the latest settlement date of any participating Regulated Fund or Affiliated Fund will occur as close in time as practicable and in no event more than ten business days apart. The grant to one or more Regulated Funds or Affiliated Funds, but not the respective Regulated Fund, of the right to nominate a director for election to a portfolio company's board of directors, the right to have an observer on the board of directors or similar rights to participate in the governance or management of the portfolio company will not be interpreted so as to violate this Condition 5, if Condition 2(c)(iii)(B) is met.

6. *Standard Review Dispositions.*

(a) *General.* If any Regulated Fund or Affiliated Fund elects to sell, exchange or otherwise dispose of an interest in a security and one or more Regulated Funds and Affiliated Funds have previously participated in a Co-Investment Transaction with respect to the issuer, then:

(i) The Adviser to such Regulated Fund or Affiliated Fund [26] will notify each Regulated Fund that holds an investment in the issuer of the proposed Disposition at the earliest practical time; and

(ii) the Adviser to each Regulated Fund that holds an investment in the issuer will formulate a recommendation as to participation by such Regulated Fund in the Disposition.

(b) *Same Terms and Conditions.* Each Regulated Fund will have the right to participate in such Disposition on a proportionate basis, at the same price and on the same terms and conditions as those applicable to the Affiliated Funds and any other Regulated Fund.

(c) *No Board Approval Required.* A Regulated Fund may participate in such a Disposition without obtaining prior approval of the Required Majority if:

(i) (A) the participation of each Regulated Fund and Affiliated Fund in such Disposition is proportionate to its then-current holding of the security (or securities) of the issuer that is (or are) the subject of the Disposition; [27] (B) the Board of the Regulated Fund has approved as being in the best interests of the Regulated Fund the ability to participate in such Dispositions on a pro rata basis (as described in greater detail in the application); and (C) the Board of the Regulated Fund is provided on a quarterly basis with a list of all Dispositions made in accordance with this Condition; or

(ii) each security is a Tradable Security and (A) the Disposition is not to the issuer or any affiliated person of the issuer; and (B) the security is sold for cash in a transaction in which the only term negotiated by or on behalf of the participating Regulated Funds and Affiliated Funds is price.

(d) *Standard Board Approval.* In all other cases, the Adviser will provide its written recommendation as to the

[23] For example, procuring the Regulated Fund's investment in a Potential Co-Investment Transaction to permit an affiliate to complete or obtain better terms in a separate transaction would constitute an indirect financial benefit.

[24] This exception applies only to Follow-On Investments by a Regulated Fund in issuers in which that Regulated Fund already holds investments.

[25] ''Related Party'' means (i) any Close Affiliate and (ii) in respect of matters as to which any Adviser has knowledge, any Remote Affiliate.

''Close Affiliate'' means the Advisers, the Regulated Funds, the Affiliated Funds and any other person described in section 57(b) (after giving effect to rule 57b–1) in respect of any Regulated Fund (treating any registered investment company or series thereof as a BDC for this purpose) except for limited partners included solely by reason of the reference in section 57(b) to section 2(a)(3)(D).

''Remote Affiliate'' means any person described in section 57(e) in respect of any Regulated Fund (treating any registered investment company or series thereof as a BDC for this purpose) and any limited partner holding 5% or more of the relevant limited partner interests that would be a Close Affiliate but for the exclusion in that definition.

[26] Any Prospect Proprietary Account that is not advised by an Adviser is itself deemed to be an Adviser for purposes of Conditions 6(a)(i), 7(a)(i), 8(a)(i) and 9(a)(i).

[27] In the case of any Disposition, proportionality will be measured by each participating Regulated Fund's and Affiliated Fund's outstanding investment in the security in question immediately preceding the Disposition.

Regulated Fund's participation to the Eligible Directors and the Regulated Fund will participate in such Disposition solely to the extent that a Required Majority determines that it is in the Regulated Fund's best interests.

7. *Enhanced Review Dispositions.*

(a) *General.* If any Regulated Fund or Affiliated Fund elects to sell, exchange or otherwise dispose of a Pre-Boarding Investment in a Potential Co-Investment Transaction and the Regulated Funds and Affiliated Funds have not previously participated in a Co-Investment Transaction with respect to the issuer:

(i) The Adviser to such Regulated Fund or Affiliated Fund will notify each Regulated Fund that holds an investment in the issuer of the proposed Disposition at the earliest practical time;

(ii) the Adviser to each Regulated Fund that holds an investment in the issuer will formulate a recommendation as to participation by such Regulated Fund in the Disposition; and

(iii) the Advisers will provide to the Board of each Regulated Fund that holds an investment in the issuer all information relating to the existing investments in the issuer of the Regulated Funds and Affiliated Funds, including the terms of such investments and how they were made, that is necessary for the Required Majority to make the findings required by this Condition.

(b) *Enhanced Board Approval.* The Adviser will provide its written recommendation as to the Regulated Fund's participation to the Eligible Directors, and the Regulated Fund will participate in such Disposition solely to the extent that a Required Majority determines that:

(i) The Disposition complies with Condition 2(c)(i), (ii), (iii)(A), and (iv); and

(ii) the making and holding of the Pre-Boarding Investments were not prohibited by section 57 or rule 17d–1, as applicable, and records the basis for the finding in the Board minutes.

(c) *Additional Requirements:* The Disposition may only be completed in reliance on the Order if:

(i) *Same Terms and Conditions.* Each Regulated Fund has the right to participate in such Disposition on a proportionate basis, at the same price and on the same terms and Conditions as those applicable to the Affiliated Funds and any other Regulated Fund;

(ii) *Original Investments.* All of the Affiliated Funds' and Regulated Funds' investments in the issuer are Pre-Boarding Investments;

(iii) *Advice of counsel.* Independent counsel to the Board advises that the making and holding of the investments in the Pre-Boarding Investments were not prohibited by section 57 (as modified by rule 57b–1) or rule 17d–1, as applicable;

(iv) *Multiple Classes of Securities.* All Regulated Funds and Affiliated Funds that hold Pre-Boarding Investments in the issuer immediately before the time of completion of the Co-Investment Transaction hold the same security or securities of the issuer. For the purpose of determining whether the Regulated Funds and Affiliated Funds hold the same security or securities, they may disregard any security held by some but not all of them if, prior to relying on the Order, the Required Majority is presented with all information necessary to make a finding, and finds, that: (x) Any Regulated Fund's or Affiliated Fund's holding of a different class of securities (including for this purpose a security with a different maturity date) is immaterial [28] in amount, including immaterial relative to the size of the issuer; and (y) the Board records the basis for any such finding in its minutes. In addition, securities that differ only in respect of issuance date, currency, or denominations may be treated as the same security; and

(v) *No control.* The Affiliated Funds, the other Regulated Funds and their affiliated persons (within the meaning of section 2(a)(3)(C) of the Act), individually or in the aggregate, do not control the issuer of the securities (within the meaning of section 2(a)(9) of the Act).

8. *Standard Review Follow-Ons.*

(a) *General.* If any Regulated Fund or Affiliated Fund desires to make a Follow-On Investment in an issuer and the Regulated Funds and Affiliated Funds holding investments in the issuer previously participated in a Co-Investment Transaction with respect to the issuer:

(i) The Adviser to each such Regulated Fund or Affiliated Fund will notify each Regulated Fund that holds securities of the portfolio company of the proposed transaction at the earliest practical time; and

(ii) the Adviser to each Regulated Fund that holds an investment in the issuer will formulate a recommendation as to the proposed participation, including the amount of the proposed investment, by such Regulated Fund.

(b) *No Board Approval Required.* A Regulated Fund may participate in the Follow-On Investment without obtaining prior approval of the Required Majority if:

(i)(A) The proposed participation of each Regulated Fund and each Affiliated Fund in such investment is proportionate to its outstanding investments in the issuer or the security at issue, as appropriate,[29] immediately preceding the Follow-On Investment; and (B) the Board of the Regulated Fund has approved as being in the best interests of the Regulated Fund the ability to participate in Follow-On Investments on a pro rata basis (as described in greater detail in the application); or

(ii) it is a Non-Negotiated Follow-On Investment.

(c) *Standard Board Approval.* In all other cases, the Adviser will provide its written recommendation as to the Regulated Fund's participation to the Eligible Directors and the Regulated Fund will participate in such Follow-On Investment solely to the extent that a Required Majority makes the determinations set forth in Condition 2(c). If the only previous Co-Investment Transaction with respect to the issuer was an Enhanced Review Disposition the Eligible Directors must complete this review of the proposed Follow-On Investment both on a stand-alone basis and together with the Pre-Boarding Investments in relation to the total economic exposure and other terms of the investment.

(d) *Allocation.* If, with respect to any such Follow-On Investment:

(i) The amount of the opportunity proposed to be made available to any Regulated Fund is not based on the Regulated Funds' and the Affiliated Funds' outstanding investments in the issuer or the security at issue, as appropriate, immediately preceding the Follow-On Investment; and

(ii) the aggregate amount recommended by the Advisers to be invested in the Follow-On Investment

[28] In determining whether a holding is ''immaterial'' for purposes of the Order, the Required Majority will consider whether the nature and extent of the interest in the transaction or arrangement is sufficiently small that a reasonable person would not believe that the interest affected the determination of whether to enter into the transaction or arrangement or the terms of the transaction or arrangement.

[29] To the extent that a Follow-On Investment opportunity is in a security or arises in respect of a security held by the participating Regulated Funds and Affiliated Funds, proportionality will be measured by each participating Regulated Fund's and Affiliated Fund's outstanding investment in the security in question immediately preceding the Follow-On Investment using the most recent available valuation thereof. To the extent that a Follow-On Investment opportunity relates to an opportunity to invest in a security that is not in respect of any security held by any of the participating Regulated Funds or Affiliated Funds, proportionality will be measured by each participating Regulated Fund's and Affiliated Fund's outstanding investment in the issuer immediately preceding the Follow-On Investment using the most recent available valuation thereof.

by the participating Regulated Funds and any participating Affiliated Funds, collectively, exceeds the amount of the investment opportunity, then the Follow-On Investment opportunity will be allocated among them pro rata based on the size of the Internal Orders, as described in section III.A.1.b. of the application.

(e) *Other Conditions.* The acquisition of Follow-On Investments as permitted by this Condition will be considered a Co-Investment Transaction for all purposes and subject to the other Conditions set forth in the application.

9. *Enhanced Review Follow-Ons.*

(a) *General.* If any Regulated Fund or Affiliated Fund desires to make a Follow-On Investment in an issuer that is a Potential Co-Investment Transaction and the Regulated Funds and Affiliated Funds holding investments in the issuer have not previously participated in a Co-Investment Transaction with respect to the issuer:

(i) The Adviser to each such Regulated Fund or Affiliated Fund will notify each Regulated Fund that holds securities of the portfolio company of the proposed transaction at the earliest practical time;

(ii) the Adviser to each Regulated Fund that holds an investment in the issuer will formulate a recommendation as to the proposed participation, including the amount of the proposed investment, by such Regulated Fund; and

(iii) the Advisers will provide to the Board of each Regulated Fund that holds an investment in the issuer all information relating to the existing investments in the issuer of the Regulated Funds and Affiliated Funds, including the terms of such investments and how they were made, that is necessary for the Required Majority to make the findings required by this Condition.

(b) *Enhanced Board Approval.* The Adviser will provide its written recommendation as to the Regulated Fund's participation to the Eligible Directors, and the Regulated Fund will participate in such Follow-On Investment solely to the extent that a Required Majority reviews the proposed Follow-On Investment both on a stand-alone basis and together with the Pre-Boarding Investments in relation to the total economic exposure and other terms and makes the determinations set forth in Condition 2(c). In addition, the Follow-On Investment may only be completed in reliance on the Order if the Required Majority of each participating Regulated Fund determines that the making and holding of the Pre-Boarding Investments were not prohibited by section 57 (as modified by rule 57b–1) or rule 17d–1, as applicable. The basis for the Board's findings will be recorded in its minutes.

(c) *Additional Requirements.* The Follow-On Investment may only be completed in reliance on the Order if:

(i) *Original Investments.* All of the Affiliated Funds' and Regulated Funds' investments in the issuer are Pre-Boarding Investments;

(ii) *Advice of counsel.* Independent counsel to the Board advises that the making and holding of the investments in the Pre-Boarding Investments were not prohibited by section 57 (as modified by rule 57b–1) or rule 17d–1, as applicable;

(iii) *Multiple Classes of Securities.* All Regulated Funds and Affiliated Funds that hold Pre-Boarding Investments in the issuer immediately before the time of completion of the Co-Investment Transaction hold the same security or securities of the issuer. For the purpose of determining whether the Regulated Funds and Affiliated Funds hold the same security or securities, they may disregard any security held by some but not all of them if, prior to relying on the Order, the Required Majority is presented with all information necessary to make a finding, and finds, that: (x) Any Regulated Fund's or Affiliated Fund's holding of a different class of securities (including for this purpose a security with a different maturity date) is immaterial in amount, including immaterial relative to the size of the issuer; and (y) the Board records the basis for any such finding in its minutes. In addition, securities that differ only in respect of issuance date, currency, or denominations may be treated as the same security; and

(iv) *No control.* The Affiliated Funds, the other Regulated Funds and their affiliated persons (within the meaning of section 2(a)(3)(C) of the Act), individually or in the aggregate, do not control the issuer of the securities (within the meaning of section 2(a)(9) of the Act).

(d) *Allocation.* If, with respect to any such Follow-On Investment:

(i) The amount of the opportunity proposed to be made available to any Regulated Fund is not based on the Regulated Funds' and the Affiliated Funds' outstanding investments in the issuer or the security at issue, as appropriate, immediately preceding the Follow-On Investment; and

(ii) the aggregate amount recommended by the Advisers to be invested in the Follow-On Investment by the participating Regulated Funds and any participating Affiliated Funds, collectively, exceeds the amount of the investment opportunity, then the Follow-On Investment opportunity will be allocated among them pro rata based on the size of the Internal Orders, as described in section III.A.1.b. of the application.

(e) *Other Conditions.* The acquisition of Follow-On Investments as permitted by this Condition will be considered a Co-Investment Transaction for all purposes and subject to the other Conditions set forth in the application.

10. *Board Reporting, Compliance and Annual Re-Approval.*

(a) Each Adviser to a Regulated Fund will present to the Board of each Regulated Fund, on a quarterly basis, and at such other times as the Board may request, (i) a record of all investments in Potential Co-Investment Transactions made by any of the other Regulated Funds or any of the Affiliated Funds during the preceding quarter that fell within the Regulated Fund's then-current Objectives and Strategies and Board-Established Criteria that were not made available to the Regulated Fund, and an explanation of why such investment opportunities were not made available to the Regulated Fund; (ii) a record of all Follow-On Investments in and Dispositions of investments in any issuer in which the Regulated Fund holds any investments by any Affiliated Fund or other Regulated Fund during the prior quarter; and (iii) all information concerning Potential Co-Investment Transactions and Co-Investment Transactions, including investments made by other Regulated Funds or Affiliated Funds that the Regulated Fund considered but declined to participate in, so that the Independent Directors, may determine whether all Potential Co-Investment Transactions and Co-Investment Transactions during the preceding quarter, including those investments that the Regulated Fund considered but declined to participate in, comply with the Conditions.

(b) All information presented to the Regulated Fund's Board pursuant to this Condition will be kept for the life of the Regulated Fund and at least two years thereafter, and will be subject to examination by the Commission and its staff.

(c) Each Regulated Fund's chief compliance officer, as defined in rule 38a–1(a)(4), will prepare an annual report for its Board each year that evaluates (and documents the basis of that evaluation) the Regulated Fund's compliance with the terms and Conditions of the application and the procedures established to achieve such compliance. In the case of a BDC Downstream Fund that does not have a

chief compliance officer, the chief compliance officer of the BDC that controls the BDC Downstream Fund will prepare the report for the relevant Independent Party.

(d) The Independent Directors (including the non-interested members of each Independent Party) will consider at least annually whether continued participation in new and existing Co-Investment Transactions is in the Regulated Fund's best interests.

11. *Record Keeping.* Each Regulated Fund will maintain the records required by section 57(f)(3) of the Act as if each of the Regulated Funds were a BDC and each of the investments permitted under these Conditions were approved by the Required Majority under section 57(f).

12. *Director Independence.* No Independent Director (including the non-interested members of any Independent Party) of a Regulated Fund will also be a director, general partner, managing member or principal, or otherwise be an ''affiliated person'' (as defined in the Act) of any Affiliated Fund.

13. *Expenses.* The expenses, if any, associated with acquiring, holding or disposing of any securities acquired in a Co-Investment Transaction (including, without limitation, the expenses of the distribution of any such securities registered for sale under the Securities Act) will, to the extent not payable by the Advisers under their respective advisory agreements with the Regulated Funds and the Affiliated Funds, be shared by the Regulated Funds and the participating Affiliated Funds in proportion to the relative amounts of the securities held or being acquired or disposed of, as the case may be.

14. *Transaction Fees.*[30] Any transaction fee (including break-up, structuring, monitoring or commitment fees but excluding brokerage or underwriting compensation permitted by section 17(e) or 57(k)) received in connection with any Co-Investment Transaction will be distributed to the participants on a pro rata basis based on the amounts they invested or committed, as the case may be, in such Co-Investment Transaction. If any transaction fee is to be held by an Adviser pending consummation of the transaction, the fee will be deposited into an account maintained by the Adviser at a bank or banks having the qualifications prescribed in section 26(a)(1), and the account will earn a competitive rate of interest that will also be divided pro rata among the participants. None of the Advisers, the Affiliated Funds, the other Regulated Funds or any affiliated person of the Affiliated Funds or the Regulated Funds will receive any additional compensation or remuneration of any kind as a result of or in connection with a Co-Investment Transaction other than (i) in the case of the Regulated Funds and the Affiliated Funds, the pro rata transaction fees described above and fees or other compensation described in Condition 2(c)(iii)(B)(z), (ii) brokerage or underwriting compensation permitted by section 17(e) or 57(k) or (iii) in the case of the Advisers, investment advisory compensation paid in accordance with investment advisory agreements between the applicable Regulated Fund(s) or Affiliated Fund(s) and its Adviser.

15. *Independence.* If the Holders own in the aggregate more than 25 percent of the Shares of a Regulated Fund, then the Holders will vote such Shares as directed by an independent third party when voting on (1) the election of directors; (2) the removal of one or more directors; or (3) any other matter under either the Act or applicable State law affecting the Board's composition, size or manner of election.

For the Commission, by the Division of Investment Management, under delegated authority.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2019–27447 Filed 12–19–19; 8:45 am]

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[30] Applicants are not requesting and the Commission is not providing any relief for transaction fees received in connection with any Co-Investment Transaction.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87762; File No. SR–CBOE–2019–116]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Reflect the Financial Crimes Enforcement Network's Adoption of a Final Rule on Customer Due Diligence Requirements for Financial Institutions

December 16, 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 December 5, 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 Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe Exchange, Inc. (''Cboe'' or the ''Exchange'') is filing 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, to reflect the Financial Crimes Enforcement Network's (''FinCEN'') adoption of a final rule on Customer Due Diligence Requirements for Financial Institutions (''CDD Rule''). 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

I. Background

The Bank Secrecy Act[5] (''BSA''), among other things, requires financial institutions,[6] including broker-dealers,

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

[5] 31 U.S.C. 5311, *et seq.*

[6] *See* U.S.C. 5312(a)(2) (defining ''financial institution'').

to develop and implement AML programs that, at a minimum, meet the statutorily enumerated ''four pillars.''[7] These four pillars currently require broker-dealers to have written AML programs that include, at a minimum:

- The establishment and implementation of policies, procedures and internal controls reasonably designed to achieve compliance with the applicable provisions of the BSA and implementing regulations;
- independent testing for compliance by broker-dealer personnel or a qualified outside party;
- designation of an individual or individuals responsible for implementing and monitoring the operations and internal controls of the AML program; and
- ongoing training for appropriate persons.[8]

In addition to meeting the BSA's requirements with respect to AML programs, Exchange Members[9] must also comply with Exchange Rule 8.12, which incorporates the BSA's four pillars, as well as requires Members' AML programs to establish and implement policies and procedures that can be reasonably expected to detect and cause the reporting of suspicious transactions.

On May 11, 2016, FinCEN, the bureau of the Department of the Treasury responsible for administering the BSA and its implementing regulations, issued the CDD Rule[10] to clarify and strengthen customer due diligence for covered financial institutions,[11] including broker-dealers. In its CDD Rule, FinCEN identifies four components of customer due diligence: (1) Customer identification and verification; (2) beneficial ownership identification and verification; (3) understanding the nature and purpose of customer relationships; and (4) ongoing monitoring for reporting suspicious transactions and, on a risk basis, maintaining and updating customer information.[12] As the first component is already required to be part of a broker-dealers AML program under the BSA, the CDD Rule focuses on the other three components.

Specifically, the CDD Rule focuses particularly on the second component by adding a new requirement that covered financial institutions identify and verify the identity of the beneficial owners of all legal entity customers at the time a new account is opened, subject to certain exclusions and exemptions.[13] The CDD Rule also addresses the third and fourth components, which FinCEN states ''are already implicitly required for covered financial institutions to comply with their suspicious activity reporting requirements,'' by amending the existing AML program rules for covered financial institutions to explicitly require these components to be included in AML programs as a new ''fifth pillar.''

On November 21, 2017, FINRA published Regulatory Notice 17–40 to provide guidance to member firms regarding their obligations under FINRA Rule 3310 in light of the adoption of FinCEN's CDD Rule. In addition, the Notice summarized the CDD Rule's impact on member firms, including the addition of the new fifth pillar required for member firms' AML programs. FINRA also amended FINRA Rule 3310 to explicitly incorporate the fifth pillar.[14] This proposed rule change amends Cboe Rule 8.12 to harmonize it with the FINRA rule and incorporate the fifth pillar.

II. Exchange Rule 8.12 and Amendment to Minimum Requirements for Members' AML Programs

Section 352 of the USA PATRIOT Act of 2001[15] amended the BSA to require broker-dealers to develop and implement AML programs that include the four pillars mentioned above. Consistent with Section 352 of the PATRIOT Act, and incorporating the four pillars, Cboe Rule 8.12 requires each Member to develop and implement a written AML program reasonably designed to achieve and monitor the Member's compliance with the BSA and implementing regulations. Among other requirements, Cboe Rule 8.12 requires that each Member firm, at a minimum: (1) Establish and implement policies and procedures that can be reasonably expected to detect and cause the reporting of suspicious transactions; (2) establish and implement policies, procedures, and internal controls reasonably designed to achieve compliance with the BSA and implementing regulations; (3) provide independent testing for compliance to be conducted by Member personnel or a qualified outside party; (4) designate and identify to Cboe an individual or individuals (*i.e.,* AML compliance person(s)) who will be responsible for implementing and monitoring the day-to-day operations and internal controls of the AML program and provide prompt notification to the Exchange of any changes to the designation; and (5) provide ongoing training for appropriate persons.

FinCEN's CDD Rule does not change the requirements of Exchange Rule 8.12, and Members must continue to comply with its requirements.[16] However, FinCEN's CDD Rule amends the minimum regulatory requirements for broker-dealers' AML programs by explicitly requiring such programs to include risk-based procedures for conducting ongoing customer due diligence.[17] Accordingly, the Exchange is proposing to amend Exchange Rule 8.12 to incorporate this ongoing customer due diligence element, or ''fifth pillar'' required for AML programs. Thus, proposed Rule 8.12(b)(6) would provide that the AML programs required by this Rule shall, at a minimum include appropriate risk-based procedures for conducting ongoing customer due diligence, to include, but not be limited to: (A) Understanding the nature and purpose of customer relationships for the purpose of developing a customer risk profile; and (B) conducting ongoing monitoring to identify and report suspicious transactions and, on a risk basis, to maintain and update customer information.

As stated in the CDD Rule, these provisions are not new and merely codify existing expectations for Members to adequately identify and report suspicious transactions as required under the BSA and encapsulate practices generally already undertaken by securities firms to know and

[7] 31 U.S.C. 5318(h)(1).

[8] 31 CFR 1023.210(b).

[9] *See* Exchange Rule 1.1.

[10] FinCEN Customer Due Diligence Requirements for Financial Institutions; CDD Rule, 81 FR 29397 (May 11, 2016) (CDD Rule Release); 82 FR 45182 (September 28, 2017) (making technical correcting amendments to the final CDD Rule published on May 11, 2016). FinCEN is authorized to impose AML program requirements on financial institutions and to require financial institutions to maintain procedures to ensure compliance with the BSA and associated regulations. 31 U.S.C. 5318(h)(2) and (a)(2). The CDD Rule is the result of the rulemaking process FinCEN initiated in March 2012. *See* 77 FR 13046 (March 5, 2012) (Advance Notice of Proposed Rulemaking) and 79 FR 45151 (Aug. 4, 2014) (Notice of Proposed Rulemaking).

[11] *See* 31 CFR 1010.230(f) (defining ''covered financial institution'').

[12] *See* CDD Rule Release at 29398.

[13] *See* 31 CFR 1010.230(d) (defining ''beneficial owner'') and 31 CFR 1010.230(e) (defining ''legal entity customer'').

[14] *See* Securities Exchange Act Release No. 83154 (May 2, 2018), 83 FR 20906 (May 8, 2018) (File No. SR–FINRA–2018–016).

[15] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Public Law 107–56, 115 Stat. 272 (2001).

[16] FinCEN notes that broker-dealers must continue to comply with FINRA Rules, notwithstanding differences between the CDD Rule and FINRA Rule 3310, which is substantially identical to Exchange Rule 8.12. *See* CDD Rule Release 29421, n. 85.

[17] *See* CDD Rule Release at 29420; 31 CFR 1023.210.

understand their customers.[18] The proposed rule change simply incorporates into Exchange Rule 8.12 the ongoing customer due diligence element, or ''fifth pillar,'' required for AML programs by the CDD Rule to aid Members in complying with the CDD Rule's requirements. However, to the extent that these elements, which are briefly summarized below, are not already included in Members' AML programs, the CDD Rule requires Members to update their AML programs to explicitly incorporate them.

III. Summary of Fifth Pillar's Requirements

Understanding the Nature and Purpose of Customer Relationships

FinCEN states in the CDD Rule that firms must necessarily have an understanding of the nature and purpose of the customer relationship in order to determine whether a transaction is potentially suspicious and, in turn, to fulfill their SAR obligations.[19] To that end, the CDD Rule requires that firms understand the nature and purpose of the customer relationship in order to develop a customer risk profile. The customer risk profile refers to information gathered about a customer to form the baseline against which customer activity is assessed for suspicious transaction reporting.[20] Information relevant to understanding the nature and purpose of the customer relationship may be self-evident and, depending on the facts and circumstances, may include such information as the type of customer, account or service offered, and the customer's income, net worth, domicile, or principal occupation or business, as well as, in the case of existing customers, the customer's history of activity.[21] The CDD Rule also does not prescribe a particular form of the customer risk profile.[22] Instead, the CDD Rule states that depending on the firm and the nature of its business, a customer risk profile may consist of individualized risk scoring, placement of customers into risk categories or another means of assessing customer risk that allows firms to understand the risk posed by the customer and to demonstrate that understanding.[23]

The CDD Rule also addresses the interplay of understanding the nature and purpose of customer relationships with the ongoing monitoring obligation discussed below. The CDD Rule explains that firms are not necessarily required or expected to integrate customer information or the customer risk profile into existing transaction monitoring systems (for example, to serve as the baseline for identifying and assessing suspicious transactions on a contemporaneous basis).[24] Rather, FinCEN expects firms to use the customer information and customer risk profile as appropriate during the course of complying with their obligations under the BSA in order to determine whether a particular flagged transaction is suspicious.[25]

Conduct Ongoing Monitoring

As with the requirement to understand the nature and purpose of the customer relationship, the requirement to conduct ongoing monitoring to identify and report suspicious transactions and, on a risk basis, to maintain and update customer information, merely adopts existing supervisory and regulatory expectations as explicit minimum standards of customer due diligence required for firms' AML programs.[26] If, in the course of its normal monitoring for suspicious activity, the Member detects information that is relevant to assessing the customer's risk profile, the Member must update the customer information, including the information regarding the beneficial owners of legal entity customers.[27] However, there is no expectation that the Member update customer information, including beneficial ownership information, on an ongoing or continuous basis.[28]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6(b)[29] of the Act in general, and furthers the objectives of Section 6(b)(5) of the Act[30] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Specifically, the Exchange believes the proposed rule change will protect investors, because it will aid Members in complying with the CDD Rule's requirement that Members' AML programs include risk-based procedures for conducting ongoing customer due diligence by also incorporating the requirement into Exchange Rule 8.12.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change simply incorporates into Exchange Rule 8.12 the ongoing customer due diligence element, or ''fifth pillar,'' required for AML programs by the CDD Rule. Regardless of the proposed rule change, to the extent that the elements of the fifth pillar are not already included in Members' AML programs, the CDD Rule requires Members to update their AML programs to explicitly incorporate them. In addition, as stated in the CDD Rule, these elements are already implicitly required for covered financial institutions to comply with their suspicious activity reporting requirements. Further, all Exchange Members that have customers are required to be members of FINRA pursuant to Rule 15b9–1 under the Exchange Act,[31] and are therefore already subject to the requirements of FINRA Rule 3310. Additionally, the proposed rule change is virtually identical[32] to FINRA Rule 3310. The Exchange is not imposing any additional direct or indirect burdens on member firms or their customers through this proposal, and as such, the proposal imposes no new burdens on competition.

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

Because the foregoing proposed rule change does not:

A. Significantly affect the protection of investors or the public interest;

B. impose any significant burden on competition; and

[18] *Id.* at 29419.

[19] *Id.* at 29421.

[20] *Id.* at 29422.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.* at 29402.

[27] *Id.* at 29420–21. See also FINRA Regulatory Notice 17–40 (discussing identifying and verifying the identity of beneficial owners of legal entity customers).

[28] *Id.*

[29] 15 U.S.C. 78f.

[30] 15 U.S.C. 78f(b)(5).

[31] 17 CFR 240.15b9–1.

[32] The Exchange notes that changes between the proposed Rule and FINRA Rule 3310 are non-substantive and relate to cross references.

C. 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 [33] and Rule 19b-4(f)(6) [34] 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–2019–116 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–2019–116. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2019–116 and should be submitted on or before January 10, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[35]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2019–27458 Filed 12–19–19; 8:45 am]

BILLING CODE 8011–01–P

[33] 15 U.S.C. 78s(b)(3)(A).

[34] 17 CFR 240.19b-4(f)(6).

[35] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87756; File No. SR–DTC–2019–012]

Self-Regulatory Organizations; The Depository Trust Company; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend the Implementation Timeframe for a Rule Change To Implement a New Algorithm for Transactions Processed in the Night Cycle

December 16, 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 13, 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 Rule 19b–4(f)(4) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[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)(4).

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change [5] would amend the Procedures [6] set forth in the DTC Settlement Service Guide (''Settlement Guide'')[7] to extend the implementation timeframe for a rule change (''Approved Rule Change''), that became effective pursuant to rule filing SR–DTC–2019–005, as amended (''Original Rule Filing'') [8] upon approval by the Commission.[9] In this regard, pursuant to the proposed rule change, the Settlement Guide would be amended to state that the Approved Rule Change will be implemented by March 6, 2020, rather than being implemented by December 6, 2019, as stated in the Settlement Guide, 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 amend the Procedures set forth in the Settlement Guide [10] to extend the implementation timeframe for the Approved Rule Change. In this regard, pursuant to the proposed rule change, the Settlement Guide would be

[5] Capitalized terms not defined herein are defined in the Rules, By-Laws and Organization Certificate of DTC (''Rules''), *available at http://www.dtcc.com/~/media/Files/Downloads/legal/rules/dtc_rules.pdf.*

[6] Pursuant to the Rules, the term ''Procedures'' means the Procedures, service guides, and regulations of DTC adopted pursuant to Rule 27, as amended from time to time. *See* Rule 1, Section 1, *supra* note 5. Pursuant to Rule 27, each Participant and DTC is bound by the Procedures and any amendment thereto in the same manner as it is bound by the Rules. *See* Rule 27, *supra* note 5.

[7] *Available at http://www.dtcc.com/~/media/Files/Downloads/legal/service-guides/Settlement.pdf.*

[8] *Available at http://www.dtcc.com/legal/sec-rule-filings?subsidiary=DTC&pgs=1.*

[9] *See* Securities Exchange Act Release No. 87022 (September 19, 2019), 84 FR 50541 (September 25, 2019) (SR–DTC–2019–005).

[10] *Supra* note 7.

amended to state that the Approved Rule Change will be implemented by March 6, 2020, rather than being implemented by December 6, 2019, as stated in the Settlement Guide, as discussed below.

Background

Pursuant to the Approved Rule Change, DTC will implement changes (''Night Cycle Reengineering'') related to its processing of book-entry Deliveries [11] and Payment Orders [12] in the DTC night cycle (''Night Cycle''). As more fully described in the Original Rule Filing, Night Cycle Reengineering is designed to maximize transaction throughput by optimizing available positions and controlling the order in which transactions are attempted for settlement within existing Night Cycle timeframes. Upon implementation, the reengineered Night Cycle will introduce a new, advanced settlement processing algorithm capable of evaluating each Participant's transaction obligations, available positions, transaction priorities and risk management controls, including Net Debit Cap and Collateral Monitor,[13] to identify the transaction processing order that maximizes Night Cycle settlement rates.

Pursuant to the Settlement Guide, the changes set forth in the Approved Rule Change are to take effect by December 6, 2019. DTC proposes to extend the implementation timeframe for the Approved Rule Change to allow additional time to facilitate finalization of operational testing of DTC systems changes related to the implementation of the Approved Rule Change.

In this regard, pursuant to the proposed rule change, DTC proposes to amend the Settlement Guide with respect to the implementation timeframe setting forth the date by which the Approved Rule Change will become effective, as described below.

Proposed Rule Change

The Settlement Guide contains the following legend (''Original Legend'') [14] regarding the implementation timeframe for the Approved Rule Change.

[Changes to these Procedures, as amended by File No. SR–DTC–2019–005, are available at *dtcc.com/legal/sec-rule-filings?subsidiary=DTC.* These changes have been approved by the Securities and Exchange Commission but have not yet been implemented. By December 6, 2019, these changes will be implemented, and this legend will automatically be removed from these Procedures.]

Pursuant to the proposed rule change, this legend would be deleted and replaced with the following revised legend (''Revised Legend'').

[Changes to these Procedures, as amended by File No. SR–DTC–2019–005, are available at *dtcc.com/legal/sec-rule-filings?subsidiary=DTC.* These changes have been approved by the Securities and Exchange Commission but have not yet been implemented. By March 6, 2020, these changes will be implemented, and this legend will automatically be removed from these Procedures.]

Implementation Timeframe

The proposed rule change would become effective upon filing with the Commission such that the text of the Settlement Guide would be revised to delete the Original Legend and replace it with the Revised Legend, as discussed above.

2. Statutory Basis

DTC believes this proposal is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a registered clearing agency. Specifically, DTC believes this proposal is consistent with Section 17A(b)(3)(F) of the Act [15] for the reason described below.

Section 17A(b)(3)(F) of the Act requires, in part, that the Rules be designed to promote the prompt and accurate clearance and settlement of securities transactions.[16] DTC believes that by allowing additional time to finalize operational testing of DTC system changes related to the implementation of the Approved Rule Change, the proposed rule change would facilitate the ability of DTC to implement the Approved Rule Change in a manner that minimizes the possibility of disruptions relating to implementation of Night Cycle Reengineering, which is designed to maximize transaction throughput in the Night Cycle, as discussed above. Therefore, DTC believes that the proposed rule change to extend the implementation timeframe, which would allow additional time for DTC to complete operational testing relating to the Approved Rule Change, would promote the prompt and accurate clearance and settlement of securities transactions, consistent with Section 17A(b)(3)(F) of the Act.

(B) Clearing Agency's Statement on Burden on Competition

DTC does not believe the proposed rule change would have any impact on competition. The proposed rule change would extend the implementation timeframe for the Approved Rule Change and not affect existing processing of securities transactions at DTC.

(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.

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 [17] and paragraph (f) of Rule 19b–4 thereunder.[18] 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:

[11] Pursuant to Rule 1, the term ''Delivery'' as used with respect to a Security held in the form of a Security Entitlement on the books of DTC, means debiting the Security from an Account of the Deliverer and crediting the Security to an Account of the Receiver. *Supra* note 1.

[12] Pursuant to the Settlement Guide, ''Payment Order'' means a transaction in which a Participant charges another Participant for changes in value for outstanding stock loans or option contract premiums. *See* Settlement Guide, *supra* note 7, at 5.

[13] In managing its credit risk, DTC uses the Collateral Monitor and Net Debit Cap. These two controls work together to protect the DTC settlement system in the event of Participant default. The Collateral Monitor requires net debit settlement obligations, as they accrue intraday, to be fully collateralized; the Net Debit Cap limits the amount of any Participant's net debit settlement obligation to an amount that can be satisfied with DTC liquidity resources (the Participants Fund and the committed line of credit from a consortium of lenders). *See* Settlement Guide, *supra* note 7, at 64–67.

[14] *See* Settlement Guide, *supra* note 7 at 1.

[15] 15 U.S.C. 78q–1(b)(3)(F).

[16] *Id.*

[17] 15 U.S.C. 78s(b)(3)(A).

[18] 17 CFR 240.19b–4(f).

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–2019–012 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–2019–012. 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–2019–012 and should be submitted on or before January 10, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2019–27452 Filed 12–19–19; 8:45 am]

BILLING CODE 8011–01–P

[19] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87755; File No. SR–NSCC–2019–005]

Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend the Implementation Timeframe for an Approved Rule Change To Amend Procedure VII With Respect to the Receipt of CNS Securities and Make Other Changes

December 16, 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 11, 2019, National Securities Clearing Corporation (''NSCC'') 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. NSCC filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act[3] and Rule 19b–4(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 would amend NSCC Rules & Procedures (''Rules'')[5] to extend the implementation timeframe for a rule change (''Approved Rule Change'') that became effective pursuant to rule filing SR–NSCC–2019–002, as amended (''Original Rule Filing'')[6] upon approval by the Commission. In this regard, pursuant to the proposed rule change, the Rules would be amended to state that the Approved Rule Change will be implemented by March 6, 2020, rather than being implemented by December 6, 2019, as stated in the Rules, 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 amend the Rules to extend the implementation timeframe for the Approved Rule Change. In this regard, pursuant to the proposed rule change, the Rules would be amended to state that the Approved Rule Change will be implemented by March 6, 2020, rather than being implemented by December 6, 2019, as stated in the Rules, as discussed below.

(i) Background

Pursuant to the Approved Rule Change, NSCC (i) amended Procedure VII (CNS Accounting Operation) in the Rules with respect to the receipt of securities from NSCC's Continuous Net Settlement (''CNS'') System in order to reflect a change in the allocation algorithm used during the night cycle and (ii) made certain other technical changes to the Rules. Pursuant to the Rules, the changes set forth in the Approved Rule Change are to take effect by December 6, 2019. NSCC proposes to extend the implementation timeframe for the Approved Rule Change to allow additional time to facilitate finalization of operational testing of NSCC system changes related to the implementation of the Approved Rule Change.

In this regard, pursuant to the proposed rule change, NSCC proposes to amend the Rules with respect to the implementation timeframe setting forth the date by which the Approved Rule Change will become effective, as described below.

(ii) Proposed Rule Change

Procedure VII of the Rules contains the following legend (''Original Procedure VII Legend'')[7] regarding the implementation timeframe for the Approved Rule Change.

[Changes to this Procedure VII, as amended by File No. SR–NSCC–2019–002, are available at *dtcc.com/legal/sec-rule-filings?subsidiary=NSCC.* These changes have been approved by the Securities and Exchange Commission but have not yet been

[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)(4).

[5] Capitalized terms not defined herein are defined in the Rules, *available at http://www.dtcc.com/~/media/Files/Downloads/legal/rules/nscc_rules.pdf.*

[6] *Available at http://www.dtcc.com/legal/sec-rule-filings?subsidiary=NSCC&pgs=1.*

[7] *See* Rules, *supra* note 5 at 248.

implemented. By December 6, 2019, these changes will be implemented, and this legend will automatically be removed from this Procedure VII.]

Pursuant to the proposed rule change, the Original Procedure VII Legend would be deleted and replaced with the following revised legend (''Revised Procedure VII Legend'').

[Changes to this Procedure VII, as amended by File No. SR–NSCC–2019–002, are available at *dtcc.com/legal/sec-rule-filings?subsidiary=NSCC.* These changes have been approved by the Securities and Exchange Commission but have not yet been implemented. By March 6, 2020, these changes will be implemented, and this legend will automatically be removed from this Procedure VII.]

Addendum G of the Rules contains the following legend (''Original Addendum G Legend'') [8] regarding the implementation timeframe for the Approved Rule Change.

[Changes to this Addendum G, as amended by File No. SR–NSCC–2019–002, are available at *dtcc.com/legal/sec-rule-filings?subsidiary=NSCC.* These changes have been approved by the Securities and Exchange Commission but have not yet been implemented. By December 6, 2019, these changes will be implemented, and this legend will automatically be removed from this Addendum G.]

Pursuant to the proposed rule change, the Original Addendum G Legend would be deleted and replaced with the following revised legend (''Revised Addendum G Legend'').

[Changes to this Addendum G, as amended by File No. SR–NSCC–2019–002, are available at *dtcc.com/legal/sec-rule-filings?subsidiary=NSCC.* These changes have been approved by the Securities and Exchange Commission but have not yet been implemented. By March 6, 2020, these changes will be implemented, and this legend will automatically be removed from this Addendum G.]

(iii) Implementation Timeframe

The proposed rule change would become effective upon filing with the Commission such that the text of the Rules would be revised to delete the Original Procedure VII Legend and Original Addendum G Legend and replace them with the Revised Procedure VII Legend and Revised Addendum G Legend, respectively, as discussed above.

2. Statutory Basis

NSCC believes this proposal is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a registered clearing agency. Specifically, NSCC believes this proposal is consistent with Section 17A(b)(3)(F) of the Act [9] for the reason described below.

Section 17A(b)(3)(F) of the Act requires, in part, that the Rules be designed to promote the prompt and accurate clearance and settlement of securities transactions.[10] NSCC believes that by allowing additional time to finalize operational testing of NSCC system changes related to the implementation of the Approved Rule Change, the proposed rule change would facilitate the ability of NSCC to implement the Approved Rule Change in a manner that minimizes the possibility of disruptions to NSCC systems, including the CNS System.[11] Therefore, NSCC believes that the proposed rule change to extend the implementation timeframe, which would allow additional time for NSCC to complete operational testing relating to the Approved Rule Change, would promote the prompt and accurate clearance and settlement of securities transactions, consistent with Section 17A(b)(3)(F) of the Act.

(B) Clearing Agency's Statement on Burden on Competition

NSCC does not believe the proposed rule change will have any impact on competition. The proposed rule change would extend the implementation timeframe for the Approved Rule Change and not affect existing processing of securities transactions at NSCC.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments relating to this proposed rule change have not been solicited or received. NSCC will notify the Commission of any written comments received by NSCC.

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) 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.

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–NSCC–2019–005 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–NSCC–2019–005. 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 NSCC 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–NSCC–

[8] *See* Rules, *supra* note 5 at 349.

[9] 15 U.S.C. 78q–1(b)(3)(F).

[10] *Id.*

[11] The CNS System and its operation are described in Rule 11 (CNS System) and Procedure VII (CNS Accounting Operation) of the Rules, *supra* note 5.

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f).

2019–005 and should be submitted on or before January 10, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2019–27451 Filed 12–19–19; 8:45 am]

BILLING CODE 8011–01–P

[14] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice: 10982]

Review of the Designation as a Foreign Terrorist Organization of al-Murabitoun (al-Mulathamun Battalion and Other Aliases)

Based upon a review of the Administrative Record assembled pursuant to Section 219(a)(4)(C) of the Immigration and Nationality Act, as amended (8 U.S.C. 1189(a)(4)(C)) (''INA''), and in consultation with the Attorney General and the Secretary of the Treasury, I conclude that the circumstances that were the basis for the designation of the aforementioned organization as a Foreign Terrorist Organization have not changed in such a manner as to warrant revocation of the designation and that the national security of the United States does not warrant a revocation of the designation. I also conclude that al-Murabitoun, one of the aliases under which this group was designated, is the primary name for this group and shall be used accordingly.

Therefore, I hereby determine that the designation of the aforementioned organization as a Foreign Terrorist Organization, pursuant to Section 219 of the INA (8 U.S.C. 1189), shall be maintained.

This determination shall be published in the **Federal Register**.

Dated: December 13, 2019.

Michael R. Pompeo,

Secretary of State.

[FR Doc. 2019–27561 Filed 12–19–19; 8:45 am]

BILLING CODE 4710–AD–P

DEPARTMENT OF STATE

[Public Notice: 10983]

Review of the Designation as a Foreign Terrorist Organization of Harakat ul-Jihad-i-Islami/Bangladesh (and Other Aliases)

Based upon a review of the Administrative Record assembled pursuant to Section 219(a)(4)(C) of the Immigration and Nationality Act, as amended (8 U.S.C. 1189(a)(4)(C)) (''INA''), and in consultation with the Attorney General and the Secretary of the Treasury, I conclude that the circumstances that were the basis for the designation of the aforementioned organization as a Foreign Terrorist Organization have not changed in such a manner as to warrant revocation of the designation and that the national security of the United States does not warrant a revocation of the designation.

Therefore, I hereby determine that the designation of the aforementioned organization as a Foreign Terrorist Organization, pursuant to Section 219 of the INA (8 U.S.C. 1189), shall be maintained.

This determination shall be published in the **Federal Register**.

Dated: December 13, 2019.

Michael R. Pompeo,

Secretary of State.

[FR Doc. 2019–27560 Filed 12–19–19; 8:45 am]

BILLING CODE 4710–AD–P

DEPARTMENT OF STATE

[Public Notice: 10981]

Review of the Designation as a Foreign Terrorist Organization of Ansar al-Dine (and Other Aliases)

Based upon a review of the Administrative Record assembled pursuant to Section 219(a)(4)(C) of the Immigration and Nationality Act, as amended (8 U.S.C. 1189(a)(4)(C)) (''INA''), and in consultation with the Attorney General and the Secretary of the Treasury, I conclude that the circumstances that were the basis for the designation of the aforementioned organization as a Foreign Terrorist Organization have not changed in such a manner as to warrant revocation of the designation and that the national security of the United States does not warrant a revocation of the designation.

Therefore, I hereby determine that the designation of the aforementioned organization as a Foreign Terrorist Organization, pursuant to Section 219 of the INA (8 U.S.C. 1189), shall be maintained.

This determination shall be published in the **Federal Register**.

Dated: December 13, 2019.

Michael R. Pompeo,

Secretary of State.

[FR Doc. 2019–27562 Filed 12–19–19; 8:45 am]

BILLING CODE 4710–AD–P

DEPARTMENT OF STATE

[Public Notice: 10980]

Review of the Designation as a Foreign Terrorist Organization of Revolutionary People's Liberation Party/Front (and Other Aliases)

Based upon a review of the Administrative Record assembled pursuant to Section 219(a)(4)(C) of the Immigration and Nationality Act, as amended (8 U.S.C. 1189(a)(4)(C)) (''INA''), and in consultation with the Attorney General and the Secretary of the Treasury, I conclude that the circumstances that were the basis for the designation of the aforementioned organization as a Foreign Terrorist Organization have not changed in such a manner as to warrant revocation of the designation and that the national security of the United States does not warrant a revocation of the designation.

Therefore, I hereby determine that the designation of the aforementioned organization as a Foreign Terrorist Organization, pursuant to Section 219 of the INA (8 U.S.C. 1189), shall be maintained.

This determination shall be published in the **Federal Register**.

Dated: December 13, 2019.

Michael R. Pompeo,

Secretary of State.

[FR Doc. 2019–27563 Filed 12–19–19; 8:45 am]

BILLING CODE 4710–AD–P

DEPARTMENT OF STATE

[Public Notice: 10979]

Commission on Unalienable Rights; Notice of Open Meeting

The Commission on Unalienable Rights (''Commission'') will meet from 1:15 until 5:30 p.m., on Friday, January 10 at the Department of State in Washington, DC. Participants are asked to use the 23rd Street entrance of the Harry S. Truman Building to gain access to the meeting. The meeting will be directed by the Chair of the Commission and Learned Hand Professor of Law at Harvard Law School, Mary Ann Glendon. The Commission serves the U.S. government in a solely advisory capacity and provides advice concerning principles related to human rights. The January 10 meeting will focus on international legal commitments concerning human rights that the United States has entered since World War II. This meeting follows the December 11 meeting on the same topic.

This meeting is open to the public. Entry to the building is controlled. To

obtain pre-clearance for entry, members of the public planning to attend must, *no later than January 2,* provide their full name and email address to the RSVP email address at *RSVPCommission@state.gov.* Non-Department of State attendees should also provide date of birth and identifying data (driver's license or passport number). Requests for reasonable accommodation should be made at the same time as the notification. Late requests will be considered but might not be possible to fulfill.

This information is being collected pursuant to 22 U.S.C. 2651a and 22 U.S.C. 4802 for the purpose of screening and pre-clearing participants to enter the host venue at the U.S. Department of State, in line with standard security procedures for events of this size. The Department of State will use this information consistent with the routine uses set forth in the System of Records Notices for Protocol Records (State-33) and Security Records (State-36). See *https://www.state.gov/system-of-records-notices-privacy-office/.* Provision of this information is voluntary, but failure to provide accurate information may impede your ability to register for the event. Email addresses are collected for purposes of notification should the meeting be postponed or cancelled due to weather or other exigencies.

Please see *https://www.state.gov/commission-on-unalienable-rights* for the commissioners' biographies, read-ahead materials (if available), and Commission-related documents. To communicate with the Commission, the public may submit materials in advance of the meeting to *commission@state.gov,* or mail to: U.S. Department of State, ATTN: Duncan Walker, HST 7312, 2201 C Street NW, Washington, DC 20520.

In addition, there will be microphones in the audience for questions and comments during the Q&A portion of the meeting, as well as a table to leave written documents with the Commission.

For additional information, contact Duncan Walker, Policy Planning Staff, at (202) 647–2236, or *walkerdh3@state.gov.*

Duncan H. Walker,

Designated Federal Officer, U.S. Department of State.

[FR Doc. 2019–27473 Filed 12–19–19; 8:45 am]

BILLING CODE 4710–10–P

DEPARTMENT OF STATE

[Public Notice: 10984]

Review of the Designation as a Foreign Terrorist Organization of Al-Qa'ida in the Islamic Maghreb (and Other Aliases)

Based upon a review of the Administrative Record assembled pursuant to Section 219(a)(4)(C) of the Immigration and Nationality Act, as amended (8 U.S.C. 1189(a)(4)(C)) (''INA''), and in consultation with the Attorney General and the Secretary of the Treasury, I conclude that the circumstances that were the basis for the designation of the aforementioned organization as a Foreign Terrorist Organization have not changed in such a manner as to warrant revocation of the designation and that the national security of the United States does not warrant a revocation of the designation.

Therefore, I hereby determine that the designation of the aforementioned organization as a Foreign Terrorist Organization, pursuant to Section 219 of the INA (8 U.S.C. 1189), shall be maintained.

This determination shall be published in the **Federal Register**.

Dated: December 13, 2019.

Michael R. Pompeo,

Secretary of State.

[FR Doc. 2019–27558 Filed 12–19–19; 8:45 am]

BILLING CODE 4710–AD–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Random Drug and Alcohol Testing Percentage Rates of Covered Aviation Employees for the Period of January 1, 2020, Through December 31, 2020

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice.

SUMMARY: The FAA has determined that the minimum random drug and alcohol testing percentage rates for the period January 1, 2020, through December 31, 2020, will remain at 25 percent of safety-sensitive employees for random drug testing and 10 percent of safety-sensitive employees for random alcohol testing.

FOR FURTHER INFORMATION CONTACT: Ms. Vicky Dunne, Office of Aerospace Medicine, Drug Abatement Division, Program Policy Branch (AAM–820), Federal Aviation Administration, 800 Independence Avenue SW, Room 806, Washington, DC 20591; Telephone (202) 267–8442.

SUPPLEMENTARY INFORMATION:

Discussion: Pursuant to 14 CFR 120.109(b), the FAA Administrator's decision on whether to change the minimum annual random drug testing rate is based on the reported random drug test positive rate for the entire aviation industry. If the reported random drug test positive rate is less than 1.00%, the Administrator may continue the minimum random drug testing rate at 25%. In 2018, the random drug test positive rate was 0.731%. Therefore, the minimum random drug testing rate will remain at 25% for calendar year 2020.

Similarly, 14 CFR 120.217(c), requires the decision on the minimum annual random alcohol testing rate to be based on the random alcohol test violation rate. If the violation rate remains less than 0.50%, the Administrator may continue the minimum random alcohol testing rate at 10%. In 2018, the random alcohol test violation rate was 0.099%. Therefore, the minimum random alcohol testing rate will remain at 10% for calendar year 2020.

If you have questions about how the annual random testing percentage rates are determined please refer to the Code of Federal Regulations Title 14, section 120.109(b) (for drug testing), and 120.217(c) (for alcohol testing).

Issued in Washington, DC, on December 17, 2019.

Michael A. Berry,

Federal Air Surgeon.

[FR Doc. 2019–27527 Filed 12–19–19; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Environmental Impact Statement: San Diego and Orange Counties, California

AGENCY: Federal Highway Administration, U.S. Department of Transportation.

ACTION: Notice of Intent.

SUMMARY: The Federal Highway Administration (FHWA), on behalf of the California Department of Transportation (Caltrans), is issuing this notice to advise the public that a Draft Environmental Impact Statement (Draft EIS) will be prepared for a proposed highway project in Orange County and San Diego County, California.

DATES: The formal scoping period has been extended a second time and will occur from November 8, 2019 through February 7, 2020. The deadline for comments is now 5:00 p.m. on February 7, 2020. Two scoping meetings have

been held: On Wednesday, November 20, 2019, from 5:00 p.m. to 8:00 p.m. and on Wednesday, December 4, 2019 from 5:00 p.m. to 8:00 p.m.

ADDRESSES: The Wednesday, November 20, 2019 public scoping meeting was held at Norman P. Murray Community Center, 24932 Veterans Way, Mission Viejo, CA 92692. The Wednesday, December 4, 2019 public scoping meeting was held at the Ocean Institute, 24200 Dana Point Harbor Drive, Dana Point, CA 92629.

FOR FURTHER INFORMATION CONTACT: Caltrans District 12, 1750 East 4th Street, Santa Ana, CA 92705, Attn: Env/SCTRE Scoping. Formal scoping comments can also be submitted via email at *scoping@SCTRE.org.* More information can also be found at the project website at *http://www.SCTRE.org.*

SUPPLEMENTARY INFORMATION: Effective July 1, 2007, the FHWA assigned, and Caltrans assumed, environmental responsibilities for this project pursuant to 23 U.S.C. 327. Caltrans as the assigned National Environmental Policy Act (NEPA) agency, in cooperation with the Foothill/Eastern Transportation Corridor Agency (F/ETCA), will prepare a Draft EIS on a proposal for a highway improvement project in Orange County and San Diego County, California. The proposed improvements intended to address north-south regional mobility and accommodation of travel demand include the extension of the tolled State Route (SR) 241 lanes to Interstate (I) 5, the extension of Crown Valley Parkway to SR 241, new connections between Ortega Highway, Antonio Parkway, Avery Parkway, and SR–73, new general purpose lanes on I–5, new managed lanes on I–5, or combinations of these preliminary alternatives. Currently, the following alternatives are being considered, ranging from approximately 4 to 22 miles in length:

- Alternative 1/No Build Alternative; taking no action.
- Alternative 13; connect SR 241 to I–5 via a connection from Los Patrones Parkway to La Novia Avenue, I–5 widening and improvements, and the addition of HOT lanes in each direction on I–5
- Alternative 17; connect SR 241 to I–5 via a connection from Los Patrones Parkway to Avenida Vaquero, I–5 widening and improvements, and the addition of HOT lanes in each direction on I–5
- Alternative 14; connect SR 241 to I–5 via a connection from Los Patrones Parkway to Avenida Pico, I–5 widening and improvements, and the addition of HOT lanes in each direction on I–5
- Alternative 11; add I–5 general purpose lanes from I–405 to San Diego County
- Alternative 12; add I–5 HOT/toll lanes from I–405 to San Diego County
- Alternative 9; connect Ortega Highway and Antonio Parkway to Avery Parkway and SR 73
- Alternative 18; connect SR–241 to SR–73 and extend Crown Valley Parkway to SR 241
- Alternative 21; extend Los Patrones Parkway to Avenida La Pata and add HOT lanes in each direction on I–5
- Alternative 22; extend Los Patrones Parkway to Avenida La Pata
- Alternative 23; extend I–5 managed lanes from SR 73 to Basilone Road or from Avenida Pico to Basilone Road (depending on the design option)

Anticipated Federal approvals include permits under the National Pollutant Discharge Elimination System (NPDES), Clean Water Act (CWA) Section 401 Water Quality, CWA Section 404 Nationwide Permit from the United States Army Corps of Engineers (USACE), CWA Section 10 Permit from the USACE, California Fish and Game Code Section 1602 Lake or Streambed Alteration Agreement from the California Department of Fish and Wildlife (CDFW), Section 7 Consultation with the United States Fish and Wildlife Service (USFWS) for listed species under the Federal Endangered Species Act (FESA), CDFW 2080.1 Consistency Determination for listed species under the California Endangered Species Act (CESA), and Coastal Zone Management Act (CZMA) Consistency Determination from the California Coastal Commission (CCC).

Letters describing the proposed action and soliciting comments will be sent to appropriate Federal, State, Participating Agencies, tribal governments, and local agencies, and to private organizations and citizens who have previously expressed or are known to have interest in this proposal. The public scoping process officially began in November 2019. In addition, a public hearing will be held once the Draft EIS is completed. Public notice will be given of the time and place of the meeting and hearing. The Draft EIS will be available for public and agency review and comment prior to the public hearing to ensure that the full range of issues related to this proposed action are addressed and all significant issues are identified, and comments and suggestions are invited from all interested parties. Comments or questions concerning this proposed action and the EIS should be directed to Caltrans at the address provided above.

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

Issued on: December 16, 2019.

Tashia Clemons,

Director, State Programs, Federal Highway Administration, Sacramento, California.

[FR Doc. 2019–27549 Filed 12–19–19; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Actions on Proposed Highway in California

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

ACTION: Notice of Limitation on Claims for Judicial Review of Actions by the California Department of Transportation (Caltrans) and U.S. Army Corps of Engineers (USACE).

SUMMARY: The FHWA, on behalf of Caltrans, is issuing this notice to announce actions taken by Caltrans and USACE that are final. The actions relate to a proposed highway project, I–10 Blythe Pavement Rehabilitation Project in the County of Riverside, California. Those actions grant licenses, permits, and approvals for the project.

DATES: By this notice, the FHWA, on behalf of Caltrans, is advising the public of final agency actions subject to 23 U.S.C. 139(*l*)(1). A claim seeking judicial review of the Federal agency actions on the highway project will be barred unless the claim is filed on or before May 18, 2020. If the Federal law that authorizes judicial review of a claim provides a time period of less than 150 days for filing such claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: For Caltrans: Antonia Toledo, Senior Environmental Planner, California Department of Transportation-District 8, 464 W 4th Street, MS–820, San Bernardino, CA 92401. Office Hours: 8:00 a.m.–5:00 p.m., Pacific Standard Time, telephone, (909) 806–2541 or email *Antonia.Toledo@dot.ca.gov.* For USACE: Veronica C. Li, Project Manager, U.S. Army Corp of Engineers, 915 Wilshire Blvd., Los Angeles, CA 90017. Office Hours: 9:00 a.m. to 5:00 p.m., Pacific Standard Time, telephone, (213) 452–3292 or email *veronica.c.li@usace.army.mil.* For FHWA, contact

David Tedrick at (916) 498–5024 or email *david.tedrick@dot.gov.*

SUPPLEMENTARY INFORMATION: Effective July 1, 2007, the FHWA assigned, and the Caltrans assumed, environmental responsibilities for this project pursuant to 23 U.S.C. 327. Notice is hereby given that Caltrans and USACE have taken final agency actions subject to 23 U.S.C. 139(*l*)(1) by issuing licenses, permits, and approvals for the following highway project in the State of California: Rehabilitation of the existing asphalt concrete (AC) pavement on Interstate 10 from Post Mile (PM) R104.9 to PM R134.0. in the County of Riverside. Rehabilitation Activities include removal and replacement of existing inside and outside shoulders, guardrails, rumble strips, drainage inlets, and dikes, and installation of oversized drains. The project will also involve upgrades to ramp facilities for ADA compliance, installation of two temporary detour lanes in the existing median, extension of existing rock slope protection at bridge locations, and hydroseeding the median for erosion control and vegetation restoration. The primary purpose of this project is to restore and extend the life of existing pavement for a minimum of forty years, enhance trip reliability, and consequently minimize expenditures associated with future maintenance. The actions by the Federal agencies, and the laws under which such actions were taken, are described in the Final Environmental Assessment (FEA)/ Finding of No Significant Impact (FONSI) for the project, approved on November 8, 2019, and in other documents in Caltrans' project records. The FEA, FONSI and other project records are available by contacting Caltrans at the addresses provided above. The USACE decision are available by contacting USACE at the address provided above.

This notice applies to all Federal agency decisions as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to:

1. National Environmental Policy Act of 1969, as amended, 42 U.S.C. 4331(b)(2)
2. Federal Highway Act of 1970, U.S.C. 772
3. Federal Clean Air Act, as amended
4. Clean Water Act of 1977 and 1987
5. Federal Water Pollution Control Act of 1972
6. Safe Drinking Water Act of 1944, as amended
7. Endangered Species Act of 1973
8. Executive Order 11990, Protection of Wetlands
9. Executive Order 13112, Invasive Species
10. Fish and Wildlife Coordination Act of 1934, as amended
11. Migratory Bird Treaty Act
12. Title VI of the Civil Rights Act of 1964, as amended
13. Executive Order 12898, Federal Actions to Address Environmental Justice in Minority and Low-Income Populations
14. National Historic Preservation Act of 1966, as amended

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

Authority: 23 U.S.C. 139(*l*)(1).

Issued on: December 16, 2019.

Tashia J. Clemons,

Director, Planning and Environment, Federal Highway Administration, California Division.

[FR Doc. 2019–27548 Filed 12–19–19; 8:45 am]

BILLING CODE 4910–RY–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Environmental Impact Statement in Erie County, NY

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

ACTION: Notice of intent.

SUMMARY: The FHWA is issuing this notice to advise the public that an Environmental Impact Statement (EIS) will be prepared for a proposed project known as the New York State (NYS) Route 5 (Buffalo Skyway) Project, in Erie County, New York.

FOR FURTHER INFORMATION CONTACT: Frank Cirillo, Regional Director, New York State Department of Transportation, 100 Seneca Street, Buffalo, New York 14203, Telephone: (716) 847–3238; or Richard Marquis, Division Administrator, Federal Highway Administration, New York Division, Leo W. O'Brien Federal Building, 7th Floor, 11A Clinton Avenue, Albany, New York 12207, Telephone (518) 431–4127.

SUPPLEMENTARY INFORMATION: The New York State Department of Transportation (NYSDOT), in cooperation with FHWA, will prepare an EIS in accordance with the National Environmental Policy Act (NEPA) on a proposal to remove the Buffalo Skyway bridge and its approaches, including portions of NYS Route 5 along the Outer Harbor, and realign the transportation network within the Buffalo Outer Harbor and South Buffalo areas.

NYS Route 5 serves as the primary vehicular route connecting Buffalo's downtown to its southern suburbs. In recent years, the Buffalo Inner and Outer Harbors have undergone substantial redevelopment with recreational/mixed-use improvements. It has become apparent that the portions of NYS Route 5 along the Buffalo Outer Harbor, including the Skyway Bridge, present both a physical and visual barrier to continued development within this area. Infrastructure removal is needed to accommodate existing and planned recreational, mixed-use, and waterfront development and support waterfront economic development initiatives. The project is also needed to improve the transportation network to safely and efficiently accommodate the traffic currently carried by the Skyway Bridge and to address the safety, operational, and capacity deficiencies of the highway connections that serve economic development areas and local communities within South Buffalo.

The purpose of the project is to realign the existing transportation network to support existing and planned recreational, mixed-use, and waterfront development in the Buffalo Outer Harbor area. The project will also address the safety, operational, and capacity deficiencies of the highway connections that serve economic development areas and local communities within South Buffalo.

A reasonable range of alternatives is currently being considered and will be evaluated during the NEPA scoping process in consideration of agency and public comments received. Letters describing the proposed action and soliciting comments have been sent to Cooperating and Participating Agencies. Public and agency outreach will include formal Public Scoping Meetings, a Public Hearing, and consultation with Cooperating and Participating Agencies. Public notice will be given of the dates, times, and locations of the Scoping Meetings and Public Hearing.

To assist in determining the scope of issues to be addressed and identifying the potential for significant issues related to the proposed action, the general public will have the opportunity to submit written comments at the Scoping Meetings and during a scoping comment period. A Draft EIS will be available for public and agency review and comment prior to the Public Hearing.

Comments or questions concerning this proposed action should be directed to the NYSDOT and FHWA at the addresses provided above.

Issued on: December 11, 2019.

Richard J. Marquis,

New York Division Administrator, Albany, New York.

[FR Doc. 2019–27420 Filed 12–19–19; 8:45 am]

BILLING CODE 4910–RY–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA–2019–0004–N–22]

Proposed Agency Information Collection Activities; Comment Request

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

ACTION: Notice of information collection; request for comment.

SUMMARY: Under the Paperwork Reduction Act of 1995 (PRA) and its implementing regulations, this notice announces that FRA is forwarding the Information Collection Requests (ICRs) abstracted below to the Office of Management and Budget (OMB) for review and comment. The ICRs describe the information collections and their expected burden. On October 7, 2019, FRA published a notice providing a 60-day period for public comment on the ICRs.

DATES: Interested persons are invited to submit comments on or before January 21, 2020.

ADDRESSES: Submit written comments on the ICRs to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW, Washington, DC 20503, Attention: FRA Desk Officer. Comments may also be sent via email to OMB at the following address: *oira_submissions@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Ms. Hodan Wells, Information Collection Clearance Officer, Office of Railroad Safety, Federal Railroad Administration, 1200 New Jersey Avenue SE, Washington, DC 20590, (telephone: (202) 493–0440) or Ms. Kim Toone, Information Collection Clearance Officer, Office of Information Technology, Federal Railroad Administration, 1200 New Jersey Avenue SE, Washington, DC 20590, (telephone: (202) 493–6132).

SUPPLEMENTARY INFORMATION: The PRA, 44 U.S.C. 3501–3520, and its implementing regulations, 5 CFR part 1320, require Federal agencies to issue two notices seeking public comment on information collection activities before OMB may approve paperwork packages. *See* 44 U.S.C. 3506, 3507; 5 CFR 1320.8 through 1320.12. On October 7, 2019, FRA published a 60-day notice in the **Federal Register** soliciting public comment on the ICRs for which it is now seeking OMB approval. *See* 84 FR 53556. FRA has received no comments in response to this notice.

Before OMB decides whether to approve these proposed collections of information, it must provide 30-days' notice for public comment. Federal law requires OMB to approve or disapprove paperwork packages between 30 and 60 days after the 30-day notice is published. 44 U.S.C. 3507(b)–(c); 5 CFR 1320.12(d); *see also* 60 FR 44978, 44983, Aug. 29, 1995. OMB believes the 30-day notice informs the regulated community to file relevant comments and affords the agency adequate time to digest public comments before it renders a decision. 60 FR 44983, Aug. 29, 1995. Therefore, respondents should submit their respective comments to OMB within 30 days of publication to best ensure having their full effect.

Comments are invited on the following ICRs regarding: (1) Whether the information collection activities are necessary for FRA to properly execute its functions, including whether the information will have practical utility; (2) the accuracy of FRA's estimates of the burden of the information collection activities, including the validity of the methodology and assumptions used to determine the estimates; (3) ways for FRA to enhance the quality, utility, and clarity of the information being collected; and (4) ways to minimize the burden of information collection activities on the public, including the use of automated collection techniques or other forms of information technology.

The summaries below describe the ICRs that FRA will submit for OMB clearance as the PRA requires:

Title: Remotely Controlled Switch Operations.

OMB Control Number: 2130–0516.

Abstract: Sections 49 CFR 218.30 and 218.77 require remotely controlled switches be properly lined to protect workers who are vulnerable to being struck by moving cars as they inspect or service rolling equipment on track or occupy camp cars. Creating required notifications promotes safety by minimizing the mental lapses of workers who are simultaneously handling several tasks. These sections require the operator of remotely controlled switches to maintain a record of each blue signal protection request for 15 days. Operators of remotely controlled switches use the information as a record documenting blue signal protection of workers or camp cars. This record also serves as a valuable resource for railroad supervisors and FRA and State inspectors monitoring regulatory compliance.

Type of Request: Extension with change (revised estimates) of a currently approved collection.

Affected Public: Businesses.

Form(s): N/A.

Respondent Universe: 53 railroads.

Frequency of Submission: On occasion.

Total Estimated Annual Responses: 1,934,650.

Total Estimated Annual Burden: 24,183 hours.

Total Estimated Annual Burden Hour Dollar Cost Equivalent: $1,378,431.

Title: Bad Order, Home Shop Card, and Stenciling Reporting Mark.

OMB Control Number: 2130–0519.

Abstract: Under 49 CFR part 215, railroads are required to inspect freight cars placed in service and take remedial action when defects are identified. A railroad freight car with a part 215 defect may be moved to another location for repair only after the railroad has complied with the process under 49 CFR 215.9. Section 215.9 requires railroads to affix a ''bad order'' tag describing each defect to each side of the freight car. It is imperative that a defective freight car be tagged ''bad order'' so it can be readily identified and moved to another location for repair purposes only, and so that the maximum speed and other restrictions necessary for safely conducting the movement are known. At the repair location, the ''bad order'' tag serves as a notification of the defective condition of the freight car. Railroads must retain each tag for 90 days to verify that proper repairs were made at the designated location. When inspecting a freight car, FRA and State inspectors review all pertinent records to determine railroads' compliance with the movement restrictions of 49 CFR 215.9.

Additionally, section 215.301 [1] requires railroads and private car owners to stencil or otherwise display identification marks on freight cars. FRA uses the identification marks to determine the railroads affected, the number and type of cars involved, the commodities being carried, and the territorial and speed limits within which the cars will be operated. FRA reviews this information to determine if the freight car is safe to operate and if the operation qualifies for dedicated

[1] Burdens associated with section 215.301 were formerly covered under OMB Control Number 2130–0520.

service and is excluded from the requirements of part 215. Railroads use the required information to provide identification and control so that dedicated cars remain in the prescribed service.

Type of Request: Extension with change (revised estimates) of a currently approved collection.

Affected Public: Businesses (railroads).

Form(s): N/A.

Respondent Universe: 752 railroads.

Frequency of Submission: On occasion.

Total Estimated Annual Responses: 300,000.

Total Estimated Annual Burden: 38,250 hours.

Total Estimated Annual Burden Hour Dollar Cost Equivalent: $2,187,900.

Title: Bridge Worker Safety Rules.

OMB Control Number: 2130–0535.

Abstract: Subpart B of 49 CFR part 214 establishes minimum workplace safety standards for railroad employees as they apply to railroad bridges. Specifically, 49 CFR 214.105(c) establishes standards and practices for safety net systems. Safety nets and net installations must be drop-tested at the job site after initial installation and before being used as a fall-protection system, after major repairs, and at 6-month intervals if left at one site. If a drop-test is not feasible and is not performed, then the railroad or railroad contractor, or a designated certified person, must provide written certification the net complies with the safety standards of 49 CFR 214.105. FRA and State inspectors use the information to enforce Federal regulations. The information maintained at the job site promotes safe bridge worker practices.

Type of Request: Extension with change (revised estimates) of a currently approved collection.

Affected Public: Businesses (railroads).

Form(s): N/A.

Respondent Universe: 746 railroads.

Frequency of Submission: On occasion.

Total Estimated Annual Responses: 3.

Total Estimated Annual Burden: 15 minutes.

Total Estimated Annual Burden Hour Dollar Cost Equivalent: $19.

Under 44 U.S.C. 3507(a) and 5 CFR 1320.5(b) and 1320.8(b)(3)(vi), FRA informs all interested parties that it may not conduct or sponsor, and a respondent is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Authority: 44 U.S.C. 3501–3520.

Brett A. Jortland,

Acting Chief Counsel.

[FR Doc. 2019–27462 Filed 12–19–19; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA–2019–0004–N–23]

Proposed Agency Information Collection Activities; Comment Request

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

ACTION: Notice of information collection; request for comment.

SUMMARY: Under the Paperwork Reduction Act of 1995 (PRA) and its implementing regulations, FRA seeks approval of the Information Collection Request (ICR) abstracted below. Before submitting this ICR to the Office of Management and Budget (OMB) for approval, FRA is soliciting public comment on specific aspects of the activities identified below.

DATES: Interested persons are invited to submit comments on or before February 18, 2020.

ADDRESSES: Submit written comments on the ICR activities by mail to: Ms. Kim Toone, Information Collection Clearance Officer, Office of Information Technology, Federal Railroad Administration, 1200 New Jersey Avenue SE, Washington, DC 20590. Commenters requesting FRA to acknowledge receipt of their respective comments must include a self-addressed stamped postcard stating, ''Comments on OMB Control Number 2130–0593,'' and should also include the title of the ICR. Alternatively, comments may be faxed to Ms. Toone at *Kim.Toone@dot.gov.* Please refer to the assigned OMB control number in any correspondence submitted. FRA will summarize comments received in response to this notice in a subsequent notice and include them in its information collection submission to OMB for approval.

FOR FURTHER INFORMATION CONTACT: Ms. Kim Toone, Information Collection Clearance Officer, Office of Information Technology, Federal Railroad Administration, 1200 New Jersey Avenue SE, Washington, DC 20590, (telephone: 202–493–6132).

SUPPLEMENTARY INFORMATION: The PRA, 44 U.S.C. 3501–3520, and its implementing regulations, 5 CFR part 1320, require Federal agencies to provide 60-days' notice to the public to allow comment on information collection activities before seeking OMB approval of the activities. *See* 44 U.S.C. 3506, 3507; 5 CFR 1320.8 through 1320.12. Specifically, FRA invites interested parties to comment on the following ICR regarding: (1) Whether the information collection activities are necessary for FRA to properly execute its functions, including whether the activities will have practical utility; (2) the accuracy of FRA's estimates of the burden of the information collection activities, including the validity of the methodology and assumptions used to determine the estimates; (3) ways for FRA to enhance the quality, utility, and clarity of the information being collected; and (4) ways for FRA to minimize the burden of information collection activities on the public, including the use of automated collection techniques or other forms of information technology. *See* 44 U.S.C. 3506(c)(2)(A); 5 CFR 1320.8(d)(1).

FRA believes that soliciting public comment may reduce the administrative and paperwork burdens associated with the collection of information that Federal regulations mandate. In summary, FRA reasons that comments received will advance three objectives: (1) Reduce reporting burdens; (2) organize information collection requirements in a ''user-friendly'' format to improve the use of such information; and (3) accurately assess the resources expended to retrieve and produce information requested. *See* 44 U.S.C. 3501.

The summary below describes the ICR that FRA will submit for OMB clearance as the PRA requires:

Title: Generic Clearance for the Collection of Qualitative Feedback on Agency Service.

OMB Control Number: 2130–0593.

Abstract: This collection of information is necessary to enable FRA to garner customer and stakeholder feedback in an efficient, timely manner, consistent with its commitment to improving service delivery. The information collected from FRA's customers and stakeholders will help ensure users have an effective, efficient, and satisfying experience with FRA's programs. This feedback will provide insights into customer or stakeholder perceptions, experiences and expectations, provide an early indicator of issues with service, and focus attention on areas where communication, training or changes in operations might improve delivery of products or services. This collection will allow ongoing, collaborative, and

actionable communications between FRA and its customers and stakeholders. It also allows feedback to contribute directly to the improvement of program management.

Improving FRA's programs requires ongoing assessment of service delivery, meaning a systematic review of the operation of a program compared to a set of explicit or implicit standards as a means of contributing to the continuous improvement of the program. FRA will collect, analyze, and interpret information gathered through this generic clearance to identify strengths and weaknesses of current services and make improvements in service delivery based on feedback. The solicitation of feedback will target areas such as: timeliness, appropriateness, accuracy of information, courtesy, efficiency of service delivery, and resolution of issues with service delivery. FRA will assess responses to plan and inform efforts to improve or maintain the quality of service offered to the public. If this information is not collected, vital feedback from customers and stakeholders on FRA's services will be unavailable.

FRA will only submit a collection for approval under this generic clearance under the following conditions:

- The information gathered is only used internally for general service improvement and program management purposes and is not intended for public release;
- The information gathered is not used to substantially inform significant policy decisions;
- The information gathered will yield qualitative information; FRA will not design the collection or expect it to yield statistically reliable results or use it as though the results are generalizable to the population of study;
- Participation in the collection is voluntary;
- The collection is low-burden for respondents (based on considerations of total burden hours, total number of respondents, or burden-hours per respondent) and is low-cost for both the respondents and the Federal Government;
- The collection is non-controversial and does not raise issues of concern to other Federal agencies;
- The collection is directed to the solicitation of opinions from respondents who have experience with the OMB program or may have experience with the OMB program soon after receiving the collection; and
- With the exception of information needed to provide remuneration for participants of focus groups and cognitive laboratory studies, personally identifiable information (PII) is collected only to the extent necessary and is not retained by FRA.

Type of Request: Extension without change of a current information collection.

Affected Public: Individuals and Households, Businesses and Organizations, State, Local or Tribal Governments.

Frequency of Submission: Once per request.

Reporting Burden:

ESTIMATED ANNUAL REPORTING BURDEN

Type of collection	Respondent universe	Total annual responses	Average time per responses (minutes)	Total annual burden hours
1. Surveys, comment cards, interviews, focus groups, and web-based technologies for Customer Service Satisfaction and Delivery for the Office of the Administrator.	350	Annual, periodically ...	10	59
2. Surveys, comment cards, interviews, focus groups, and web-based technologies for Customer Service Satisfaction and Delivery for the Office of Railroad Safety, Safety Assurance and Compliance.	350	Annual, periodically ...	10	59
3. Surveys, comment cards, interviews, focus groups, and web-based technologies for Customer Service Satisfaction and Delivery for the Office of Railroad Safety, Passenger Rail.	350	Annual, periodically ...	10	59
4. Surveys, comment cards, interviews, focus groups, and web-based technologies for Customer Service Satisfaction and Delivery for the Office of Railroad Safety, Safety Analysis.	350	Annual, periodically ...	10	59
5. Surveys, comment cards, interviews, focus groups, and web-based technologies for Customer Service Satisfaction and Delivery for the Office of Railroad Policy and Development, Research and Development and Passenger and Freight Programs.	350	Annual, periodically ...	10	59
6. Surveys, comment cards, interviews, focus groups, and web-based technologies for Customer Service Satisfaction and Delivery for the Office of Financial Management and Administration.	350	Annual, periodically ...	10	59
Annual Total (estimated)	2,100	.....	.....	354

Total Estimated Annual Responses: 2,100.

Total Estimated Annual Burden Hours: 354.

Under 44 U.S.C. 3507(a) and 5 CFR 1320.5(b) and 1320.8(b)(3)(vi), FRA informs all interested parties that it may not conduct or sponsor, and a respondent is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Authority: 44 U.S.C. 3501–3520.

Brett A. Jortland,

Acting Chief Counsel.

[FR Doc. 2019–27464 Filed 12–19–19; 8:45 am]

BILLING CODE 4910–06–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 (SDN List) based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them. Additionally, OFAC is publishing the names of one or more persons that have been removed from the SDN List. Their property and interests in property are no longer blocked, and U.S. persons are no longer generally prohibited from engaging in transactions with them.

DATES: See **SUPPLEMENTARY INFORMATION** section for effective date(s).

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 on OFAC's website (*https://www.treasury.gov/ofac*).

Notice of OFAC Actions

On December 13, 2019, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons are blocked under the relevant sanctions authority listed below.

Individuals

1. AHMAD, Nazem Said (a.k.a. AHMAD, Nazem Ali; a.k.a. AHMAD, Nazem Saeed; a.k.a. AHMAD, Nazim; a.k.a. AHMAD, Nazim Sa'id; a.k.a. AHMAD, Nizam Saed; a.k.a. AHMED, Nazem Said; a.k.a. AHMED, Nazem Saied), Mteferraa From Es Semrlnd, Beirut, Lebanon; DOB 05 Jan 1965; POB Sierra Leone; nationality Lebanon; citizen Belgium; Additional Sanctions Information—Subject to Secondary Sanctions Pursuant to the Hizballah Financial Sanctions Regulations; Gender Male (individual) [SDGT] (Linked To: HIZBALLAH).

Designated pursuant to section 1(a)(iii)(C) of Executive Order 13224 of September 23, 2001, ''Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism'', 3 CFR, 2001 Comp., p. 786, as amended by Executive Order 13886 of September 9, 2019, ''Modernizing Sanctions To Combat Terrorism,'' 84 FR 48041 (E.O. 13224, as amended), for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of HIZBALLAH, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

2. ASSI, Saleh (a.k.a. 'ASI, Salih 'Ali; a.k.a. ASSI, Salah; a.k.a. ASSI, Saleh Ali; a.k.a. ASSI, Salih), Congo, Democratic Republic of the; Etage 5 (5th Floor), 3 Avenue Bosquet, Paris 27007, France; Bashoura, Beirut, Lebanon; Immeuble Verdun 750, 5E Etage-Rue Rachid Karame Verdun, Beyrouth, Lebanon; DOB 14 May 1960; citizen France; Gender Male; Passport 04FE50421 (France) (individual) [SDGT] (Linked To: TABAJA, Adham Husayn).

Designated pursuant to section 1(a)(iii)(C) of Executive Order 13224, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of ADHAM TABAJA, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

3. SAAB, Tony (a.k.a. SA'B, Tony Boutros; a.k.a. SA'B, Tony Butrus), Tannourine Tahta, Batroun, Lebanon; DOB 20 May 1977; Gender Male (individual) [SDGT] (Linked To: ASSI, Saleh).

Designated pursuant to section 1(a)(iii)(C) of Executive Order 13224, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of SALEH ASSI, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

Entities

1. ARAMOUN 1506 SAL, Jnah, Adnan Al Hakim Street, Al Wazeer Building, First Floor, Real Estate No. 3673, Beirut, Lebanon; Commercial Registry Number 1013408 (Lebanon) [SDGT] (Linked To: AHMAD, Nazem Said).

Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for being owned, controlled, or directed by NAZEM SAID AHMAD, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

2. BEIRUT DIAM SAL (a.k.a. BEIRUT DIAM COMPANY SAL), Downtown Beirut, Solidere, Property No. 1479 of Marfa Real Estate, Block A, 4th Floor, Beirut, Lebanon; Commercial Registry Number 1005283 (Lebanon) [SDGT] (Linked To: AHMAD, Nazem Said).

Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for being owned, controlled, or directed by NAZEM SAID AHMAD, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

3. BEIRUT GEM SAL (a.k.a. BEIRUT GM SAL), Downtown Beirut, Solidere, Property No. 1479 of Marfa Real Estate, Block A, 4th Floor, Beirut, Lebanon; Commercial Registry Number 1005284 (Lebanon) [SDGT] (Linked To: AHMAD, Nazem Said).

Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for being owned, controlled, or directed by NAZEM SAID AHMAD, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

4. BEIRUT TRADE SAL, Maarad Street, Solidere King, Property 200, Harbor, Beirut, Lebanon; Building 200, Maarad Street, Beirut, Lebanon; Commercial Registry Number 1004271 (Lebanon) [SDGT] (Linked To: AHMAD, Nazem Said).

Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for being owned, controlled, or directed by NAZEM SAID AHMAD, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

5. BLUE STAR DIAMOND SAL—OFFSHORE, Ramla Al Bayda, Al Bizri Street, Beirut, Lebanon; Commercial Registry Number 1800235 (Lebanon) [SDGT] (Linked To: AHMAD, Nazem Said).

Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for being owned, controlled, or directed by NAZEM SAID AHMAD, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

6. DAMOUR 850 SAL, Jnah, Adnan Al Hakim Street, Minister Building, First Floor, Beirut, Lebanon; Commercial Registry Number 1013407 (Lebanon) [SDGT] (Linked To: AHMAD, Nazem Said).

Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for being owned, controlled, or directed by NAZEM SAID AHMAD, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

7. DEBBIYE 143 SAL (a.k.a. AL DIBIYA 143 SAL), Adnane Al Hakim Street, Al-Wazeer Building, First Floor, Building No. 3673, Msaytbeh, Beirut, Lebanon; Commercial Registry Number 1013410 (Lebanon) [SDGT] (Linked To: AHMAD, Nazem Said).

Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for being owned, controlled, or directed by NAZEM SAID AHMAD, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

8. GEBAA 2480 SAL (a.k.a. JEBAA 2480 SAL), Adnan Al Hakim Street, Al Wazeer Building, First Floor, Building No. 3672, Msaytbeh, Beirut, Lebanon; Commercial Registry Number 1013406 (Lebanon) [SDGT] (Linked To: AHMAD, Nazem Said).

Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for being owned, controlled, or directed by NAZEM SAID AHMAD, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

9. MONTECARLO BEACH SAL, Beirut, Lebanon; Commercial Registry Number 44925 (Lebanon) [SDGT] (Linked To: AHMAD, Nazem Said).

Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for being owned, controlled, or directed by NAZEM SAID AHMAD, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

10. NOUMAYRIYE 1057 SAL (a.k.a. NUMEIRIYA 1057 SAL), Adnan Al Hakim Street, Al Wazeer Building, First Floor, Building No. 3673, Msaytbeh, Beirut, Lebanon; Commercial Registry Number 1013409 (Lebanon) [SDGT] (Linked To: AHMAD, Nazem Said).

Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for being owned, controlled, or directed by NAZEM SAID AHMAD, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

11. NOUR HOLDING SAL (a.k.a. NOOR HOLDING SAL), Bizri Street, Beirut, Lebanon; Commercial Registry Number 1901008 (Lebanon) [SDGT] (Linked To: AHMAD, Nazem Said).

Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for being owned, controlled, or directed by NAZEM SAID AHMAD, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

12. AL YUMUN REAL ESTATE COMPANY SAL, Beirut, Lebanon; Commercial Registry Number 48642 (Lebanon) [SDGT] (Linked To: ASSI, Saleh).

Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for being owned, controlled, or directed by SALEH ASSI, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

13. INTER ALIMENT SAL OFF–SHORE (a.k.a. INTERALIMENT OFFSHORE COMPANY), Verdun 732 Center 3377/74 Mousseitbeh, Dar El-Fatwa Sector, Rachid Karame Sreet, Beirut, Lebanon; Verdun—Center, 730, Section 74 of the property 3377, Area Msaytbeh Real Estate—the fifth floor, Beirut, Lebanon; 732 Center, 5th Floor, Verdun Street, Beirut, Lebanon; D–U–N–S Number 557757412; Phone Number 9611797101; Registration ID 1239305; Commercial Registry Number 1801267 (Lebanon) [SDGT] (Linked To: ASSI, Saleh).

Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for being owned, controlled, or directed by SALEH ASSI, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

14. MINOCONGO (a.k.a. MINO CONGO; a.k.a. MINOTERIE DU CONGO SPRL), Avenue Konda-Konda No 2, Commune De Ngaliema, Kinshasa 180, Congo, Democratic Republic of the; D–U–N–S Number 850461914 [SDGT] (Linked To: ASSI, Saleh).

Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for being owned, controlled, or directed by SALEH ASSI, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

15. PAIN VICTOIRE (a.k.a. PAINS VICTOIRE; a.k.a. PAN VICTOIRE; a.k.a. SOCIETE GENERAL DES PAINS SPRL; a.k.a. SOCIETE GENERALE DE PAIN; a.k.a. SOCIETE GENERALE DES PAINS), 22 Avenue Konda, Kinshasa, Congo, Democratic Republic of the; D–U–N–S Number 558023852 [SDGT] (Linked To: ASSI, Saleh).

Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for being owned, controlled, or directed by SALEH ASSI, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

16. SALASKO OFFSHORE S.A.L., Verdun, Beirut, Lebanon; Commercial Registry Number 1801152 (Lebanon) [SDGT] (Linked To: ASSI, Saleh).

Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for being owned, controlled, or directed by SALEH ASSI, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

17. TRANS GAZELLE (a.k.a. TRANS GAZELLE SPRL; a.k.a. TRANSGAZELLE), Congo, Democratic Republic of the [SDGT] (Linked To: ASSI, Saleh).

Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for being owned, controlled, or directed by SALEH ASSI, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

Vessel

1. FLYING DRAGON Pleasure Craft Malta flag; Vessel Registration Identification IMO 9752216; MMSI 248297000 (vessel) [SDGT] (Linked To: ASSI, Saleh).

Identified as property in which SALEH ASSI has an interest, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

On December 13, 2019, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons are unblocked, and removed these persons from the SDN List.

Entities

1. TSAO, OOO (Cyrillic: ООО ЦАО) (a.k.a. OBSHCHESTVO S OGRANICHENNOI OTVETSTVENNOSTYU TSENTR AVTOOBSLUZHIVANIYA), 9, per., Omski Kurgan, Kurganskaya Oblast 640000, Russia; D-U-N-S Number 68-215-4722; Tax ID No. 4501122896 (Russia); Government Gazette Number 78739479 (Russia); Registration Number 1064501172394 (Russia) [CYBER2] (Linked To: GUSEV, Denis Igorevich).

2. VERTIKAL, OOO (Cyrillic: ООО ВЕРТИКАЛЬ) (a.k.a. OBSHCHESTVO S OGRANICHENNOI OTVETSTVENNOSTYU VERTIKAL), d. 102/1, ul. Beregovaya Kogalym, Khanty-Mansiski, Avtonomny Okrug - Yugra Okr. 628482, Russia; D-U-N-S Number 50-630-4726; Tax ID No. 8608056026 (Russia); Government Gazette Number 26149774 (Russia); Registration Number 1138608000189 (Russia) [CYBER2] (Linked To: GUSEV, Denis Igorevich).

3. YUNIKOM, OOO (Cyrillic: ООО ЮНИКОМ) (a.k.a. OBSHCHESTVO S OGRANICHENNOI OTVETSTVENNOSTYU YUNIKOM), d. 18, ul. Tsentralnaya Kogalym, Khanty-Mansiski, Avtonomny Okrug - Yugra Okr. 628483, Russia; D-U-N-S Number 68-321-9795; Tax ID No. 8608052180 (Russia); Government Gazette Number 97396163 (Russia); Registration Number 1068608008204 (Russia) [CYBER2] (Linked To: GUSEV, Denis Igorevich).

Dated: December 13, 2019.

Andrea Gacki,

Director, Office of Foreign Assets Control.

[FR Doc. 2019–27434 Filed 12–19–19; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Multiple Fiscal Service Information Collection Requests

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 21, 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:

Bureau of the Fiscal Service (BFS)

1. Title: Direct Deposit Sign-Up Forms.

OMB Control Number: 1530–0006.

Type of Review: Extension without change of a currently approved collection.

Description: The Direct Deposit Sign-Up Form is used by recipients to authorize the deposit of Federal payments into their accounts at financial institutions. The information is used to route the Direct Deposit payment to the correct account at the correct financial institution. It identifies persons who have executed the form.

Form: FS Form 1200, FS Form 1201S, Form 1200 Online, FS Form 1200, FS Form 1201L, SF–1199A, FS Form 1200 VADE.

Affected Public: Individuals and households.

Estimated Number of Respondents: 406,715.

Frequency of Response: Once.

Estimated Total Number of Annual Responses: 406,715.

Estimated Time per Response: 10 minutes.

Estimated Total Annual Burden Hours: 67,786.

2. Title: Management of Federal Agency Disbursements.

OMB Control Number: 1530–0016.

Type of Review: Extension without change of a currently approved collection.

Description: This regulation requires that most Federal payments be made by Electronic Funds Transfer (EFT); sets forth waiver requirements; and provides for a low-cost Treasury-designated account to individuals at a financial institution that offers such accounts.

Form: None.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 1,300.

Frequency of Response: Once.

Estimated Total Number of Annual Responses: 1,300.

Estimated Time per Response: 15 minutes.

Estimated Total Annual Burden Hours: 325.

3. Title: Electronic Funds Transfer (EFT) Market Research Study.

OMB Control Number: 1530–0022.

Type of Review: Extension without change of a currently approved collection.

Description: This is a generic clearance to conduct customer satisfaction surveys. The need for these surveys arises from Congressional directive that accompanied legislation enacted in 1996, as part of the Debt Collection Improvement Act (Pub. L. 104–134), expanding the scope of check recipients required to use direct deposit to receive Federal benefit payments (see 31 U.S.C. 3332). Congress directed Treasury to ''study the socioeconomic and demographic characteristics of those who currently do not have Direct Deposit and determine how best to increase usage among all groups.''

Form: None.

Affected Public: Individuals and households.

Estimated Number of Respondents: 19,500.

Frequency of Response: Once.

Estimated Total Number of Annual Responses: 19,500.

Estimated Time per Response: 16 minutes.

Estimated Total Annual Burden Hours: 5,200.

Authority: 44 U.S.C. 3501 *et seq.*

Dated: December 16, 2019.

Spencer W. Clark,

Treasury PRA Clearance Officer.

[FR Doc. 2019–27446 Filed 12–19–19; 8:45 am]

BILLING CODE 4810–AS–P

DEPARTMENT OF THE TREASURY

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Multiple Internal Revenue Service Information Collection Requests

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 21, 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:

Internal Revenue Service (IRS)

1. Title: Forest Activities Schedule.

OMB Control Number: 1545–0007.

Type of Review: Revision of a currently approved collection.

Description: Form T is filed by individuals and corporations to report income and deductions from the operation of a timber business. The IRS uses Form T to determine if the correct amount of income and deductions are reported.

Form: Form T (Timber).

Affected Public: Individuals and households.

Estimated Number of Respondents: 10.

Frequency of Response: Annually.

Estimated Total Number of Annual Responses: 10.

Estimated Time per Response: 36.2 hours.

Estimated Total Annual Burden Hours: 362.

2. Title: Form 706–A—United States Additional Estate Tax Return.

OMB Control Number: 1545–0016.

Type of Review: Extension without change of a currently approved collection.

Description: Form 706–A is used by individuals to compute and pay the additional estate taxes due under Code section 2032A(c). IRS uses the information to determine that the taxes have been properly computed. The form is also used for the basis election of section 1016(c)(1).

Form: 706–A.

Affected Public: Individuals and households.

Estimated Number of Respondents: 180.

Frequency of Response: Once, Annually.

Estimated Total Number of Annual Responses: 180.

Estimated Time per Response: 9 hours 20 minutes.

Estimated Total Annual Burden Hours: 1,678.

3. Title: Consent of Shareholder to Include Specific Amount in Gross Income.

OMB Control Number: 1545–0043.

Type of Review: Extension without change of a currently approved collection.

Description: Form 972 is used by a shareholder who agrees to report a consent dividend as taxable income on their own tax return. The shareholder completes the form and sends it to the corporation that will claim the consent dividend as a deduction.

Form: 972.

Affected Public: Individuals and households.

Estimated Number of Respondents: 100.

Frequency of Response: Once.

Estimated Total Number of Annual Responses: 100.

Estimated Time per Response: 3 hours 51 minutes.

Estimated Total Annual Burden Hours: 385.

4. Title: Dividend Equivalents From Sources Within the United States REG–120282–10 (TD 9734) & Forms 1042, 1042–S and 1042–T.

OMB Control Number: 1545–0096.

Type of Review: Extension without change of a currently approved collection.

Description: The previously approved regulations pertain to section 871(m) regarding dividend equivalent payments that are treated as U.S. source income. These regulations provide guidance regarding when payments made pursuant to certain financial instruments will be treated as U.S. source income and subject to U.S. withholding tax. The information provided is necessary to permit withholding agents to determine whether U.S. withholding tax is due with respect to a payment of a dividend equivalent and the amount of the tax. The information will also be used for audit and examination purposes.

Form 1042 is used by withholding agents to report tax withheld at source on certain income paid to nonresident alien individuals, foreign partnerships, and foreign corporations to the IRS. Form 1042–S is used by withholding agents to report income and tax withheld to payees. A copy of each 1042–S is filed magnetically or with Form 1042 for information reporting purposes. The IRS uses this information to verify that the correct amount of tax has been withheld and paid to the United States. Form 1042–T is used by withholding agents to transmit Forms 1042–S to the IRS.

Form: 1042, 1042–S and 1042–T.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 3,611,200.

Frequency of Response: On occasion.

Estimated Total Number of Annual Responses: 3,611,200.

Estimated Time per Response: 12 minutes for 1042–T, 35 minutes for 1042–S, 18.05 hours for 1042 and 8 hours for REG–120282–10.

Estimated Total Annual Burden Hours: 2,945,594.

5. Title: Form 1099–DIV—Dividends and Distributions.

OMB Control Number: 1545–0110.

Type of Review: Extension without change of a currently approved collection.

Description: The Form 1099–DIV is used by the Service to insure that dividends are properly reported as required by Code section 6042 and that liquidation distributions are correctly reported as required by Code section 6043, and to determine whether payees are correctly reporting their income.

Form: 1099–DIV.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 78,339,500.

Frequency of Response: Annually, On occasion.

Estimated Total Number of Annual Responses: 78,339,500.

Estimated Time per Response: 25 minutes.

Estimated Total Annual Burden Hours: 32,119,195.

6. Title: U.S. Departing Alien Income Tax Statement.

OMB Control Number: 1545–0138.

Type of Review: Extension without change of a currently approved collection.

Description: Form 2063 is used by a departing resident alien against whom a termination assessment has not been made, or a departing non- resident alien who has no taxable income from United States sources, to certify that they have satisfied all U.S. income tax obligations. The data is used by the IRS to certify that departing aliens have complied with U.S. income tax laws.

Form: 2063.

Affected Public: Individuals and households.

Estimated Number of Respondents: 20,540.

Frequency of Response: On occasion.

Estimated Total Number of Annual Responses: 20,540.

Estimated Time per Response: 50 minutes.

Estimated Total Annual Burden Hours: 17,049.

7. Title: Form 3520, Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts; Form 3520–A, Annual Information Return of Foreign Trust With a U.S. Owner.

OMB Control Number: 1545–0159.

Type of Review: Revision of a currently approved collection.

Description: U.S. persons file Form 3520 to report certain transactions with foreign trusts, ownership of foreign trusts under the rules of Internal Revenue Code sections 671 through 679, and receipt of certain large gifts or bequests from certain foreign persons. Form 3520–A is the annual information return of a foreign trust with at least one U.S. owner. The form provides information about the foreign trust, its U.S. beneficiaries, and any U.S. person who is treated as an owner of any portion of the foreign trust under the grantor trust rules.

Form: 3520, 3520–A.

Affected Public: Individuals and households.

Estimated Number of Respondents: 2,500.

Frequency of Response: Annually.

Estimated Total Number of Annual Responses: 1,820.

Estimated Time per Response: 54.35 hours for 3520, 45.59 hours for 3520–A.

Estimated Total Annual Burden Hours: 94,537.

8. Title: Form 11–C—Occupational Tax and Registration Return for Wagering.

OMB Control Number: 1545–0236.

Type of Review: Extension without change of a currently approved collection.

Description: Form 11–C is used to register persons accepting wagers (IRC section 4412). IRS uses this form to register the respondent, collect the annual stamp tax (IRC section 4411), and to verify that the tax on wagers is reported on Form 730.

Form: 11–C.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 11,500.

Frequency of Response: Annually.

Estimated Total Number of Annual Responses: 11,500.

Estimated Time per Response: 7 hours 4 minutes.

Estimated Total Annual Burden Hours: 81,190.

9. Title: Creditability of Foreign Taxes.

OMB Control Number: 1545–0746.

Type of Review: Extension without change of a currently approved collection.

Description: The information needed is a statement by the taxpayer that it has elected to apply the safe harbor formula of section 1.901–2A(e) of the foreign tax credit regulations. This statement is necessary in order that the IRS may properly determine the taxpayer's tax liability.

Form: None.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 120.

Frequency of Response: Once, Annually.

Estimated Total Number of Annual Responses: 120.

Estimated Time per Response: 20 minutes.

Estimated Total Annual Burden Hours: 41.

10. Title: Limitation on Reduction in Income Tax Liability Incurred to the Virgin Islands (TD 6629).

OMB Control Number: 1545–0782.

Type of Review: Extension without change of a currently approved collection.

Description: The Tax Reform Act of 1986 repealed the mandatory reporting and recordkeeping requirements of section 934(d)(1954 Code). The prior exception to the general rule of section 934 (1954 Code) to prevent the Government of the U.S. Virgin Islands from granting tax rebates with regard to taxes attributable to income derived from sources within the U.S. was contingent upon the taxpayer's compliance with the reporting requirements of section 934(d).

Form: None.

Affected Public: Individuals and households.

Estimated Number of Respondents: 500.

Frequency of Response: On occasion.

Estimated Total Number of Annual Responses: 500.

Estimated Time per Response: 22 minutes.

Estimated Total Annual Burden Hours: 185.

Authority: 44 U.S.C. 3501 et seq.

Dated: December 17, 2019.

Spencer W. Clark,

Treasury PRA Clearance Officer.

[FR Doc. 2019–27546 Filed 12–19–19; 8:45 am]

BILLING CODE 4830–01–P

FEDERAL REGISTER

Vol. 84 Friday,

No. 245 December 20, 2019

Part II

Department of Commerce

National Oceanic and Atmospheric Administration

50 CFR Part 217

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Construction and Operation of the Liberty Drilling and Production Island, Beaufort Sea, Alaska; Final Rule

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 217

[Docket No. 191210–0105]

RIN 0648–BI00

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Construction and Operation of the Liberty Drilling and Production Island, Beaufort Sea, Alaska

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

ACTION: Final rule; notification of issuance.

SUMMARY: NMFS hereby issues regulations to govern the unintentional taking of marine mammals incidental to construction and operation of the Liberty Drilling and Production Island (LDPI) in the Beaufort Sea, Alaska over the course of five years. These regulations, which allow for the issuance of a Letter of Authorization for the incidental take of marine mammals during the described activities and specified timeframes, prescribe the permissible methods of taking and other means of effecting the least practicable adverse impact on marine mammal species or stocks and their habitat, as well as requirements pertaining to the monitoring and reporting of such taking.

DATES: This rule is effective December 1, 2021 through November 30, 2026.

FOR FURTHER INFORMATION CONTACT: Jaclyn Daly, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Purpose and Need for Regulatory Action

NMFS received an application from Hilcorp requesting five-year regulations and authorization to incidentally take multiple species of marine mammals in Foggy Island Bay, Beaufort Sea, by Level A harassment (non-serious injury) and Level B harassment (behavioral disturbance), incidental to construction and operation of the LDPI and associated infrastructure. Please see ''Background'' below for definitions of harassment. In addition, a limited unintentional take involving the mortality or serious injury of no more than two ringed seals (*Phoca hispida*) would be authorized to occur during annual ice road construction and maintenance. This final rule establishes a framework under the authority of the Marine Mammal Protection Act (MMPA) (16 U.S.C. 1361 *et seq.*) to allow for the issuance of a Letter of Authorization (LOA) for the take of marine mammals incidental to Hilcorp's activities related to construction and operation of the LDPI.

Legal Authority for the Proposed Action

Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1371(a)(5)(A)) directs the Secretary of Commerce to allow, upon request, the incidental, but not intentional taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region for up to five years if, after notice and public comment, the agency makes certain findings and issues regulations that set forth permissible methods of taking pursuant to that activity and other means of effecting the ''least practicable adverse impact'' on the affected species or stocks and their habitat (see the discussion below in the ''Mitigation'' section), as well as monitoring and reporting requirements. Section 101(a)(5)(A) of the MMPA and the implementing regulations at 50 CFR part 216, subpart I, provide the legal basis for issuing this rule containing five-year regulations, and for any subsequent Letters of Authorization (LOAs). As directed by this legal authority, this rule contains mitigation, monitoring, and reporting requirements.

Summary of Major Provisions Within the Final Rule

The following is a summary of the major provisions of this final rule Hilcorp would be required to implement. These measures include:

- Use of soft start during impact pile driving to allow marine mammals the opportunity to leave the area prior to beginning impact pile driving at full power;
- Implementation of shutdowns of construction activities under certain circumstances to minimize harassment, including injury;
- Prohibition on all pile and pipe driving at the island site and vessel movement outside the barrier islands during the fall Cross Island bowhead whale hunt, and seasonal drilling restrictions to minimize impacts to marine mammals and subsistence users;
- Implementation of best management practices to avoid and minimize ice seal and habitat disturbance during ice road construction, maintenance, and use;
- Use of marine mammal and acoustic monitoring to detect marine mammals and verify predicted sound fields;
- Coordination with subsistence users and adherence to a Plan of Cooperation (POC); and
- Limitation on vessel speeds and transit areas, where appropriate.

Background

The MMPA prohibits the take of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed incidental take authorization is provided to the public for review. Under the MMPA, ''take'' is defined as meaning to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal. ''Harassment'' is statutorily defined as any act of pursuit, torment, or annoyance which has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment) or has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering but which does not have the potential to injure a marine mammal or marine mammal stock in the wild (Level B harassment).

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other ''means of effecting the least practicable [adverse] impact'' on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stocks for taking for certain subsistence uses (referred to in shorthand as ''mitigation''); and ensure that requirements pertaining to the mitigation, monitoring, and reporting of such takings are set forth.

Summary of Request

On August 2, 2017, Hilcorp petitioned NMFS for rulemaking under Section 101(a)(5)(A) of the MMPA to authorize the take of six species of marine mammals incidental to construction and operation of the proposed LDPI in Foggy Island Bay, Alaska. On April 26, 2018, Hilcorp submitted a revised petition, which NMFS deemed adequate and complete. On May 9, 2018, we published a notice of receipt of Hilcorp's petition in the **Federal Register**, requesting comments and information related to the request for thirty days (83 FR 21276). We received comments from the Center for Biological Diversity and 15,843 citizens opposing issuance of the requested regulations and LOA. We also received comments from the Alaska Eskimo Whaling Commission (AEWC) who recommended we include subsistence-related mitigation and coordination requirements in the final rule. On May 29, 2019, NMFS issued a notice of proposed rulemaking in the **Federal Register** (84 FR 24926), soliciting public comments for 30 days. The 30-day comment period was subsequently extended to July 31, 2019, in response to a request from the AEWC (84 FR 32697; July 9, 2019). All public comments were considered in developing this final rule. To extract oil and gas in the Liberty Oil Field, Hilcorp is proposing to construct a 9.3-acre artificial island (the LDPI) in 19 feet (ft) (5.8 meters (m)) of water in Foggy Island Bay, approximately 5 miles (mi) (8 kilometers (km)) north of the Kadleroshilik River and install supporting infrastructure (*e.g.,* ice roads, pipeline). Ice roads would be constructed annually and begin December 2021. Island construction, which requires impact and vibratory pile driving, is proposed to take one year to complete, beginning in 2022. Pile driving would primarily occur during ice-covered season (only ice seals are present during this time period); however, up to two weeks of pile driving may occur during the open-water season. Pipeline installation is anticipated to occur in 2023. Drilling and production is proposed to occur from 2023 through 2026.

Hilcorp requests, and NMFS is authorizing, the take, by Level A harassment and Level B harassment, of bowhead whales (*Balaena mysticetus*), gray whales (*Eschrichtius robustus*), beluga whales (*Delphinapterus leucas*), ringed seals (*Phoca hispida*), bearded seals (*Erignathus barbatus*), and spotted seals (*Phoca largha*) incidental to LDPI construction and operation activities (*e.g.,* pile driving, ice road and island construction). Hilcorp also requested, and NMFS is authorizing, mortality and serious injury of two ringed seals incidental to annual ice road construction over a 5-year period. The regulations are effective from December 1, 2021, through November 30, 2026.

Changes From Proposed to Final Rule

There are minor changes from the proposed rule to the final rule. While more detail can be found later in this document, we summarize the changes here.

We modified the amount of authorized takes, by Level B harassment, of bowhead whales in years two through five from one animal to five animals per year. This change was to account for a potentially large group of whales in lieu of a single animal entering the Level B harassment isopleth. While these whales are extremely rare to Foggy Island Bay, we believe this is a more conservative approach and allows the applicant sufficient take coverage.

We also corrected the take table for gray whales to authorize the take, by Level B harassment, of two gray whales per year. The proposed rule preamble text indicated that two gray whales could be taken by Level B harassment per year; however, the table incorrectly indicated that only one gray whale take was authorized per year. Two animals per year more adequately reflects average group size.

We also modified the mitigation measures during the Cross Island bowhead whale hunt to comport with the Bureau of Ocean Energy Management's (BOEM) Record of Decision for permitting the project. This resulted in additional mitigation to ensure the taking of marine mammals authorized in these regulations will effect the least practicable adverse impact on subsistence uses as well as the least practicable adverse impact on the species and their habitat. Specifically, the proposed rule required Hilcorp to cease impact pile driving during the Cross Island hunt. The new mitigation measure mirrors BOEM's measure, which requires that all pile driving (impact and vibratory) must cease by August 1 and not resume until the official end of the hunt or when the quota is met. In addition, Hilcorp may not operate LDPI-related vessels outside the McClure Island Group during this time.

We also modified other mitigation and monitoring measures (*e.g.,* requiring ice road observers be equipped with binoculars and protected species observers (PSOs) be equipped with laser range finders) in consideration of input provided in public comments.

Public comments on the proposed rule indicated some confusion over the mitigation and monitoring distances for both ringed seal structures and ringed seals themselves in the Ice Road and Ice Trail Best Management Practices (BMPs). In light of public comments, Hilcorp modified the BMPs to provide clarity and consistency with mitigation and monitoring distances. Those changes, made to both the BMPs and these final regulations, reflect a standard 150-m set back distance to ringed seal structures (both lairs and breathing holes) and a 50-m setback distance to ringed seals on ice.

Finally, the effective date of this final rule is advanced one year from that in the proposed rule, as described in the **Federal Register** document announcing our re-opening of the public comment period on the proposed rule (84 FR 32697, July 9, 2019), to accommodate Hilcorp's most recent construction schedule. The regulations are effective from December 1, 2021, through November 30, 2026.

Description of the Specified Activity

Overview

Hilcorp is proposing to construct and operate the LDPI, a self-contained offshore drilling and production facility located on an artificial gravel island. Infrastructure and facilities necessary to drill wells and process and export approximately 60,000 to 70,000 barrels of oil per day to shore would be installed on the island. To transport oil, a pipeline from the island would be installed, tying into the existing Bandami pipeline located on shore between the Sagavanirktok and Kadleroshilik Rivers on Alaska's North Slope. To access the island and move vehicles and equipment, ice roads would be constructed annually. All island construction and pipeline installation would occur as much as possible during the winter months; however, pile driving and slope protection could occur during the open water season. Drilling and production, once begun, would occur year round. After island and pipeline construction, Hilcorp would commence and continue drilling and production for approximately 20 to 25 years at which time the island would be decommissioned. The regulations and LOA cover the incidental take of marine mammals during LDPI construction and operation for the first five years of work. Thereafter, data collected during these five years (*e.g.,* acoustic monitoring during drilling, ice road marine

mammal monitoring) would determine if future incidental take authorizations are warranted for continuing operations.

Dates and Duration

The regulations are valid for a period of five years from December 1, 2021, through November 30, 2026. Ice road construction and pipeline installation would be limited to winter months. Island construction would be conducted primarily during winter months; however, given that construction schedules are subject to delays for multiple reasons, Hilcorp anticipates, at most, up to two weeks of open-water sheet pile driving may be required in the first year to complete any pile driving not finished during the winter. Other work, such as island slope armoring, may also occur during open-water conditions. All island construction would commence and is expected to be completed in the first year of the regulations (December 2021 through November 2022). Pipeline installation would occur in year 2 of the regulations (December 2022 through November 2023), while drilling and production would begin in year 3 and continue through the life of the regulations. Ice road construction and maintenance activities would occur each winter.

Specified Geographical Region

The Liberty field is located in Federal waters of Foggy Island Bay, Beaufort Sea, about 8.9 km (5.5 mi) offshore in 6.1 m (20 ft) of water, approximately 8 to 13 km (5 to 8 mi) east of the existing Endicott Satellite Drilling Island (SDI) and approximately 32 km (20 mi) east of Prudhoe Bay. Hilcorp would construct the Liberty project on three leases, OCS–Y–1650, OCS–Y–1886, and OCS–Y–1585. The proposed LDPI would be constructed in 19 ft (5.8 m) of water about 5 mi (8 km) offshore in Foggy Island Bay. The LDPI and all associated infrastructure (*e.g.,* ice roads) are located inside the McClure barrier island group which separates Foggy Island Bay from the Beaufort Sea (Figure 1).

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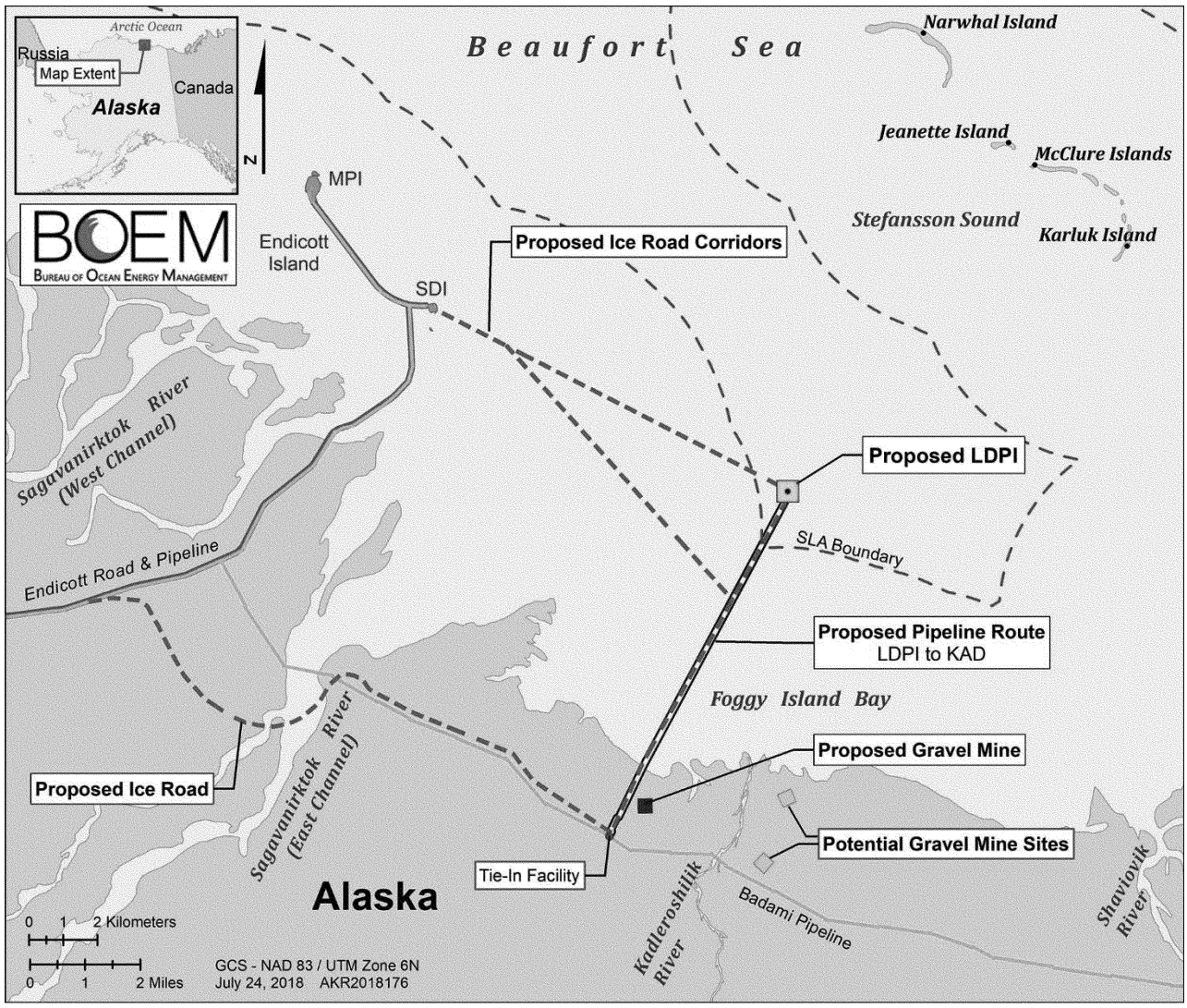

Figure 1. Location of the LDPI and Associated Infrastructure.

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Detailed Description of Activities

The Liberty Prospect is located 8.85 km offshore in about 6 m of water, inside the Beaufort Sea's barrier islands. Hilcorp, as the Liberty operator, is proposing to develop the Liberty Oil Field reservoir, located on the Outer Continental Shelf (OCS), in Foggy Island Bay, Beaufort Sea, Alaska. The Liberty reservoir is the largest delineated but undeveloped light oil reservoir on the North Slope. It is projected to deliver a peak production rate of between 60,000 and 70,000 barrels of oil per day within two years of initial production. Total recovery over an estimated field life of 15 to 20 years is predicted to be in the range of 80 to 150 million stock tank barrels of oil. The Liberty Oil Field leases were previously owned by BP Exploration Alaska, Inc. (BPXA). In April 2014, BPXA announced the sale of several North Slope assets to Hilcorp, including the area where the proposed LDPI would be constructed and other existing oil production islands (Northstar, Endicott, Milne Point). The Liberty Project has many similarities to previous oil and gas islands constructed on the North Slope, including Endicott, Northstar, and Oooguruk.

The proposed LDPI project includes development of a mine-site to supply gravel for the construction of the LDPI, construction of the island and annual ice roads, installation of an undersea pipeline that reaches shore from the LDPI and then connects to the existing above-ground Badami pipeline, drilling, production, and operation (for simplicity, hence forward we refer to both production and operation as ''production''). The mine site is located inland of marine mammal habitat over which NMFS has jurisdiction; therefore, its development will not be discussed further in this rule as no impacts to marine mammals under NMFS jurisdiction would be affected by this project component. Here, we discuss those activities that have the potential to take marine mammals: Ice road construction and maintenance, island construction (pile driving and slope armoring), pipeline installation, drilling, and production. We also describe auxiliary activities, including vessel and aircraft transportation. A schedule of all phases of the project and a summary of equipment and activities involved are included in Table 1a with more details on schedule provided in Table 1b.

TABLE 1a—LDPI PROJECT COMPONENTS, SCHEDULE, AND ASSOCIATED EQUIPMENT

Project component	Regulation year	Season	Equipment and activity
Ice road construction, use, and maintenance.	1–5	Ice-covered	Grader, ice auger, trucks (flood road, haul gravel, general transit, maintenance).
Island construction	*1	Ice-covered, open water	Impact and vibratory pile and pipe driving, backhoe (digging), excavator (slope shaping, armor installation, ditchwitch (sawing ice).
Pipeline installation	2	Ice-covered	Ditchwitch (sawing ice), backhoe (digging), trucks.
Drilling and production	3–5	Ice-covered, open water	Drill rig, land-based equipment on island (*e.g.,* generators).
Marine vessel and aircraft support.	1–5	Open-water, ice-covered (helicopter only).	Barge, tugs, crew boats, helicopter.
Emergency and oil response training.	1–5	Ice-covered, open water	Vessels, hovercrafts, all-terrain vehicles, snow machines, etc.

*Hilcorp has indicated a goal to complete all LDPI construction in the first year the regulations would be valid; however, they may need to install foundation piles in year 2.

TABLE 1b—DOMINANT NOISE SOURCE BY MONTH AND DAYS OF EACH ACTIVITY

Season	Month	Year 1	Year 2	Year 3	Year 4	Year 5
Ice-covered Season	Dec, Jan	Ice Road Construction (62 days).	Ice Road Construction (62 days).	Drilling and Production (212 days).	Drilling and Production (212 days).	Drilling and Production (212 days)
	Feb, March, April.	Island Construction (89 days).	Facility Construction (150 days)			
	May	Island Construction (14 days). Vibratory Sheet Pile Driving. (17 days).				
	June	Vibratory Sheet Pile Driving (30 days)				
Open-water Season	July	Vibratory Sheet Pile Driving (15 days).. Slope Shaping (16 days).	Foundation Piles Installation (31 days).	Drilling and Production (123 days).	Drilling and Production (123 days).	Production (123 days).
	Aug	Slope Shaping (31 days).	Rig Mobilization & Well Prep (92 days)			
	Sept, Oct	Rig Mobilization & Well Prep (61 days)				
Ice-covered Season	Nov	Rig Mobilization & Well Prep (30 days).	Drilling and Production (30 days).	Drilling and Production (30 days).	Drilling and Production (30 days).	Production (30 days)

Ice Road and Ice Pad Construction and Maintenance

Hilcorp will construct ice roads and perform maintenance, as necessary. Ice roads are a route across sea ice created by clearing and grading snow then pumping seawater from holes drilled through the floating ice. Some roads may use grounded ice. Hilcorp would clear away snow using a tractor, bulldozer, or similar piece of equipment, then pump seawater from

holes drilled through floating ice, and then flood the ice road. The ice roads will generally be constructed by pumper units equipped with an ice auger to drill holes in the sea ice and then pump water from under the ice to flood the surface of the ice. The ice augers and pumping units will continue to move along the ice road alignment to flood the entire alignment, returning to a previous area as soon as the flooded water has frozen. The ice road will be maintained and kept clean of gravel and other solids. Freshwater can be sprayed onto the road surface to form a cap over the main road structure for the top layer or to repair any cracks.

Ice roads will be used for onshore and offshore access, installing the pipeline, hauling gravel used to construct the island, moving equipment on/off island, personnel and supply transit, etc. Ice roads are best constructed when weather is −20 degrees Fahrenheit (F) to −30 degrees F, but temperatures below 0 degree F are considered adequate for ice road construction. Ice road construction can typically be initiated in mid- to late-December and can be maintained until mid-May. At the end of the season, ice roads will be barricaded by snow berm and/or slotted at the entrance to prevent access and allowed to melt naturally. Figure 1 shows the locations of the proposed ice roads.

- Ice road #1 will extend approximately 11.3 km (7 mi) over shorefast sea ice from the Endicott SDI to the LDPI (the SDI to LDPI ice road). It will be approximately 37 m wide (120 ft) with a driving lane of approximately 12 m (40 ft). It would cover approximately 160 acres of sea ice.
- Ice road #2 (approximately 11.3 km (7 mi)) will connect the LDPI to the proposed Kadleroshilik River gravel mine site and then will continue to the juncture with the Badami ice road (which is ice road #4). It will be approximately 15 m (50 ft) wide.
- Ice road #3 (approximately 9.6 km [6 mi], termed the ''Midpoint Access Road'') will intersect the SDI to LDPI ice road and the ice road between the LDPI and the mine site. It will be approximately 12 m (40 ft) wide.
- Ice road #4 (approximately 19.3 km (12 mi)), located completely onshore, will parallel the Badami pipeline and connect the mine site with the Endicott road.

All four ice roads would be constructed for the first three years to support pipeline installation and transportation from existing North Slope roads to the proposed gravel mine site, and from the mine site to the proposed LDPI location in the Beaufort Sea. After year 3, only ice road #1 would be constructed to allow additional materials and equipment to be mobilized to support LDPI, pipeline, and facility construction activities as all island construction and pipeline installation should be complete by year 3. Winter sea ice road/trail construction will begin as early as possible (typically December 1 through mid-February). It is anticipated that all ice road construction activities will be initiated prior to March 1, before the time when female ringed seals establish birth lairs.

In addition to the ice roads, three ice pads are proposed to support construction activities (year 2 and 3). These would be used to support LDPI, pipeline (including pipe stringing and two stockpile/disposal areas), and facilities construction. A fourth staging area ice pad (approximately 350 feet by 700 feet) would be built on the sea ice on the west side of the LDPI during production well drilling operations.

Other on-ice activities occurring prior to March 1 could also include spill training exercises, pipeline surveys, snow clearing, and work conducted by other snow vehicles such as a Pisten Bully, snow machine, or rollagon. Prior to March 1, these activities could occur outside of the delineated ice road/trail and shoulder areas.

LDPI Construction

The LDPI will include a self-contained offshore drilling and production facility located on an artificial gravel island with a subsea pipeline to shore. The LDPI will be located approximately 8 kilometers (km) or 5 miles (mi) offshore in Foggy Island Bay and 11.7 km (7.3 mi) southeast of the existing SDI on the Endicott causeway (see Figure 1). The LDPI will be constructed of reinforced gravel in 5.8 meters (m) (19 feet (ft)) of water and have a working surface of approximately 3.8 hectares (ha) (9.3 acres (ac)). A steel sheet pile wall would surround the island to stabilize the placed gravel and the island would include slope protection bench, dock and ice road access, and a seawater intake area (Figure 2).

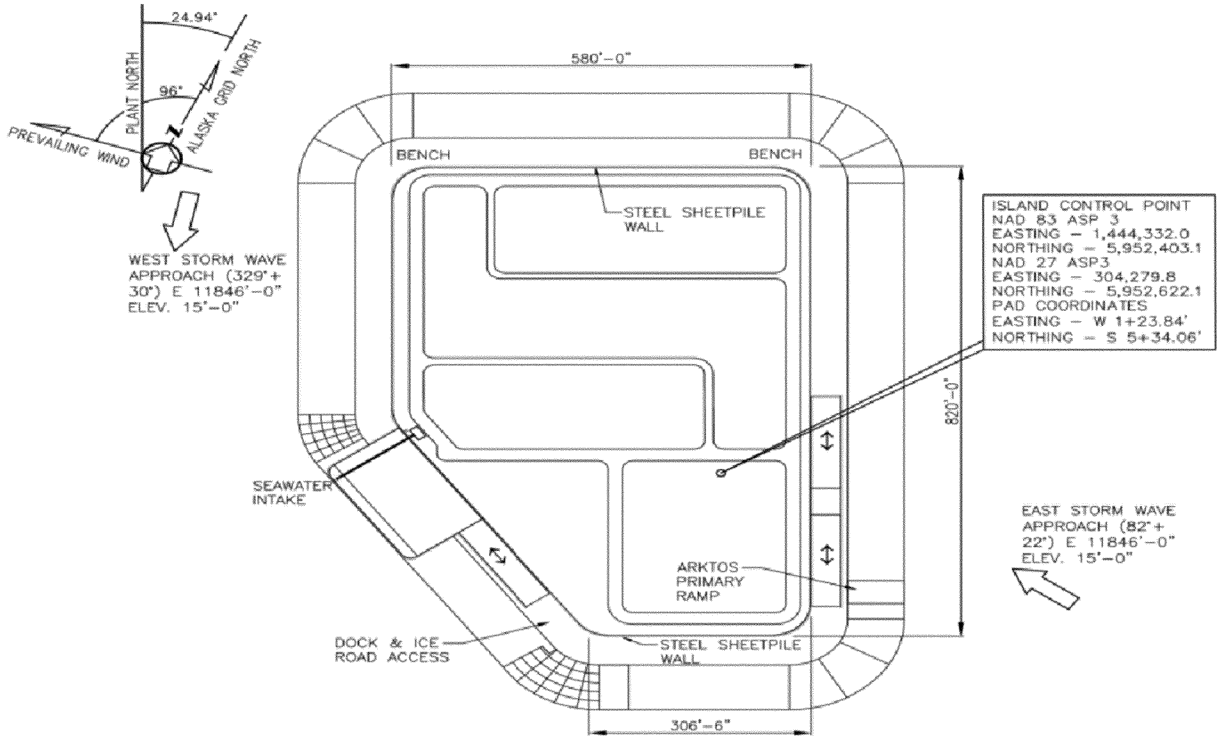

Figure 2. Proposed Liberty Development and Production Island.

Hilcorp would begin constructing the LDPI during the winter immediately following construction of the ice road from the mine site to the island location. Sections of sea ice at the island's location would be cut using a ditchwitch and removed. A backhoe and support trucks using the ice road would move ice away. Once the ice is removed, gravel will be poured through the water column to the sea floor, building the island structure from the bottom up. A conical pile of gravel (hauled in from trucks from the mine site using the ice road) will form on the sea floor until it reaches the surface of the ice. Gravel hauling over the ice road to the LDPI construction site is estimated to continue for 50 to 70 days, and conclude mid-April or earlier depending on road conditions. The construction would continue with a sequence of removing additional ice and pouring gravel until the surface size is achieved. Following gravel placement, slope armoring and protection installation would occur. Using island-based equipment (*e.g.,* backhoe, bucket-dredge) and divers, Hilcorp would create a slope protection profile consisting of a 60-ft (18.3 m) wide bench covered with a linked concrete mat that extends from a sheet pile wall surrounding the island to slightly above mean low low water (MLLW) (Figure 3). The linked concrete mat requires a high strength, yet highly permeable, woven polyester fabric under layer to contain the gravel island fill. The filter fabric panels will be overlapped and tied together side-by-side (requiring diving operations) to prevent the panels from separating and exposing the underlying gravel fill. Because the fabric is overlapped and tied together, no slope protection debris would enter the water column should it be damaged. Above the fabric under layer, a robust geo-grid will be placed as an abrasion guard to prevent damage to the fabric by the linked mat armor. The concrete mat system would continue at a 3:1 slope another 86.5 ft into the water, terminating at a depth of −19 ft (−5.8 m). In total, from the sheet pile wall, the bench and concrete mat would extend 146.5 ft. Island slope protection is required to assure the integrity of the gravel island by protecting it from the erosive forces of waves, ice ride-up, and currents. A detailed inspection of the island slope protection system will be conducted annually during the open-water season to document changes in the condition of this system that have occurred since the previous year's inspection. Any damaged material would be removed. Above-water activities will consist of a visual inspection of the dock and sheet pile enclosure that will document the condition of the island bench and ramps. The below-water slopes will be inspected by divers or, if water clarity allows, remotely by underwater cameras contracted separately by Hilcorp. The results of the below-water inspection will be recorded for repair if needed. No vessels will be required. Multi-beam bathymetry and side-scan sonar imagery of the below-water slopes and adjacent sea bottom will be acquired using a bathymetry vessel. The sidescan sonar would operate at a frequency between 200–400 kilohertz (kHz). The single-beam echosounder would operate at a frequency of about 210 kHz.

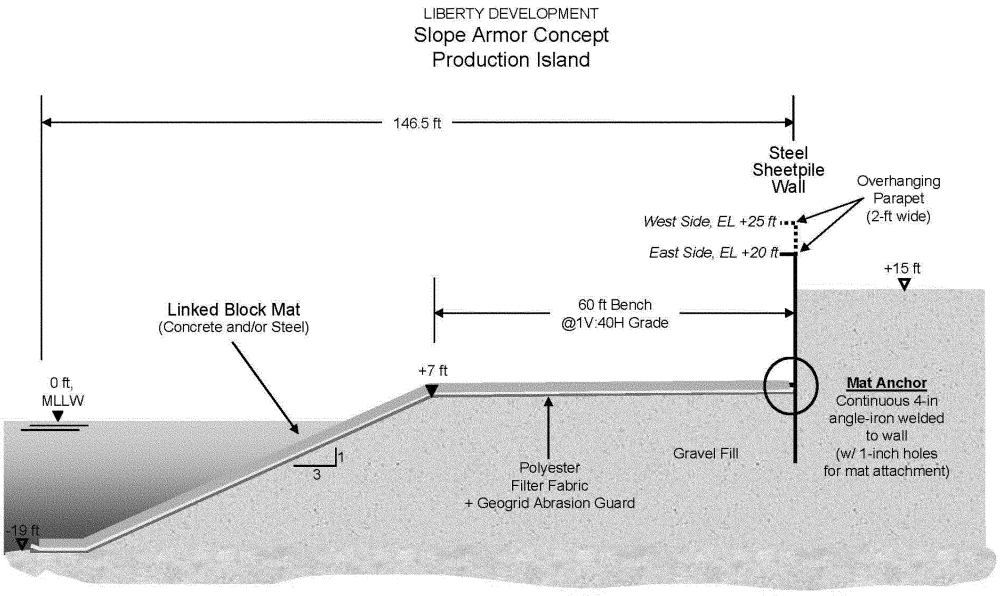

Figure 3. LDPI Slope Protection.

Once the slope protection is in place, Hilcorp would install the sheet pile wall around the perimeter of the island using vibratory and, if necessary, impact hammers. Hilcorp anticipates driving up to 20 piles per day to a depth of 25 ft. A vibratory hammer would be used first, followed by an impact hammer to ''proof'' the pile. Hilcorp anticipates each pile needing 100 hammer strikes over approximately 2 minutes of impact driving to obtain the final desired depth for each sheet pile. This equates to a maximum of 40 minutes and 2,000 strikes of impact hammering per day. For vibratory driving, pile penetration speed can vary depending on ground conditions, but a minimum sheet pile penetration speed is 20 inches (0.5 m) per minute to avoid damage to the pile or hammer (NASSPA 2005). For this project, the anticipated duration is based on a preferred penetration speed greater than 40 inches (1 m) per minute, resulting in 7.5 minutes to drive each pile. Given the high storm surge and larger waves that are expected to arrive at the LDPI site from the west and northwest, the wall will be higher on the west side than on the east side. At the top of the sheet-pile wall, overhanging steel ''parapet'' will be installed to prevent wave passage over the wall.

Within the interior of the island, 16 steel conductor pipes would be driven to a depth of 160 ft (49 m) to provide the initial stable structural foundation for each oil well. They would be set in a well row in the middle of the island. Depending on the substrate, the conductor pipes would be driven by impact or vibratory methods or both. During the construction of the nearby Northstar Island (located in deeper water), it took 5 to 8.5 hours to drive one conductor pipe (Blackwell *et al.,* 2004). For the Liberty LDPI, Hilcorp anticipates it would take two hours of active pile driving per day to install a conductor pipe given the 5 to 8.5 hour timeframe at Northstar includes pauses in pile driving and occurred in deeper water requiring deeper pile depths. In addition, approximately 700 to 1,000 foundation piles may also be installed within the interior of the island should engineering determine they are necessary for island support.

Pipeline Installation

Hilcorp would install a pipe-in-pipe subsea pipeline consisting of a 12-in diameter inner pipe and a 16-in diameter outer pipe to transport oil from the LDPI to the existing Bandami pipeline. Pipeline construction is planned for the winter after the island is constructed. A schematic of the pipeline can be found in Figure 2–3 of BOEM's Final Environmental Impact Statement (FEIS) available at *https://www.boem.gov/Hilcorp-Liberty/.* The pipeline will extend from the LDPI, across Foggy Island Bay, and terminate onshore at the existing Badami Pipeline tie-in location. For the marine segment, construction will progress from shallower water to deeper water with multiple construction spreads.

To install the pipeline, a trench will be excavated using ice-road based long-reach excavators with pontoon tracks. The pipeline bundle will be lowered into the trench using side booms to control its vertical and horizontal position, and the trench will be backfilled by excavators using excavated trench spoils and select backfill. Hilcorp intends to place all material back in the trench slot. All work will be done from ice roads using conventional excavation and dirt-moving construction equipment. The target trench depth is 9 to 11 ft (2.7 to 3.4 m) with a proposed maximum depth of cover of approximately 7 ft (2.1 m). The pipeline will be approximately 5.6 mi (9 km)

long. Hydro-testing (pressure testing using sea water) of the entire pipeline will be completed prior to commissioning.

Drilling and Production

The final drill rig has yet to be chosen by Hilcorp but has been narrowed to two options and will accommodate drilling of 16 wells. The first option is the use of an existing platform-style drilling unit that Hilcorp owns and operates in the Cook Inlet. Designated as Rig 428, the rig has been used recently and is well suited in terms of depth and horsepower rating to drill the wells at Liberty. A second option that is being investigated is a new build drilling unit that would be built to not only drill Liberty development wells, but would be more portable and more adaptable to other applications on the North Slope. Regardless of drill rig type, the well row arrangement on the island is designed to accommodate up to 16 wells. We note that while Hilcorp is proposing a 16-well design, only 10 wells would be drilled. The 6 additional well slots would be available as backups or for potential in-fill drilling if needed during the project life.

Process facilities on the island will separate crude oil from produced water and gas. Gas and water will be injected into the reservoir to provide pressure support and increase recovery from the field. A single-phase subsea pipe-in-pipe pipeline will transport sales-quality crude from the LDPI to shore, where an aboveground pipeline will transport crude to the existing Badami pipeline. From there, crude will be transported to the Endicott Sales Oil Pipeline, which ties into Pump Station 1 of the TransAlaska Pipeline System (TAPS) for eventual delivery to a refinery.

Comments and Responses

Notice of NMFS's proposal to issue regulations to Hilcorp was published in the **Federal Register** on May 29, 2019 (84 FR 24926). That document described, in detail, Hilcorp's proposed activity, the marine mammal species that may be affected by the activity, and the anticipated effects on marine mammals. At the request of the Alaska Eskimo Whaling Commission (AEWC), NMFS reopened the public comment period until July 31, 2019 (84 FR 32697; July 9, 2019). During the public comment period, NMFS received comments from the Marine Mammal Commission (the Commission); Alaska Wilderness League (AWL), on behalf of the Animal Welfare Institute, Center for Biological Diversity, Defenders of Wildlife, Earthjustice, Environmental Investigation Agency, Eyak Preservation Council, Friends of the Earth, and Northern Alaska Environmental Center; AEWC; North Slope Borough (NSB); and seven private citizens. These comments and our responses are described below.

Comment 1: The Commission recommends that NMFS consult with external scientists and acousticians to determine the appropriate accumulation time that action proponents should use to determine the extent of the Level A harassment zones based on the associated cumulative sound exposure level (SELcum) thresholds for the various types of sound sources, including stationary sound sources.

Response: The Commission has raised this concern before and NMFS has previously responded that NMFS considers this a priority and has formed a Working Group to focus on the issue of accumulation time. Once the NMFS internal Working Group develops a proposal, it will be shared with Federal partners and other stakeholders. However, in the meantime, as we have described previously, Hilcorp used a sophisticated modeling approach that considered the full duration of activity within a day which allows for a conservative estimate of the distances at which marine mammals could potentially experience injurious sound levels if they were subject to the full duration of exposure.

Comment 2: The Commission recommends that NMFS include in the preamble of the final rule all of the inputs it used to estimate takes by Level A and B harassment, including the type of activity that will occur during each season and the number of days each season that each activity will occur.

Response: All of the inputs into the Level A harassment analysis, including ensonified areas, are included in the final rule. NMFS also provided a table in the final rule that lists the activities with the greatest potential for take and the number of days each season that the activities are anticipated to occur in each year of the 5-year regulations (Table 1b).

Comment 3: The Commission believes that the number of Level A harassment takes for ringed seals have been underestimated and claims there is the potential for at least one ringed seal to be taken by Level A harassment each day that impact pile driving occurs, particularly since it appears that impact pile driving could occur intermittently throughout a given day. The Commission recommends that NMFS increase the number of Level A harassment takes of ringed seals from 5 to at least 15 during Year 1 considering 15 days of open-water pile driving could occur.

Response: The estimated number of marine mammals that may be potentially exposed to noises exceeding NMFS' established thresholds was calculated based on marine mammal density estimates, the ensonified area, and the duration of each project activity. The Commission's recommendation does not provide reason for why this standard approach is not acceptable. In addition, the Commission has inaccurately characterized the Level A harassment distance output of the model as the distance at which an animal will immediately incur permanent threshold shift (PTS) if it crosses that distance. However, this is not the case as described in the Technical Guidance (NMFS 2018). The Level A threshold distance represents the distance at which an animal could incur PTS if it remains at that distance for the duration considered in the model. An animal crossing this distance for a shorter period of time does not necessarily incur PTS. The Level A isopleth calculations included a conservative 40 minutes of active impact pile driving per day, which does not consider the time it takes to reset for piles, and Footnote 2 in Table 4 indicates the average duration of impact driving per day is closer to 20 minutes, which would result in a much smaller Level A harassment distance and, again, the animal would have to remain at that distance for that period of time. The Commission also states that Hilcorp would not be required to shut down if a seal comes within the Level A harassment isopleth; however, as described in Hilcorp's application, the proposed rule, and this final rule, if a seal enters the Level A harassment zone while pile driving is ongoing, work may continue until the pile is completed (estimated to require approximately 15–20 minutes), but additional pile driving must not be initiated until the animal has left the Level A harassment zone. The Commission also does not consider seasonal density of ringed seals, which is very low during the summer when impact pile driving during open-water could occur, further reducing the potential for Level A harassment take. For these reasons, NMFS does not agree with the Commission's recommendation and, as in the proposed rule, the final rule authorizes the take, by Level A harassment, of five ringed seals in year 1 incidental to pile driving as this is the calculated Level A harassment take based on seal density, the ensonified area, and the number of impact pile driving days.

Comment 4: The Commission recommends that NMFS revise the numbers of Level B harassment takes for all species to account for vibratory driving occurring at any of the five sides of the island during the open-water season and, unless Hilcorp has contrary data regarding how many days vibratory driving would occur at each of the five sides of the island, assume that pile driving would occur for three days at each of the five sides. This recommendation is based on the proposed rule's approach that Level B harassment takes during sheet pile driving during the open-water season were based on an ensonified area of 64 km^2 for each of the estimated 15 days of pile driving. That ensonified area is associated with the southwest side of the island, which was the smallest of the ensonified areas associated with each of the five sides of the island.

Response: Hilcorp stated several times in their application, correspondence with NMFS, and during the peer-review panel that they intend to conduct all sheet pile driving during the ice-covered season, as was done with Northstar. This information is provided in their description of the specified activity. However, as a precautionary measure, two weeks to complete sheet piling driving during open water (early July) have been included for estimating potential marine mammal takes. Hilcorp's construction process validates the reason for using the southwest perimeter acoustic model results (64 km^2) in the take estimate. Hilcorp proposes to begin vibratory sheet pile driving on the north end of LDPI during ice-covered conditions, progressing around the island perimeter and finishing with sheet pile driving on the southwest side of the island. Therefore, although ideally all pile driving would be done during the ice-covered season, the only part of the island which could be unfinished by the open-water period is the southwest side of the island. The Commission's recommendation to assume three days of pile driving at each of the five sides is inconsistent with Hilcorp's construction plan. For these reasons, NMFS used the SW ensonified area of 64 km^2 to estimate marine mammal takes while also accounting for group size in its take authorization, as presented in the proposed rule. In addition, we note that NMFS adjusted cetacean take numbers from a simple density estimate, which uses an ensonified area, to one that accounts for group size and previous monitoring data, raising all take numbers born from estimates that solely relied on ensonified area. For example, the estimated density of gray whales in Foggy Island Bay is zero, therefore even if different ensonified areas were used, the outcome of takes based solely on the ensonified area would always be zero; however, by also including group size and previous monitoring data, the Level B harassment take estimate for gray whales is two per year.

Comment 5: The Commission recommends that NMFS increase the Level B harassment takes of gray whales from one to two annually in Years 1 through 5 and that NMFS increase the Level B harassment takes of bowhead whales to account for the typical group size of two to five whales annually in Years 2 through 5.

Response: Although gray whales and bowhead whales are extremely rare in Foggy Island Bay, NMFS agrees to conservatively account for group sizes of these species in the open Beaufort Sea. This final rule authorizes the take, by Level B harassment, of two gray whales, annually for the life of the regulations, and five bowhead whales, annually in years 2–5 of the final rule, incidental to the proposed project. As in the proposed rule, NMFS estimates that six bowhead whales may be taken by Level B harassment in year 1 of the regulations.

Comment 6: If there is a possibility that pile driving could occur after the Nuiqsut Cross Island hunt, the Commission recommends that NMFS re-estimate the number of Level B harassment takes, as well as Level A harassment takes for bowhead whales since they occur in greater numbers, and thus higher densities, in the fall (September through October).

Response: Other than to account for large group size (see above), NMFS did not adjust bowhead whale take numbers. It is very unlikely Hilcorp would conduct pile driving after the Cross Island hunt as this is not in their project plan. Hilcorp intends to conduct all sheet pile driving during the ice-covered months as was done with Northstar. Some sheet pile driving during the open-water season was included in the rulemaking analysis to conservatively account for any delays resulting in the need for sheet pile driving during that time.

Comment 7: The Commission recommends that NMFS specify in the final rule that the Level A harassment zones equate to the shut-down zones and the relevant circumstances when they apply. The AWL made a similar comment and we address both here.

Response: As described in the proposed rule (84 FR 24955) and this final rule, in the unlikely event a low frequency cetacean (bowhead or gray whale) approaches or enters the Level A harassment zone, pile driving would be shut down. This measure is designed to provide the most protection practicable for large whales included in subsistence uses. If a mid-frequency cetacean (beluga) or pinniped (seal) enters the Level A harassment zone during pile driving, Hilcorp could complete setting the pile (which takes ten to fifteen minutes from commencement) but not initiate additional pile driving of new piles until the marine mammal has left and is on a path away from the Level A harassment zone. This measure is also included in section 217.34 of the proposed and final regulations. As such, the Commission's recommendation to specify the Level A harassment zones equate to the shut-down zones is not necessary. The Commission and AWL's confusion appears to be generated by one statement in parentheses in the proposed rule preamble that did not clearly identify that the shut-down zone is equal to Level A harassment zone only for low frequency cetaceans. NMFS corrected this statement in the final rule to clarify the Level A zone is equal to the shut-down zone only for low frequency cetaceans.

Comment 8. The Commission recommends that NMFS make the Wildlife Action Plan available to the public and provide an additional opportunity for review and comment on both the BMPs and the Wildlife Action Plan prior to issuing the final rule.

Response: NMFS posted both the BMPs and the relevant sections of the Wildlife Action Plan during the initial public comment period. These documents were also available during the second public comment period.

Comment 9: The Commission recommends that NMFS include the following requirements in the final rule: (1) That Hilcorp conduct PAM [passive acoustic monitoring] using a hand-held hydrophone deployed through the ice during the ice-covered season and (2) Hilcorp include in its annual reports and final report an extrapolated total take estimate for each species based on the number of marine mammals observed and the extent of the harassment zones during the applicable construction activities.

Response: The proposed and final rule includes the requirement that Hilcorp conduct PAM using a hand-held hydrophone. This requirement is also in both the Marine Mammal Mitigation and Monitoring Plan (4MP) and the Acoustic Monitoring Plan which the Commission reviewed concurrently with the proposed rule. In the final rule, NMFS has added a requirement that Hilcorp provide in its annual and final

report an extrapolated total take estimate for each species.

Comment 10: The Commission recommends that NMFS ensure the minimum distance specified in the final rule, 4MP, and BMPs for avoidance of ringed seals and lairs is at least 150 m, not 150 ft (we note AWL provided a similar comment) and that NMFS clarify in the preamble to the final rule its rationale for not incorporating the peer-review panel's recommendations to (1) increase the avoidance distance for ringed seals and lairs to 300 m and (2) investigate the availability of laser range finders that would improve the resolution and range of detections of marine mammals beyond 600 m.

Response: The final rule makes corrections and clarifies the minimum distances of approach for ringed seals and ringed seal structures. The minimum distance to avoid ringed seals remains as stated in the proposed rule and BMPs as 50 m. The minimum distance to avoid ringed seal structures (*e.g.,* lairs, breathing holes) in this final rule is 150 m. The BMP entries, which appear to be the source of confusion for the Commission and AWL, have been modified and are available at *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.* With respect to the peer-review panel's recommendation, they provided no justification for why the proposed avoidance distances were not appropriate nor did they provide justification for the 300-m recommendation. A 300-m avoidance distance of both seals and lairs is three times greater than the NMFS marine mammal viewing guidelines recommendation and is not practicable for the applicant to carry out ice-road work. For these reasons, NMFS did not accept the peer-review panel's 300-m avoidance recommendation.

We note that the peer-review panel's report made one mention of range finders and recommended user range finders that would improve resolution and range detections of marine mammals beyond 600 m. The 4MP indicates distances to nearby marine mammals will be estimated with binoculars containing a reticle to measure the vertical angle of the line of sight to the animal relative to the horizon. However, for a more immediate distance estimator tool, NMFS has included the requirement for PSOs to be equipped with rangefinders.

Comment 10: AWL asserts the proposed rule employs an unlawful small numbers analysis that arbitrarily fails to consider the full suite of impacts from the operation of the Liberty project on marine mammals in that NMFS ignores takes that will occur from operation of the Liberty project.

Response: Hilcorp requested authorization for the take of six species of marine mammals incidental to construction and operation of the proposed LDPI during the five-year period from December 1, 2021, through November 30, 2026. NMFS does not ignore takes that will occur from operation of the Liberty project during that period. The acoustic models indicate there is potential for NMFS Level B harassment thresholds to be reached during drilling (*i.e.,* operation) approximately 230 m and 55 m from the island during ice and open-water conditions, respectively. Animal density, by species, was considered with respect to these ensonified areas and accounted for in the take estimates. Therefore, NMFS has analyzed and authorized takes for operation (*i.e.,* drilling) of the Liberty project. During the onset of drilling and production, Liberty will perform acoustic measurements to determine if the model accurately predicted these harassment isopleths, and future requests for take authorizations after the regulations have expired will be contingent upon those measurements.

Comment 11: AWL expressed concern that NMFS used the median range of radial distances to NMFS Level B harassment thresholds to determine the ensonified area in which takes would occur. They assert that use of the median range could lead to roughly 50 percent of an exposed cohort experiencing impacts that are not accounted for in NMFS's analysis. They assert NMFS' approach contravenes the precautionary nature of the MMPA and the statutory definition of harassment, which includes not only those actions that will injure or disturb marine mammals, but those that have the potential to do so.

Response: It is NMFS standard practice to apply median source levels when determining distances to NMFS harassment thresholds. By using the median, we eliminate the few loud outliers in the data, better representing the overall acoustic footprint of the project. NMFS notes that using the median harassment isopleth also does not translate into underestimating an exposed cohort by 50 percent as the AWL asserts. This is because the median harassment isopleth distance is not half of the maximum isopleth (which is derived by applying the absolute maximum source level). For example, the median Level B harassment isopleth for impact driving sheet piles is 2,050 m while the maximum is 2,250 m. Similarly, the median Level B harassment isopleth for impact driving pipe piles is 315 m while the maximum is 400 m. Because take is based on the density of animals in a given area, the area (which is derived from isopleth distances) would have to be 50 percent less to have a 50 percent reduction in take. More importantly, all predicted cetacean takes were adjusted upwards to account for group size so the actual take authorized is greater than any predicted take based on density and harassment isopleth distances. For these reasons, we believe we have accurately accounted for the potential for takes of all species.

Regarding Level B harassment, based on the language and structure of the definition of Level B harassment, we interpret the concept of ''potential to disturb'' as embedded in the assessment of the behavioral response that results from an act of pursuit, torment, or annoyance (collectively referred to hereafter as an ''annoyance''). The definition refers to a ''potential to disturb'' by causing disruption of behavioral patterns. Thus, an analysis that indicates a disruption in behavioral patterns establishes the ''potential to disturb.'' A separate analysis of ''potential to disturb'' is not needed.

Comment 12: AWL believes NMFS ignores takes that will occur from ship strikes and noise pollution from vessel and air traffic associated with the Liberty project. These activities may cause takes of all the species analyzed in the agency's proposed rule—bowhead whales, gray whales, beluga whales, spotted seals, ringed seals, and bearded seals—as well as a host of other species (North Pacific right whales, humpback whales, minke whales, fin whales, killer whales, sperm whales, harbor porpoise, Dall's porpoise, beaked whales, Steller sea lions, harbor seals, and ribbon seals) not included in the analysis.

Response: NMFS does not ignore impacts from ship strikes and noise from vessel and air traffic associated with the Liberty project. As described in the analysis, the probability of a ship strike from the specified activities is very low and, further, Hilcorp proposed, and NMFS included, a number of measures to further reduce the likelihood of vessel interactions. Accordingly, takes from ship strikes are neither anticipated nor authorized. Regarding ship traffic noise, the impacts of vessel traffic from these activities are assessed and considered in NMFS' Biological Opinion, Hilcorp's application, and the proposed rule (*e.g.,* 84 FR 24945, May 29, 2019), and while marine mammals may respond to vessel traffic, responses rising to the level of a

take are considered unlikely to occur and are not authorized here. As for aircraft, the critical angle necessary for noise to enter the water column from airborne sources is very small. While aircraft flying low directly overhead may be audible to a cetacean (whose ears are adapted to underwater hearing), it is highly unlikely that noise would cause changes to patterns of behavior that would rise to a level of a take. For all species, including pinnipeds, behavioral harassment would be minimized through mitigation measures that establish minimum flight altitudes, as described in the Biological Opinion and which has been added as a mitigation measure to this final rule. Hence, NMFS disagrees these activities have the potential to take the species AWL believes NMFS did not include in the analysis.

Comment 13: AWL believes NMFS improperly lumps together the take of marine mammals that it acknowledges will occur. For example, NMFS ignores the impacts of masking from pile driving that might rise to Level B harassment because it will occur concurrently with harassment already considered in estimating takes from vibratory and impact pile driving.

Response: NMFS disagrees with AWL's characterization. A detailed discussion on masking is presented on page 24944 of the proposed rule (84 FR 24926; May 29, 2019) and noted throughout the *Auditory Effects* section of that document. NMFS qualitatively considers masking in its analysis. NMFS does not quantify and authorize separate Level B harassment takes based on the stressor (*e.g.,* masking vs. stress, etc.), rather, we evaluate the number of takes anticipated to occur and then assess the impacts of the authorized take on the individual (and subsequently the population), qualitatively considering the nature of the takes that are anticipated to occur, *e.g.,* whether they are more or less severe, or what kind of stressor or stressors they are resulting from. Accordingly, while all stressors are appropriately considered in the analysis (quantitatively or qualitatively), a total amount of Level B harassment takes are authorized.

Comment 14: AWL asserts that repeated exposures should be considered as separate takes, because they will repeatedly affect auditory and behavioral responses. AWL is concerned NMFS appears to count any exposure that occurs over the course of a given day as one take.

Response: While NMFS' analysis fully considers the nature of any takes that will occur (*e.g.,* the severity, whether they are comprised of multiple exposures within a day, the duration of the exposure), for the purposes of consistency in tracking across projects and practicality for applicant implementation, and in consideration of the fact that many marine mammal behaviors and responses are linked to a diel cycle, NMFS appropriately uses a daily metric to count takes for the purposes of authorization. Specifically we do not consider one individual animal as taken more than one time in a day and, the corollary of that—we consider takes that occur in a subsequent 24-hour period a separate instance of take, even if they may be accruing to the same individual. These basic rules allow for consistent and reliable estimation of take and, further, it is rarely the case that there is adequate information to predict impacts with any precision at a more granular level. Accordingly, we count multiple exposures in one day to an individual as one take, but our analysis considers the severity and nature of each take in our negligible impact analysis.

Comment 15: AWL asserts that NMFS's analysis also improperly ignores the species-particular behaviors and life-stages of animals at the anticipated times and places that takes would occur and that responses of marine mammals to noise generated by the project may be markedly different depending on what the animal is doing, time of year (*i.e.,* season), or life-stage of the animal at the time of exposure.

Response: NMFS analyzed both species-specific behaviors and life-stages in the proposed rule. For example, cetaceans are not present in Foggy Island Bay during the ice-covered periods; therefore, we determined there was no potential for harassment to cetaceans during this time period. NMFS also investigated and described the potential effects of ice road construction during ringed seal lairing time periods and specifically discussed that to offset impacts to reproductive behaviors by ringed seals (*e.g.,* lairing, pupping), Hilcorp would follow a number of ice road BMPs developed in coordination with NMFS ringed seal experts. During the open-water season, NMFS identified in the proposed rule that cetaceans rarely use Foggy Island Bay and has clarified in the final rule that Foggy Island Bay does not serve as critical reproductive or foraging grounds for any cetacean species.

Comment 16: AWL believes NMFS's analysis of small numbers improperly conflates this criterion with the separate negligible impact requirement of the statute. By defining small numbers to be relative to the overall population, the criterion ends up being similar to the negligible impact finding.

Response: We disagree with AWL's characterization of our analysis—NMFS very clearly distinguishes our separate analyses for the small numbers and negligible impact standards. As described in the proposed rule (84 FR 24959, May 29, 2019), wherein the small numbers assessment is based solely on the number of takes in relation to the abundance of the stock (a purely numerical comparison), the negligible impact analysis considers other factors, such as the nature of the anticipated takes, the context of the exposures, the life history and vulnerability of the individuals of different species, effects on habitat, the likely effectiveness of mitigation, and the status of the affected stocks (among other things) to determine if the takes will affect the fitness of any individuals and, if so, whether the scale of any anticipated impacts to reproduction or survivorship will adversely affect the species or stock. For a fuller description of how NMFS conducts its small numbers analysis, please see our final notice of issuance for five IHAs for seismic surveys in the Atlantic (83 FR 63375, December 7, 2018).

Comment 17: AWL indicates that both NMFS's negligible impact determination and its small numbers analysis ignore the impacts of oil spills. Oil spills are an inevitable part of the Liberty project and should be considered. NMFS ignores the impacts of oil spills in its negligible impact and small numbers analysis by claiming that Hilcorp has not requested authorization of takes from oil spills and oil spills are not part of the ''specified activity'' for which NMFS is authorizing takes. However, NMFS defines the ''specified activity'' as the ''construct[ion] and operat[ion] of the LPDI, a self-contained offshore drilling and production facility located on an artificial gravel island.'' And as the Final EIS makes clear, small oil spills are an inevitable part of the development and production and therefore should be considered part of the ''specified activity'' for NMFS's authorization.

Response: The Bureau of Safety and Environmental Enforcement (BSEE) has primary regulatory authority related to safety and prevention of pollution, including accidental oil spills, related to offshore oil and gas operations. Pollution-prevention regulatory requirements for oil, gas, and sulphur operations in the outer continental shelf are in 30 CFR part 250, subpart C, Pollution Prevention and Control. These regulations require operators that engage in activities such as exploration,

development, production, and transportation of oil and gas to take measures to prevent unauthorized discharge of pollutants into offshore waters (30 CFR 250.300). Operators shall not create conditions that will pose unreasonable risks to public health, life, property, aquatic life, wildlife, recreation, navigation, commercial fishing, or other uses of the ocean. If pollution occurs that damages or threatens to damage life (including fish and other aquatic life), property, any mineral deposits in leased and unleased areas, or the marine, coastal, or human environment, immediate corrective action must be taken and the control and removal of the pollution must be to the satisfaction of BSEE . These regulations further mandate that the operator conduct inspections of drilling and production facilities daily, or at other approved or prescribed intervals, to determine if pollution is occurring (30 CFR 250.301). If problems are detected, necessary maintenance or repairs must be made immediately.

BSEE and BOEM considered the potential risk of oil spills from the LDPI project in the 2018 EIS. Based on BOEM and BSEE's oil spill analysis in the EIS, the only sized spills that are reasonably likely to occur in association with the LDPI operation are small spills (<1,000 barrels (bbls)). Any crude oil spill would not occur prior to drilling and operations, which are likely to begin in year 3 of the effective period of the final rule. BOEM estimates about 70 small spills, most of which would be less than 10 bbls, would occur over the life of the Liberty Project, which is 25 years. Because the first 2 years of the project would not involve drilling, the time during which spills could occur is limited to 23 years. Extrapolating this estimate to the effective period of the rule and during a time at which spills could occur (year 3–5), about 9 spills (70 spills/23 years * 3 years) would be estimated to occur in the three years the rule is valid.

BOEM also explains in the EIS that spills are more likely to occur when BOEM is conducting reservoir drilling, which is defined as initial development drilling (as opposed to workovers, recompletions, and other such well operations subsequently conducted on existing wells) beyond the shoe (base) of the last casing string above the Kekiktuk Formation (*i.e.* drilling that exposes the Kekiktuk Formation to an open, uncased wellbore). Hilcorp is required by BOEM to limit reservoir drilling to the ice-covered season. During the ice-covered season, any spill would be contained by the ice and hence have limited impact on marine mammals. Limiting reservoir drilling to solid ice conditions (defined as 18 inches of ice in all areas 500 feet of the LDPI) limits the risk of an oil spill and hence limits potential impacts on pinnipeds (note cetaceans are not present and therefore unaffected by any spills during the ice-covered season).

During the open-water season, when both cetaceans and pinnipeds could be subjected to an oil spill (albeit in low abundance), BOEM anticipates that small refined spills that reach the open water would be contained by booms or absorbent pads; these small spills would also evaporate and disperse within hours to a few days. A 3 bbl refined oil spill during summer is anticipated to evaporate and disperse within 24 hours, and a 200 bbl refined oil spill during summer is anticipated to evaporate and disperse within 3 days (BOEM 2017a).

In summary, as described in the EIS, BOEM and BSEE evaluated the potential for impacts from oil spills and concluded that any potential oil spills are likely to be small, and there are measures set in place to minimize impacts of any potential spill on environmental resources, including marine mammals. For purposes of this rulemaking, NMFS discussed the potential risk of oil spills in its proposed rule (84 FR 24946; May 29, 2019), but as noted in the proposed rule, the MMPA authorizes NMFS to issue take from otherwise legal activities, of which oil spills are not, and therefore, NMFS cannot authorize, and is not authorizing, takes of marine mammals incidental to oil spills in the final rule.

Comment 18: AWL believes NMFS ignores the additive effects from other oil and gas activities in the Arctic and climate change. AWL asserts NMFS fails to consider whether the impacts of the Liberty project will be negligible in light of ongoing and future oil and gas development in the Beaufort Sea and NPR–A, including the Endicott and Northstar projects and Colville Delta 5 (CD–5), Greater Mooses Tooth (GMT) 1 and 2, and Willow project in the NPR–A, among others. AWL states the Liberty project will emit greenhouse gases and exacerbate the climate change that is threatening the continued existence of these species through habitat destruction. AWL claims NMFS's negligible impact determination fails to consider such impacts.

Response: The MMPA requires NMFS to allow, upon request, the incidental take of marine mammals related to the specified activity, which we have identified as the first five years of LDPI construction and operation. The additive effects from other oil and gas activities in the Arctic and climate change are not part of that specified activity, although the potential for them is discussed in the proposed rule and their ongoing influence is considered through their incorporation into the baseline for our analysis (*e.g.,* through the regulatory status of the species, marine mammal densities, and population trends). Further, these factors are considered in NMFS' Biological Opinion (section 5.0) and environmental analysis required under the National Environmental Policy Act (NEPA). In the Biological Opinion, all relevant future climate-related environmental conditions, such as those caused by the projects AWL acknowledges, in the action area are described in the environmental baseline. BOEM's EIS, on which NOAA was a cooperating agency and which NMFS adopted for issuance of the final rule, identifies the potential impacts of the additive effects from other oil and gas activities in the Arctic and climate change on the human environment, including marine mammals. The effects of ongoing and future oil and gas projects in the Arctic, as well as climate change, are all included in BOEM's cumulative impact analysis in the EIS.

Comment 19: AWL believes the proposed activities will adversely affect Nuiqsut's subsistence activities, including seal and bowhead whale hunting, and these impacts may not be mitigable. AWL asserts NMFS's proposed rule is inadequate because it fails to ensure that the proposed activity will not have an unmitigable adverse impact on Nuiqsut's subsistence harvest of bowhead whales. AWL argues construction and operation may cause: ''(1) deflection of whale movements farther offshore, (2) interference from support vessels, (3) avoidance of the Proposed Action Area by Nuiqsut whalers due to the presence of the proposed LDPI and production facilities and potentially contaminated resources, (4) whaling conflicts with summer construction activities such as sheet pile driving (*i.e.,* LDPI slope protection), and (5) oil spills.'' AWL also asserts that even if there are whales available near the proposed LDPI, Nuiqsut whalers will likely avoid the area and if whalers avoid the proposed LDPI site in such years their ''opportunities to strike whales could be severely reduced for one or more seasons . . . resulting in major impacts to subsistence whaling for Nuiqsut.'' AWL also argues that if there were to be a large oil spill from the proposed LDPI, communities across the North Slope would suffer. AWL asserts NMFS' explanation of its subsistence finding cites consultation and mitigation without explaining how

these measures will address the specific adverse impacts of the proposed activity on subsistence activities. AWL believes NMFS's proposed rule is therefore inadequate because NMFS has not demonstrated that the proposed activity will not have an unmitigable adverse impact on subsistence activities.

Response: AWL makes a number of assumptions that are unsupported and contradictory to NMFS' analysis of the potential impact on subsistence use of marine mammals. Importantly, the North Slope Borough (NSB) raised no significant concerns with the project and both the NSB's and AEWC's comment letters on the project commended Hilcorp for its outreach and commitment to the CAA during the rulemaking process. The proposed project would not deflect whale movement father offshore because the acoustic footprint of the project within which we would expect any disruption of behavioral patterns (*e.g.,* avoidance) is almost entirely confined to within Foggy Island Bay, where bowhead and gray whales do not migrate. In addition, BOEM has included a condition in Hilcorp's permit to minimize interference with subsistence whaling near Cross Island, wherein all pipe- and pile-driving activities and support vessel traffic outside the barrier islands will cease by August 1 and not resume until the official end of the hunt or until the quota has been met, whichever occurs first. This mitigation measure is carried over to this final rule. AWL's assumption that whalers would avoid the area on their own is unfounded and unsupported. NSB and AEWC did not raise this concern and, in contrast to AWL's assumption, requested Hilcorp to allow whalers to use the LDPI for safe harbor during the whaling season. Access to the LDPI by subsistence users was a mitigation measure included in the proposed rule and is included in the final rule to ensure the specified activities do not have an unmitigable adverse impact on subsistence users. In the unlikely event of a large oil spill, impacts could reach both marine mammal and subsistence communities, as with any large oil spill in the Arctic; however, as described in the response to Comment 17 above, large oil spills are neither anticipated during the course of this 5-year rule nor part of Hilcorp's specified activity, and NMFS is not authorizing takes of marine mammals incidental to oil spills. Further, BOEM and BSEE are responsible for permitting the construction and operation of the LDPI and for Hilcorp's oil spill response plan, respectively, not NMFS.

Comment 20: AWL believes NMFS has failed to implement measures that would effect the least practicable impact on marine mammals, by requiring mitigation measures that are unclear or ineffective, and by failing to adopt additional mitigation measures. AWL states that NMFS must clarify in the final rule that the shutdown zone is coextensive with the Level A harassment zone.

Response: The Level A harassment threshold distances and ensonified areas are identified in the proposed and final rule. As described in our response to Comment 7 above, which responds to the Commission's comment on this matter, the Level A harassment zone equates to the shutdown zone for gray whales and bowhead whales, and pile-driving cannot commence or continue if a gray whale or bowhead whale is seen within or approaching that zone; if a mid-frequency cetacean (beluga) or pinniped (seal) enters the Level A harassment zone during pile driving, Hilcorp could complete setting the pile but not initiate additional pile driving of new piles until the marine mammal has left and is on a path away from the Level A harassment zone. Hilcorp is also required to implement a number of mitigation measures that would minimize impacts to marine mammals through both the BOEM permitting process and the final rule as well as throughout their own construction methodology proposals. These include scheduling island construction during the ice-covered season, minimizing impact pile driving, avoiding pile driving during the bowhead whale migration period, reservoir drilling during solid ice conditions, using pile driving ramp-ups, and implementing the aforementioned shut down zones. Hilcorp, in coordination with NMFS and in consideration of the public comments on the proposed rule, has also clarified measures in the ice-road BMPs which must be followed per the final rule. AWL discussed concerns with monitoring but did not propose any specific additional mitigation measures. After evaluating all of the applicable information, NMFS has concluded that the required mitigation measures will effect the least practicable adverse impact on the affected marine mammal species and stocks and their habitat.

Comment 21: AWL believes NMFS relies on visual monitoring (or lookouts) and other mitigation measures for marine mammals proposed by Hilcorp that are known to be ineffective and inadequate to protect the species at issue. AWL states that in *Conservation Council for Hawaii* v. *National Marine Fisheries Service,* the court determined that NMFS may not choose the lesser mitigation option of lookouts to protect marine mammals (in that case from military sonar), especially knowing that many potential disruptions to marine mammal behavior will be difficult to detect or avoid through lookouts. AWL asserts that, here, NMFS should require Hilcorp to deploy long-term acoustic monitors consistent with the recommendations of the peer-review panel in order to obtain data both on the presence of marine mammals and sound levels generated during pile driving activities. AWL acknowledges NMFS is requiring Hilcorp to collect measurements using hand-held hydrophones lowered in a hole drilled through the ice during pile driving activities; however, AWL feels that, while this option would at least collect some noise monitoring data during the ice-covered season, the peer-review panel noted that it is only feasible in shallower water and would cover a much shorter time frame than acoustic recorders deployed before the start of winter.

Response: Hilcorp is required to abide by marine mammal mitigation measures NMFS consistently requires in pile driving incidental take authorizations, as they are considered effective at minimizing the impact to marine mammals. While Hilcorp is relying on visual monitoring to detect marine mammals, they are implementing an unmanned aircraft system (UAS) monitoring program that will allow detection farther than island-based observers can monitor. Hilcorp is also conducting acoustic monitoring in accordance with the peer-review panel's recommendations, which will aid in long-term detection analysis. The peer-review panel specifically recommended Hilcorp deploy acoustic recorders during ice-covered periods to obtain data on both the presence of marine mammals and the sound levels generated during pile driving activities. Deployment of autonomous, long-term recorders during winter is not practicable as recorders, and the data housed within them, would likely be lost to sea ice. AWL did not offer alternative methods of recording during winter; therefore, absent any new information, the peer-review panel's recommendation has been adopted and satisfied.

Comment 22: AWL also notes that the peer-review panel encouraged Hilcorp to consider deployment of additional acoustic recorders during the open-water season approximately 15 km northwest of the project area to facilitate a broader, multi-year approach to analyzing the effect of sound exposure on marine mammals by various LDPI

and non-LDPI sources. AWL believes it is not clear that Hilcorp's proposal to position recorders at unspecified ranges from the project activities will capture the same level of sound exposure on marine mammals from multiple known sources. AWL argues the final rule must incorporate the peer review panel's monitoring recommendations or otherwise ensure that this exposure is measured.

Response: Hilcorp's Acoustic Monitoring Plan, dated December 24, 2018, and their 4MP, dated February 12, 2019, and made available during the public comment period, explain that the recorder arrangement will be configured each year based on the anticipated activities for that season and the modelled sound propagation estimates for the relevant sources. This approach will provide for the most effective and relevant monitoring each year, and makes a set location unnecessary. The recorders will be onsite during each season and placed to provide data on ambient noise conditions and characterize or verify the long-range propagation of sounds emanating from the LDPI during construction activities at an offshore location. As such, AWL's concern, as well as the peer-review panel's recommendation, are satisfied because the recorders will provide long-term data sets in both the near and far fields.

Comment 23: AWL notes that the proposed rule requires implementation of BMPs to avoid and minimize ice seal and habitat disturbance during ice road construction, maintenance, and use. AWL claims, however, that the ice road BMPs fail to reflect the best available science and information and thus may not minimize the impacts of these activities on seals.

Response: The ice road BMPs, developed in consultation with Hilcorp and NMFS' leading ice seal biologist, are specifically designed to minimize impacts to ringed seals. NMFS Office of Protected Resources (OPR) and Alaska Region (AKR) closely coordinated with the leading ice seal experts in our Alaska Fisheries Science Center (AFSC) to better understand the new, best available science regarding how ice seals use ice roads (*e.g.,* how ice road construction can lead to fissures conducive to constructing lairs on the outer edges, general distances from the shoulder where lairs have been found) and detection methods. During development of the BMPs, we investigated detection methods such as the previous requirement to use specially trained dogs and infrared (IR) imagery. AFSC found that IR failed to detect seals in lairs. AFSC also previously investigated the success of using ground penetrating radar over known lairs in order to see whether there was a reliable thermal signal. Ground penetrating radar was not found to be a useful tool in this regard either. The use of trained dogs was also questionable as there was concern over the cost/benefit ratio of effectiveness versus the trace of dog scent potentially attracting polar bears to actively used ice seal structures, but more relevant is the fact that there are currently no trained dogs available. NMFS considered this and other new information obtained during ice road investigations from Northstar to develop a suite of practicable mitigation measures to implement during ice road construction for the Liberty project. Those BMPs reflect the best available science and minimize the impact of the work on ringed seals. Harassment that cannot be avoided through this comprehensive suite of mitigation measures may be authorized in LOAs pursuant to this final rule.

Comment 24: AWL states that the BMPs assume that seals will avoid the area on their own because of the construction activity, and NMFS should support this assumption with reference to monitoring and reporting information related to the extensive previous ice road construction and use in seal habitat on the North Slope.

Response: Although AWL did not provide the language in the ice road BMPs to which they are referring, we assume it is the statement, ''Prior to establishing lairs, ringed seals are mobile and are expected to generally avoid the ice roads/trails and construction activities.'' In our proposed rule (84 FR 24939; May 29, 2019), we discuss how ice seals utilize and may be attracted to ice roads as the construction of such roads tends to create cracks in the ice along the edges. Cracks and thinned ice, occurring either naturally or adjacent to ice roads, are easily exploitable habitat for ringed seals. We supplement that discussion with data from Williams et al. (2006), which compiles monitoring efforts during construction and operation of the Northstar drilling island and the two recent ice seal encounters on ice roads recently reported (voluntarily) by Hilcorp and another industry company. While NMFS has determined that the mitigation and monitoring measures contained in the BMP document support our least practicable adverse impact determination and has included them in these final regulations, the BMP document itself was drafted by Hilcorp, and NMFS' does not necessarily support every statement contained therein.

Comment 25: AWL notes that if a seal is observed within 150 feet of an ice road or trail, BMP 6 requires the observer to alert Hilcorp's Environmental Specialist, who will then monitor the seal until it is no longer within 150 feet of the road. The AWL believes disruptive activities may simply continue while the seal is within the monitoring buffer, and that the final rule should ensure a sufficient buffer area to avoid disturbance to seals during the pre-March 1 construction season.

Response: The 150 ft distance referenced by AWL refers to a monitoring area. As described in response to comment #10, corrections and clarifications were made to the original BMPs and proposed rule to clearly state that ice road construction and maintenance activities will avoid a seal structure by 150 m and a seal by 50 m on ice roads regardless of time of year. Therefore, AWL's assumption that activities could simply continue without action prior to March 1 is erroneous. The final rule and final ice road BMPs clarify this requirement

Comment 26: AWL is concerned that after March 1, the BMPs call for daytime observation of seals and lairs every other day when activity occurs on ice roads or trails and, unlike other observers noted in Hilcorp's Marine Mammal Monitoring and Mitigation plan (4M plan), these observers need not be certified Protected Species Observers (PSOs). AWL believe it is unclear why PSO certification is not required and why the observations only occur every other operation day instead of all days of operation. AWL asserts the final rule and BMPs should require observers to be PSO certified and present on all days of operation, or explain why this would not constitute a best practice.

Response: Prior to the initiation of sea ice road- and ice trail-related activities, project personnel associated with ice road construction, maintenance, use or decommissioning (*i.e.,* ice road construction workers, surveyors, security personnel, and the environmental team) will receive annual training on mitigation and monitoring measures. In addition to mitigation and monitoring measures, annual training includes: Ringed Seal Identification and Brief Life History; Physical Environment (habitat characteristics and how to potentially identify habitat); Ringed Seal Use in the Ice Road Region (timing, location, habitat use, birthing lairs, breathing holes, basking, etc.); Potential Effects of Disturbance; Importance of Lairs, Breathing Holes and Basking to Ringed Seals; and a Summary of Regulatory Requirements (*i.e.,* MMPA and the Endangered Species Act (ESA)).

Monitoring for ringed seals along the ice road is a considerably simpler task than observing for several species of seal in open water and this training will be sufficient to ensure that any seals within the monitoring zone are recorded. In 2018, Hilcorp reported zero seal observations along the Northstar ice roads. To ensure safe travel, it is important to limit the number of vehicles traveling ice roads. Therefore, for safety reasons and due to the low likelihood of observing seals within the monitoring zone, conducting monitoring every other day will be sufficient to record seals that may occur. In addition, as described in response to the next comment, the dedicated observer is not the single source of reporting. Any seals observed by drivers or workers, both day and night, are also required to report the sighting to Hilcorp's environmental coordinator.

Comment 27: AWL asserts that seal lairs are difficult to detect, and NMFS should require more vigorous efforts to detect them, for example, that the BMPs should require operators to employ trained dogs or thermal imaging techniques along the ice road routes to better support a conclusion that there are no lairs present. AWL states the Open Water Review Panel specifically recommended that NMFS investigate the viability of these and other potential detection methods. AWL asserts employing observers working only in daylight hours, only after March 1, only every other day of operation, and only equipped with their eyesight does not appear to constitute a best practice.

Response: See response to Comment 23 regarding the use of trained dogs and thermal imaging as detection methods. As for the use of observers every other day during daylight hours, NMFS believes this is an appropriate amount of coverage because the dedicated observer is not the single source of reporting. Any seals observed by drivers or workers, both day and night, are also required to report the sighting to Hilcorp's environmental coordinator. In addition, we provide subsequent justification of adequate monitoring in response to comment #26 above. Observers would be equipped with binoculars so AWL is incorrect in their assertion that only the naked eye would be used.

Comment 28: AWL believes BOEM's FEIS is inadequate in numerous respects, does not fully cover the scope of NMFS's proposed rule, and does not consider alternatives to the proposed rule, and therefore, NMFS cannot satisfy its obligations under NEPA by adopting BOEM's FEIS. They assert that the EIS fails to (1) provide meaningful disclosure and analysis of Liberty's contribution to greenhouse gas pollution and climate change; (2) accurately and thoroughly assess the likelihood and potential impacts of a significant oil spill; (3) take a hard look at Liberty's impacts on marine mammals and other species; (4) adequately consider the project's effects on subsistence and its disproportionate effect on environmental justice communities; (5) consider the cumulative effects of the project in combination with all past, present, and reasonably foreseeable actions; and (6) disclose and consider Hilcorp's track record of spills, accidents, and regulatory violations.

Response: Section 2.2.11 of BOEM's Liberty Drilling and Production Plan EIS clearly explains NMFS' permitting role in the Liberty project. The EIS states that given the widespread presence of several species of marine mammals in the Beaufort Sea and the nature of oil and gas production facility construction and, potentially, operational activities, there is the potential that some activities associated with Hilcorp's LDPI may result in the take of marine mammals incidental to the introduction of noise into the marine environment and ice road construction activities. Because of the potential for these activities to take marine mammals, Hilcorp has submitted an Incidental Take Authorization (ITA) application to NMFS. NMFS provided extensive comments to BOEM on the draft and final EIS to strengthen their analysis of marine mammal impacts in consideration of Hilcorp's request for the authorization to take marine mammals incidental to construction and operation of the LDPI. The EIS describes NMFS' action and no action alternatives, which include issuing the requested incidental take authorization and denying the requested incidental take authorization, respectively. As for the six topical areas AWL raises, the FEIS addresses all of these. The bulk of the EIS is dedicated to discussing the impacts on the human environment from small and very large oil spills (Chapter 4), and Chapter 5 is dedicated solely to a cumulative effects assessment. Greenhouse gases emission from the LDPI are quantified in Chapter 4 (*e.g.,* Table 4–6 in BOEM's EIS) and climate change impacts on marine mammals are addressed in Chapter 4 (*e.g.,* Section 3.2.4.6.6) and Chapter 5 (*e.g.,* section 5.1.3). The impacts of the LDPI on marine mammals is also thoroughly discussed in Chapter 4 which includes both construction and operation analysis. Subsistence uses and potential impacts are described throughout the document relative to each resources and are summarized in Table ES–1. The EIS does not discuss Hilcorp's previous environmental compliance record; however, as described in response to Comment #38, this is beyond the scope of NMFS' action and inclusion in the EIS is not required for us to adopt the EIS for purposes of issuing the regulations.

Comment 29: AWL notes that NMFS considered new information provided by Hilcorp that was not covered in the EIS. Specifically, on February 4, 2019, Hilcorp provided ''details on a previously undescribed component of the project (installation of foundation piles in the interior of the LDPI), and revised marine mammal density and estimated take numbers.'' AWL believes this additional information could affect the agency's analysis of the effects of the project on marine mammals.

Response: Foundation piles are described in BOEM's EIS on pages 2–12 and, as described in the proposed rule, the installation of foundation piles was found to result in very low noise levels, equivalent to driving conductor pipe piles. Given these piles are driven on the interior of the island, there is no potential for Level A harassment and the Level B harassment isopleth extends only 315 m from the island. Therefore, the potential for take is very limited. The EIS does not contain take estimates, and therefore, despite specific details and the very small amount of additional take for foundation pile installation being absent from the EIS, the information would not alter the analysis in the EIS. Requirements under NEPA are separate from those required to issue an MMPA incidental take authorization, and NMFS has satisfied the requirements for both statutes in issuing this final rule.

Comment 30: AWL asserts that BOEM's FEIS does not consider alternatives to NMFS's proposed rule. AWL believes NMFS must consider a no action alternative, under which NMFS would deny Hilcorp's request for incidental take authorization, as well as alternatives that would further reduce harm to marine mammals, such as prohibiting construction activity during the open-water season, requiring Hilcorp to cease pile driving if an ice seal is seen in the area, requiring the use of long-term acoustic monitors, or requiring all vessels associated with the Liberty project to travel at no more than 10 knots.

Response: As described above, BOEM's FEIS included NMFS' action and no action alternatives, which are, respectively, to issue the requested incidental take authorization, with

required mitigation measures, or to deny the requested incidental take authorization. Both the EIS and/or NMFS' regulations include a suite of mitigation measures to reduce adverse impacts to marine mammals, including no pile driving just before and during the bowhead whale hunt, long-term acoustic monitoring, and vessel speed restrictions where appropriate. These measures were included in both the FEIS and the final rule. Hilcorp will also minimize disturbance to ice seals through the incorporation of mitigation measures such as ramp-up. We have authorized Level A harassment and Level B harassment for ice seals, however; therefore, Hilcorp is not required to cease pile driving should a seal be observed in the area, as suggested by the AWL.

Comment 31: The NSB requested the regulations require Hilcorp to participate in the annual in-person peer review sponsored by NMFS for companies operating in areas subject to marine mammal subsistence harvest and to annually meet with Borough representatives to discuss the results and findings from Hilcorp's Marine Mammal Mitigation and Monitoring Plan. The AEWC similarly recommended findings from the mitigation and monitoring plan be reviewed annually by NMFS.

Response: Hilcorp is required to submit annual monitoring reports to NMFS in a timely manner. NMFS conducts peer-review panels when activities are proposed in Arctic waters, and whether the meetings are in-person or virtual depends on the level of expected activity necessitating MMPA authorization and the availability of travel resources for NMFS staff. For the LDPI, NMFS will provide the NSB and the public all of Hilcorp's annual monitoring reports as well as any interim reports (*e.g.,* initial acoustic monitoring reports) for their review. Throughout the life of the regulations, NMFS will engage with Hilcorp as well as the NSB to address any deficiencies or issues with those reports. In addition, Hilcorp has committed to participating in the annual peer-review panel, of which NSB is an invitee, to discuss data collected during marine mammal and acoustic monitoring as a means to carry out this coordination.

Comment 33: The NSB recommends the regulations prohibit any pile driving during, and two weeks prior to, the whale hunting season in Nuiqsut, unless Hilcorp can conclusively demonstrate that such vibratory pile driving does not alter the migratory paths of bowheads.

Response: Per the BOEM permit conditions, Hilcorp shall cease all pipe- and pile- driving by August 1, annually, and not resume until the end of the official hunt season or if subsistence users have met the whale quota. This mitigation measure is included in the final rule.

Comment 34: The AEWC commended Hilcorp for keeping the AEWC informed throughout their planning process for Liberty, their commitment to continuing their participation in the Open Water Season Conflict Avoidance Agreement (CAA) and the Annual CAA Process, and expressed their appreciation for Hilcorp's work with the AEWC, the community of Nuiqsut, and the North Slope Borough.

Response: NMFS will work with Hilcorp throughout the life of the regulations to support communication and coordination with the AEWC, the community of Nuiqst, and the NSB continues.

Comment 35: Several members of the public opposed drilling due to the potential for an oil spill.

Response: NMFS' authority and these final regulations allow for issuance of a Letter of Authorization to authorize takes of marine mammals incidental to island construction and operation. NMFS has no authority over whether this project, or any other drilling, is permitted. BOEM is the entity responsible for deciding whether to permit the project.

Comment 36: One commenter was concerned about polar bear impacts and discussed incidental take permit requirements for this species.

Response: Polar bears, and any permit related to the taking of polar bears under the MMPA or ESA, fall within the jurisdiction of the U.S. Fish and Wildlife Service. Therefore, this comment is outside NMFS' authority and the scope of the rulemaking.

Comment 37: One commenter urged review of the drilling plan for oil spill protection and earthquake contingencies and indicated that if a Deepwater Horizon event occurred in the Beaufort Sea, it would take decades to recover.

Response: NMFS remains interested in reviewing Hilcorp's oil spill response plan and, as indicated on page 24946 of the proposed rule, we have proactively engaged with BSEE (the Federal agency charged with reviewing and approving Hilcorp's oil spill response plan) and recommended measures to be included in the oil spill response plan. BSEE has indicated that NMFS will have an opportunity to review the oil spill response plan once they receive all the information necessary to move forward with their process.

Comment 38: One commenter had concerns about Hilcorp's ability to build and manage the project. Their concerns stem from an incident earlier this year when Hilcorp's underwater gas pipeline in Alaska's Cook Inlet leaked for nearly four months because the company said the presence of sea ice prevented its repair.

Response: NMFS' authority and these final regulations allow for issuance of a Letter of Authorization to authorize takes of marine mammals incidental to island construction and operation. BOEM and BSEE have authority over the permitting of the project and Hilcorp's oil spill response plan, respectively; therefore, this comment is beyond the scope of NMFS's authority under this rulemaking.

NMFS notes, however, that Cook Inlet presents different ice conditions than the Arctic where the Liberty project is to be located. Ice roads are not constructed in Cook Inlet which limited response capabilities. However, in the Arctic, ice roads and thick sea ice allow for other means of spill response. As analyzed by BOEM, the effectiveness of cleanup operations is highly dependent on volume, location, and time of year in Alaska. A small spill occurring during winter on solid ice and snow can be readily cleaned up using conventional land-based equipment such as shovels, snow blowers, and bulldozers, resulting in a near 100% recovery rate. In the event of a winter blowout, response methods would be similar to those employed on shore. Instead of using boats and skimmers to mount a response, responders would utilize front-end loaders, bulldozers, vacuum trucks, dump trucks, and front-end mounted ice trimmers to collect and remove the oil contaminated snow and ice. To facilitate response, ice roads would have to be constructed to adequately support the equipment and maintain safe operating conditions. In addition to heavy equipment, response operations would also include the use of snow blowers, shovels, and snow machines/ATVs with sleds to collect and remove the oil. In situ burning would also be utilized to remove oil from the ice surface. A release in solid ice conditions is easier to respond to because ice contains oil, limiting its dispersal into the marine environment.

Comment 39: One commenter recommended the LDPI project should not be implemented until further technology can promise this project will not impact the ocean negatively.

Response: Under the MMPA, NMFS must evaluate each request for an incidental take authorization on the merits of the application and the specified activity. Here, NMFS is not authorizing the take of marine mammals

from activities other than island construction and operation for 5 years. NMFS found, through a robust analysis of the potential effects of these activities on marine mammals and their habitat, that: The specified activities would have a negligible impact on the affected species and stocks and would not have an unmitigable adverse impact on subsistence uses, and; that the prescribed mitigation measures would effect the least practicable adverse impact on such species and stocks. NMFS has no authority to delay issuance of an ITA if the findings described above are made.

Comment 40: One commenter recommended the project should not be allowed to proceed unless it does not harm or kill marine life.

Response: NMFS does not issue permits to construct and operate the LDPI (*i.e.,* allow or not allow the underlying activity). NMFS issues authorization to take marine mammals incidental to the specified activity. The MMPA prohibits, with certain exceptions, the take of marine mammals. However, the MMPA allows, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity within a specified geographic region. Hilcorp applied for an incidental take authorization in accordance with the MMPA and its implementing regulations and NMFS followed the required process in promulgating incidental take regulations. Accordingly, NMFS is issuing regulations and will issue an LOA authorizing the take of marine mammals incidental to the construction and operation of the LDPI in accordance with the MMPA.

Comment 41: One commenter was concerned that allowing Hilcorp to harass and harm belugas, possibly resulting in their deaths, would decrease the beluga population in that area, and that this population would also not be able to recover losses. The commenter referred to the Cook Inlet beluga whale population status and lack of recovery after subsistence hunting was restricted as justification for the comment.

Response: The commenter believes the specified activities would result in beluga whale mortality and inappropriately compares a very small, isolated and critically endangered stock of beluga whales in Cook Inlet to a robust, far-ranging, non-ESA listed, stock in the Arctic. The final rule does not authorize any mortality or serious injury of beluga whales incidental to the construction and operations of the LDPI and NMFS does not believe any would potentially occur. The population of the Beaufort Sea stock of beluga whales is estimated at 39,258 individuals (compared to the Cook Inlet beluga whale stock of 327 whales) and has a much greater habitat range than Cook Inlet belugas. Any harassment to belugas in Foggy Island Bay incidental to pile driving or operations (*e.g.,* drilling) would be very limited, as pile driving would primarily occur during the ice-covered months when beluga whales are not present and, if any belugas are present during any pile driving or drilling activity, that activity would only impact a very small number of whales, as Foggy Island Bay is not heavily used by cetaceans, including beluga whales.

Comment 42: One commenter believed Hilcorp's activity may also affect the salmon populations upon which endangered whales depend and that allowing Hilcorp to take even a small number of protected animals will result in a psychological acceptance of harming these creatures and thus lead to even more animals being harmed.

Response: The potential impacts to marine mammal prey from the LDPI are evaluated in a number of assessments including the proposed rule, ESA section 7 consultation completed for issuance of the rule (see NMFS Biological Opinion issued August 30, 2019), and BOEM's EIS. Those assessments determined the LDPI would have a minimal impact on marine mammal prey, given, among other things, the LDPI's location outside critical foraging habitats and implementation of measures designed to reduce impacts to marine mammals and their habitat, including prey. The regulations, issued pursuant to the MMPA, allow the taking of marine mammals incidental to the specified activity. NMFS evaluates and, if appropriate, issues an ITA based on the information contained within an ITA application and the best available science. The take authorized is limited to the 5-year period the regulations are effective.

Description of Marine Mammals in the Area of the Specified Activity

Sections 3 and 4 of the application summarize available information regarding status and trends, distribution and habitat preferences, and behavior and life history of the potentially affected species. Additional information regarding population trends and threats may be found in NMFS' Stock Assessment Reports (SARs; *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments*), and more general information about these species (*e.g.,* physical and behavioral descriptions) may be found on NMFS' website (*www.nmfs.noaa.gov/pr/species/mammals/*). Additional information may be found in BOEM's Final EIS for the project which is available online at *https://www.boem.gov/Hilcorp-Liberty/.*

Table 2 lists all species with expected potential for occurrence in Foggy Island Bay and the surrounding Beaufort Sea and summarizes information related to the population or stock, including regulatory status under the MMPA and ESA and potential biological removal (PBR), where known. For taxonomy, we follow Committee on Taxonomy (2016). PBR is defined by the MMPA as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population (as described in NMFS' SARs). PBR and annual serious injury and mortality from anthropogenic sources are included here as gross indicators of the status of the species and other threats.

Marine mammal abundance estimates presented in this document represent the total number of individuals that make up a given stock or the total number estimated within a particular study or survey area. NMFS' stock abundance estimates for most species represent the total estimate of individuals within the geographic area, if known, that comprises that stock. For some species, this geographic area may extend beyond U.S. waters. All managed stocks in this region are assessed in NMFS' U.S. 2017 SAR for Alaska (Muto *et al.,* 2018). All values presented in Table 2 are the most recent available at the time of publication and are available in the 2017 SARs (Muto *et al.,* 2018).

TABLE 2—MARINE MAMMALS WITH EXPECTED POTENTIAL OCCURRENCE IN BEAUFORT SEA, ALASKA

Common name	Scientific name	Stock	ESA/ MMPA status; strategic (Y/N) [1]	Stock abundance (CV, N_{min}, most recent abundance survey) [2]	PBR	Annual M/SI [3]
Order Cetartiodactyla—Cetacea—Superfamily Mysticeti (baleen whales)						
Family Eschrichtiidae:						
Gray whale	*Eschrichtius robustus*	Eastern North Pacific	-;N	20,990 (0.05, 20,125, 2011)	624	132
Family Balaenidae:						
Bowhead whale	*Balaena mysticetus*	Western Arctic	E/D; Y	16,820 (0.052, 16,100, 2011)	161	46
Humpback whale	*Megaptera novaeangliae*)	Central North Pacific Stock.	E/D; Y	10,103 (0.3, 7,891, 2006)	83	26
Minke whale		Alaska	-;N	unk	undet.	0
Fin whale		Northeast Pacific	E/D; Y	3,168 (0.26, 2,554, 2013)[6]	5.1	0.6
Superfamily Odontoceti (toothed whales, dolphins, and porpoises)						
Family Delphinidae:						
Beluga whale	*Delphinapterus leucas*	Beaufort Sea	-; N	39,258 (0.229, N/A, 1992)	Und.	139
		Eastern Chukchi	-; N	20,752 (0.70, 12,194, 2012)	244	67
Killer whale	*Orcinus orcas*	Eastern North Pacific Gulf of Alaska, Aleutian Islands, and Bering Sea Transient.	-;N	587 (n/a, 587, 2012)	5.9	0
Order Carnivora—Superfamily Pinnipedia						
Family Otariidae (eared seals and sea lions):						
Steller sea lion	*Eumatopias jubatus*	Eastern U.S	-; N	41,638 (-, 41,638, 2015)	2,498	108
		Western U.S	E/D;Y	53,303 (-, 53,303, 2016)	320	241
Family Phocidae (earless seals):						
Ringed Seal	*Pusa hispida*	Alaska	T, D; Y	170,000 (-, 170,000, 2012) [4]	Und.	1,054
Bearded seal	*Erignathus barbatus*	Alaska	T, D; Y	299,174 (-, 273,676) [5]	Und.	391
Spotted seal	*Phoca largha*	Alaska		423,625 (-, 423,237, 2013)	12,697	329
Ribbon seal	*Histriophoca fasciata*	Alaska		184,000 (-, 163,086, 2013)	9,785	3.9

[1] Endangered Species Act (ESA) status: Endangered (E), Threatened (T)/MMPA status: Depleted (D). A dash (-) indicates that the species is not listed under the ESA or designated as depleted under the MMPA. Under the MMPA, a strategic stock is one for which the level of direct human-caused mortality exceeds PBR or which is determined to be declining and likely to be listed under the ESA within the foreseeable future. Any species or stock listed under the ESA is automatically designated under the MMPA as depleted and as a strategic stock.

[2] NMFS marine mammal stock assessment reports online at: www.nmfs.noaa.gov/pr/sars/. CV is the coefficient of variation; Nmin is the minimum estimate of stock abundance.

[3] These values, found in NMFS' SARs, represent annual levels of human-caused mortality plus serious injury from all sources combined (*e.g.,* subsistence use, commercial fisheries, ship strike). Annual M/SI often cannot be determined precisely and is in some cases presented as a minimum value or range. A CV associated with estimated mortality due to commercial fisheries is presented in some cases.

[4] The population provided here was derived using a very limited sub-sample of the data collected from the U.S. portion of the Bering Sea in 2012 (Conn *et al.,* 2014). Thus, the actual number of ringed seals in the U.S. sector of the Bering Sea is likely much higher, perhaps by a factor of two or more (Muto *et al.,* 2018). Reliable estimates of abundance are not available for the Chukchi and Beaufort seas (Muto *et al.,* 2018).

[5] In the spring of 2012 and 2013, surveys were conducted in the Bering Sea and the Sea of Okhotsk; these data do not include seals in the Chukchi and Beaufort Seas at the time of the survey.

[6] N_{BEST}, N_{MIN}, and PBR have been calculated for this stock; however, important caveats exist. See Stock Assessment Report text for details.

Note Italicized species are not authorized to be taken.

All species that could potentially occur in the Beaufort Sea are included in Table 2. However, the temporal and/or spatial occurrence of minke, fin, humpback whales, killer whales, narwhals, harbor porpoises, and ribbon seals are such that a take is not expected to occur, and they are not discussed further beyond the explanation provided here. These species regularly occur in the Chukchi Sea, but not as commonly in the Beaufort Sea. Narwhals, Steller sea lions, and hooded seals are considered extralimital to the proposed action area. These species could occur in the Beaufort Sea, but are either uncommon or extralimital east of Barrow (located in the Foggy Island Bay area and surveys within the Bay have revealed zero sightings).

In addition, the polar bear may be found in Foggy Island Bay. However, this species is managed by the U.S. Fish and Wildlife Service and is not considered further in this document.

On October 11, 2016, NOAA released the Final Environmental Impact Statement (FEIS) for the Effects of Oil and Gas Activities in the Arctic Ocean (81 FR 72780, October 21, 2016) regarding geological and geophysical (*i.e.,* seismic) activities, ancillary activities, and exploratory drilling. The Final EIS may be found at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/environmental-impact-statement-eis-effects-oil-and-gas-activities.* Although no seismic activities are proposed by Hilcorp, the EIS contains detailed information on marine mammal species proposed to be potentially taken by Hilcorp's specified activities. More recently, BOEM released a final EIS on the Liberty Project. We incorporate by reference the information on the species authorized to be taken by Hilcorp's specified activities from these documents and provide a summary and any relevant updates on species status here.

Bowhead Whale

The only bowhead whale stock found within U.S. waters is the Western Arctic stock, also known as the Bering-Chukchi-Beaufort stock (Rugh *et al.,* 2003) or Bering Sea stock (Burns *et al.,* 1993). The majority of the Western Arctic stock migrates annually from wintering areas (December to March) in the northern Bering Sea, through the Chukchi Sea in the spring (April through May), to the eastern Beaufort Sea where they spend much of the summer (June through early to mid-October), before returning again to the Bering Sea in the fall (September through December) to overwinter

(Braham *et al.,* 1980, Moore and Reeves 1993, Quakenbush *et al.,* 2010a, Citta *et al.,* 2015). Some bowhead whales are found in the western Beaufort, Chukchi, and Bering seas in summer, and these are thought to be a part of the expanding Western Arctic stock (Rugh *et al.,* 2003; Clarke *et al.,* 2013, 2014, 2015; Citta *et al.,* 2015). The most recent population parameters (*e.g.,* abundance, PBR) of western Arctic bowhead whales are provided in Table 2.

Bowhead whale distribution in the Beaufort Sea during summer-fall has been studied by aerial surveys through the Bowhead Whale Aerial Survey Project (BWASP). This project was funded or contracted by the Minerals Management Service (MMS)/Bureau of Ocean Energy Management (BOEM) and Bureau of Land Management (BLM) annually from 1979 to 2010. The focus of the BWASP aerial surveys was the autumn migration of bowhead whales through the Alaskan Beaufort Sea, although data were collected on all marine mammals sighted. The NMFS National Marine Mammal Laboratory (NMML) began coordinating BWASP in 2007, with funding from MMS. In 2011, an Interagency Agreement between the BOEM and NMML combined BWASP with COMIDA under the auspices of a single survey called Aerial Surveys of Arctic Marine Mammals (ASAMM) (Clarke *et al.,* 2012); both studies are funded by BOEM. In September to mid-October, bowheads begin their western migration out of the Canadian Beaufort Sea to the Chukchi Sea (Figure 3.2–10). Most westward travel across the Beaufort Sea by tagged whales was over the shelf, within 100 km (62 mi) of shore, although a few whales traveled farther offshore (Quakenbush *et al.,* 2012).

During winter and spring, bowhead whales are closely associated with sea ice (Moore and Reeves 1993, Quakenbush *et al.,* 2010a, Citta *et al.,* 2015). The bowhead whale spring migration follows fractures in the sea ice around the coast of Alaska, generally in the shear zone between the shorefast ice and the mobile pack ice. During summer, most of the population is in relatively ice-free waters in the southeastern Beaufort Sea (Citta *et al.,* 2015), an area often exposed to industrial activity related to petroleum exploration (*e.g.,* Richardson *et al.,* 1987, Davies, 1997). Summer aerial surveys conducted in the western Beaufort Sea during July and August of 2012–2014 have had relatively high sighting rates of bowhead whales, including cows with calves and feeding animals (Clarke *et al.,* 2013, 2014, 2015). During the autumn migration through the Beaufort Sea, bowhead whales generally select shelf waters (Citta *et al.,* 2015). In winter in the Bering Sea, bowhead whales often use areas with ~100 percent sea-ice cover, even when polynyas are available (Quakenbush *et al.,* 2010a, Citta *et al.,* 2015).

From 2006 through 2014, median distance of bowhead whales from shore was 23.6 km (14.7 mi) in the East Region and 24.2 km (15.0 mi) in the West Region during previous low-ice years, with annual median distances ranging from as close as 6.3 km (3.9 mi) in 2009 to 37.6 km (23.4 mi) in 2013 (Clarke *et al.,* 2015b). Median depth of sightings during previous low-ice years was 39 m (128 ft) in the East Region and 21 m (69 ft) in the West Region; in 2014, median depth of on-transect sightings was 20 m (66 ft) and 19 m (62 ft), respectively (Clarke *et al.,* 2015b). In September and October 2014, bowhead whales in the East Region of the study area were sighted in shallower water and closer to shore than in previous years of light sea ice cover; in the West Region, bowhead sightings in fall 2014 were in shallower water than in previous light ice years, but the distance from shore did not differ (Clarke *et al.,* 2015b). Behaviors included milling, swimming, and feeding, to a lesser degree. The highest numbers of sightings were in the central Beaufort Sea and east of Point Barrow. Overall, the most shoreward edge of the bowhead migratory corridor for bowhead extends approximately 40 km (25 mi) north from the barrier islands, which are located approximately 7 km (4 mi) north of Liberty Project. The closest approach of a tagged whale occurred in August 2016, when it came within 16 km of the proposed LDPI (Quakenbush, 2018).

Historically, there have been few spring, summer, or autumn observations of bowheads in larger bays such as Camden, Prudhoe, and Harrison Bays, although some groups or individuals have occasionally been observed feeding around the periphery of or, less commonly, inside the bays as migration demands and feeding opportunities permit. Observations indicate that juvenile, sub-adult, and cow-calf pairs of bowheads are the individuals most frequently observed in bays and nearshore areas of the Beaufort, while more competitive whales are found in the Canadian Beaufort and Barrow Canyon, as well as deeper offshore waters (Clarke *et al.,* 2011b, 2011c, 2011d, 2012, 2013, 2014, 2015b; Koski and Miller, 2009; Quakenbush *et al.,* 2010).

Clarke *et al.* (2015) evaluated biologically important areas (BIAs) for bowheads in the U.S. Arctic region and identified nine BIAs. The spring (April–May) migratory corridor BIA for bowheads is far offshore of the LDPI but within the transit portion of the action area, while the fall (September–October) migratory corridor BIA (western Beaufort on and north of the shelf) for bowheads is further inshore and closer to the LDPI. Clarke *et al.* (2015) also identified four BIAs for bowheads that are important for reproduction and encompassed areas where the majority of bowhead whales identified as calves were observed each season; none of these reproductive BIAs overlap with the LDPI, but they may be encompassed in indirect areas such as vessel transit routes. Finally, three bowhead feeding BIAs were identified. Again, there is no spatial overlap of the activity area with these BIAs.

From July 8, 2008, through August 25, 2008, BPXA conducted a 3D seismic survey in the Liberty Prospect, Beaufort Sea. During the August survey, a mixed-species group of whales was observed in one sighting near the barrier islands that included bowhead and gray whales (Aerts *et al.,* 2008). This is the only known survey sighting of bowhead whales within Foggy Island Bay despite industry surveys occurring during the open water season in 2010, 2014, and 2015, and NMFS aerial surveys flown inside Foggy Island Bay in 2016 and 2017.

Alaska Natives have been taking bowhead whales for subsistence purposes for at least 2,000 years (Marquette and Bockstoce, 1980, Stoker and Krupnik, 1993). Subsistence takes have been regulated by a quota system under the authority of the IWC since 1977. Alaska Native subsistence hunters, primarily from 11 Alaska communities, take approximately 0.1–0.5 percent of the population per annum (Philo *et al.,* 1993, Suydam *et al.,* 2011). The average annual subsistence take (by Natives of Alaska, Russia, and Canada) during the 5-year period from 2011 through 2015 is 43 landed bowhead whales (Muto *et al.,* 2018).

Gray Whale

The eastern North Pacific population of gray whales migrates along the coasts of eastern Siberia, North America, and Mexico (Allen and Angliss 2010; Weller *et al.,* 2002), and its population size has been steadily increasing, potentially reaching carrying capacity (Allen and Angliss, 2010, 2012). Abundance estimates will likely rise and fall in the future as the population finds a balance with the carrying-capacity of the environment (Rugh *et al.,* 2005). The steadily increasing population abundance warranted delisting the

eastern North Pacific gray whale stock in 1994, as it was no longer considered endangered or threatened under the ESA (Rugh *et al.,* 1999). A five-year status review determined that the stock was neither in danger of extinction nor likely to become endangered in the foreseeable future, thus, retaining the non-threatened classification (Rugh *et al.,* 1999). Table 2 provides population parameters for this stock.

The gray whale migration may be the longest of any mammalian species. They migrate over 8,000 to 10,000 km (5,000 to 6,200 mi) between breeding lagoons in Mexico and Arctic feeding areas each spring and fall (Rugh *et al.,* 1999). The southward migration out of the Chukchi Sea generally begins during October and November, passing through Unimak Pass in November and December, then continues along a coastal route to Baja California (Rice *et al.,* 1984). The northward migration usually begins in mid-February and continues through May (Rice *et al.* 1984).

Gray whales are the most coastal of all the large whales and inhabit primarily inshore or shallow, offshore continental shelf waters (Jones and Swartz, 2009); however, they are more common in the Chukchi than in the Beaufort Sea. Throughout the summers of 2010 and 2011, gray whales regularly occurred in small groups north of Point Barrow and west of Barrow (George *et al.,* 2011; Shelden *et al.,* 2012). In 2011, there were no sightings of gray whales east of Point Barrow during ASAMM aerial surveys (Clarke *et al.,* 2012); however, they were observed east of Point Barrow, primarily in the vicinity of Barrow Canyon, from August to October 2012 (Clarke *et al.,* 2013). Gray whales were again observed east of Point Barrow in 2013, with all sightings in August except for one sighting in late October (Clarke *et al.,* 2014). In 2014, sightings in the Beaufort Sea included a few whales east of Point Barrow and one north of Cross Island near Prudhoe Bay (Clarke *et al.,* 2015b). Gray whales prefer shoal areas (<60 m (197 ft) deep) with low (<7 percent) ice cover (Moore and DeMaster, 1997). These areas provide habitat rich in gray whale prey (amphipods, decapods, and other invertebrates).

From July 8, 2008 through August 25, 2008, BPXA conducted a 3D seismic survey in the Liberty Prospect, Beaufort Sea. During the August survey, a mixed-species group of whales was observed in one sighting near the barrier islands that included bowhead and gray whales (Aerts *et al.,* 2008). This is the only known survey sighting of gray whales within Foggy Island Bay despite industry surveys occurring during the open water season in 2010, 2014, and 2015, and NMFS aerial surveys flown inside Foggy Island Bay in 2016 and 2017.

Beluga Whale

Five beluga whale stocks are present in Alaska, including the Cook Inlet, Bristol Bay, eastern Bering Sea, eastern Chukchi Sea, and Beaufort Sea stocks (O'Corry-Crowe *et al.,* 1997, Allen and Angliss, 2015). The eastern Chukchi and Beaufort Sea stocks are thought to overlap in the Beaufort Sea. Both stocks are closely associated with open leads and polynyas in ice-covered regions throughout Arctic and sub-Arctic waters of the Northern Hemisphere. Distribution varies seasonally. Whales from both the Beaufort Sea and eastern Chukchi Sea stocks overwinter in the Bering Sea. Belugas of the eastern Chukchi may winter in offshore, although relatively shallow, waters of the western Bering Sea (Richard *et al.,* 2001), and the Beaufort Sea stock may winter in more nearshore waters of the northern Bering Sea (R. Suydam, pers. comm. 2012c). In the spring, belugas migrate to coastal estuaries, bays, and rivers. Annual migrations may cover thousands of kilometers (Allen and Angliss, 2010, 2012a).

Satellite telemetry data from 23 whales tagged in Kaseguluk Lagoon in 1998 through 2002 provided information on movements and migrations of eastern Chukchi Sea belugas. Animals initially traveled north and east into the northern Chukchi and western Beaufort seas after capture (Suydam *et al.,* 2001, 2005). Movement patterns between July and September vary by age and/or sex classes. Adult males frequent deeper waters of the Beaufort Sea and Arctic Ocean (79–80° N), where they remain throughout the summer. Immature males moved farther north than immature females but not as far north as adult males. All of the belugas frequented water deeper than 200m (656 ft) along and beyond the continental shelf break. Use of the inshore waters within the Beaufort Sea Outer Continental Shelf lease sale area was rare (Suydam *et al.,* 2005).

Most information on the distribution and movements of belugas of the Beaufort Sea stock was similarly derived using satellite tags. A total of 30 belugas were tagged in the Mackenzie River Delta, Northwest Territories, Canada, during summer and autumn in 1993, 1995, and 1997 (Richard *et al.,* 2001). Approximately half of the tagged whales traveled far offshore of the Alaskan coastal shelf, while the remainder traveled on the shelf or near the continental slope (Richard *et al.,* 2001). Migration through Alaskan waters lasted an average of 15 days. In 1997, all of the tagged belugas reached the western Chukchi Sea (westward of 170° W) between September 15 and October 9. Overall, the main fall migration corridor for beluga whales is believed to be approximately 62 mi (100 km) north of the Project Area (Richard *et al.,* 1997, 2001). Both the spring (April–May) and fall (September–October) migratory corridor BIAs for belugas are far north of the proposed action area because sightings of belugas from aerial surveys in the western Beaufort Sea are primarily on the continental slope, with relatively few sightings on the shelf (Clarke *et al.,* 2015). No reproductive and feeding BIAs exist for belugas in the action area (Clarke *et al.,* 2015).

O'Corry *et al.* (2018) studied genetic marker sets in 1,647 beluga whales. The data set was from over 20 years and encompassed all of the whales' major coastal summering regions in the Pacific Ocean. The genetic marker analysis of the migrating whales revealed that while both the wintering and summering areas of the eastern Chukchi Sea and eastern Beaufort Sea subpopulations may overlap, the timing of spring migration differs such that the whales hunted at coastal sites in Chukotka, the Bering Strait (*i.e.,* Diomede), and northwest Alaska (*i.e.,* Point Hope) in the spring and off of Alaska's Beaufort Sea coast in summer were predominantly from the eastern Beaufort Sea population. Earlier genetic investigations and recent telemetry studies show that the spring migration of eastern Beaufort whales occurs earlier and through denser sea ice than eastern Chukchi Sea belugas. The discovery that a few individual whales found at some of these spring locations had a higher likelihood of having eastern Chukchi Sea ancestry or being of mixed-ancestry, indicates that the Bering Strait region is also an area where the stock mix in spring. Citta *et al.* (2016) also observed that tagged eastern Beaufort Sea whales migrated north in the spring through the Bering Strait earlier than the eastern Chukchi belugas, so they had to pass through the latter's primary wintering area. Therefore, the eastern Chukchi stock should not be present in the action area at any time in general, but especially during summer-late fall, when the beluga exposures would be anticipated for this project. Therefore, we assume all belugas impacted by the proposed project are from the Beaufort Sea stock.

Beluga whales were regularly sighted during the September–October BWASP and the more recent ASAMM aerial surveys of the Alaska Beaufort Sea

coast. Burns and Seaman (1985) suggest that beluga whales are strongly associated with the ice fringe and that the route of the autumn migration may be mainly determined by the location of the drift ice margin. Relatively few beluga whales have been observed in the nearshore areas (on the continental shelf outside of the barrier islands) of Prudhoe Bay. However, groups of belugas have been detected nearshore in September (Clarke *et al.,* 2011a) and opportunistic sightings have been recorded from Northstar Island and Endicott. These sightings are part of the fall migration which generally occurs farther offshore, although a few sightings of a few individuals do occur closer to the shore and occasionally inside the barrier islands of Foggy Island Bay. During the 2008 seismic survey in Foggy Island Bay, three sightings of eight individuals were observed at a location about 3 mi (4.8 km) east of the Endicott Satellite Drilling Island (Aerts *et al.,* 2008). In 2014, during a BPXA 2D HR shallow geohazard survey in July and August, PSOs recorded eight groups of approximately 19 individual beluga whales, five of which were juveniles (Smultea *et al.,* 2014). During the open water season between July 9 and July 19, 2015, five sightings of belugas occurred (Cate *et al.,* 2015). Also in 2015, acoustic monitoring was conducted in Foggy Island Bay between July 6 and September 22, 2015, to characterize ambient sound conditions and to determine the acoustic occurrence of marine mammals near Hilcorp's Liberty prospect in Foggy Island Bay (Frouin-Jouy *et al.,* 2015). Two recorders collected underwater sound data before, during, and after Hilcorp's 2015 geohazard survey (July 6–Sept. 22). Detected marine mammal vocalizations included those from beluga whales and pinnipeds. Belugas were detected on five days by passive-recorders inside the bay during the three-month survey period (Frouin-Jouy *et al.,* 2015). During the 2016 and 2017 ASAMM surveys flown inside Foggy Island Bay, no belugas were observed. Beluga whales are the cetacean most likely to be encountered during the open-water season in Foggy Island Bay, albeit few in abundance.

Ringed Seal

One of five Arctic ringed seal stocks, the Alaska stock, occurs in U.S. waters. The Arctic subspecies of ringed seals was listed as threatened under the ESA on December 28, 2012, primarily due to expected impacts on the population from declines in sea and snow cover stemming from climate change within the foreseeable future (77 FR 76706). However, on March 11, 2016, the U.S. District Court for the District of Alaska issued a decision in a lawsuit challenging the listing of ringed seals under the ESA (*Alaska Oil and Gas Association et al.* v. *National Marine Fisheries Service,* Case No. 4:14–cv–00029–RRB). The decision vacated NMFS' listing of Arctic ringed seals as a threatened species. However, On February 12, 2018, in *Alaska Oil & Gas Association* v. *Ross,* Case No. 16–35380, the U.S. Court of Appeals for the Ninth Circuit reversed the district court's 2016 decision. As such, Arctic ringed seals remain listed as threatened under the ESA.

During winter and spring in the United States, ringed seals are found throughout the Beaufort and Chukchi Seas; they occur in the Bering Sea as far south as Bristol Bay in years of extensive ice coverage. Most ringed seals that winter in the Bering and Chukchi Seas are thought to migrate northward in spring with the receding ice edge and spend summer in the pack ice of the northern Chukchi and Beaufort Seas.

Ringed seals are resident in the Beaufort Sea year-round, and based on results of previous surveys in Foggy Island Bay (Aerts *et al.,* 2008, Funk *et al.,* 2008, Savarese *et al.,* 2010, Smultea *et al.,* 2014), and monitoring from Northstar Island (Aerts and Richardson, 2009, 2010), they are expected to be the most commonly occurring pinniped in the action area year-round.

Ringed seals are present in the nearshore and sea ice year-round, maintaining breathing holes and excavating subnivean lairs in the landfast ice during the ice-covered season. Ringed seals overwinter in the landfast ice in and around the LDPI action area. There is some evidence indicating that ringed seal densities are low in water depths of less than 3 m, where landfast ice extending from the shoreline generally freezes to the sea bottom in very shallow waters during the course of the winter (Moulton *et al.,* 2002a, Moulton *et al.,* 2002b, Richardson and Williams, 2003). Ringed seals that breed on shorefast ice may either forage within 100 km (62.1 mi) of their breeding habitat or undertake extensive foraging trips to more productive areas at distances of between 100–1,000 kilometers (Kelly *et al.,* 2010b). Adult Arctic ringed seals show site fidelity, returning to the same subnivean site after the foraging period ends. Movements are limited during the ice-bound months, including the breeding season, which limits their foraging activities and may minimize gene flow within the species (Kelly *et al.* 2010b). During April to early June (the reproductive period), radio-tagged ringed seals inhabiting shorefast ice near Prudhoe Bay had home range sizes generally less than 1,336 ac (500 ha) in area (Kelly *et al.,* 2005). Sub-adults, however, were not constrained by the need to defend territories or maintain birthing lairs and followed the advancing ice southward to winter along the Bering Sea ice edge where there may be enhanced feeding opportunities and less exposure to predation (Crawford *et al.,* 2012). Sub-adult ringed seals tagged in the Canadian Beaufort Sea similarly undertook lengthy migrations across the continental shelf of the Alaskan Beaufort Sea into the Chukchi Sea, passing Point Barrow prior to freeze-up in the central Chukchi Sea (Harwood *et al.,* 2012). Factors most influencing seal densities during May through June in the central Beaufort Sea between Oliktok Point and Kaktovik were water depth, distance to the fast ice edge, and ice deformation. The highest densities of seals were at depths of 5 to 35 m (16 to 144 ft) and on relatively flat ice near the fast ice edge (Frost *et al.,* 2004).

Sexual maturity in ringed seals varies with population status. It can be as early as 3 years for both sexes and as late as 7 years for males and 9 years for females. Ringed seals breed annually, with timing varying regionally. Mating takes place while mature females are still nursing their pups on the ice and is thought to occur under the ice near birth lairs. In all subspecies except the Okhotsk, females give birth to a single pup hidden from view within a snow-covered birth lair. Ringed seals are unique in their use of these birth lairs. Pups learn how to dive shortly after birth. Pups nurse for 5 to 9 weeks and, when weaned, are four times their birth weights. Ringed seal pups are more aquatic than other ice seal pups and spend roughly half their time in the water during the nursing period (Lydersen and Hammill, 1993). Pups are normally weaned before the break-up of spring ice.

Ringed seals are an important resource for Alaska Native subsistence hunters. Approximately 64 Alaska Native communities in western and northern Alaska, from Bristol Bay to the Beaufort Sea, regularly harvest ice seals (Ice Seal Committee, 2016). Based on the harvest data from 12 Alaska Native communities, a minimum estimate of the average annual harvest of ringed seals in 2009–2013 is 1,050 seals (Muto *et al.,* 2016).

Other sources of mortality include commercial fisheries and predation by

marine and terrestrial predators including polar bears, arctic foxes, walrus, and killer whales. During 2010–2014, incidental mortality and serious injury of ringed seals was reported in 4 of the 22 federally-regulated commercial fisheries in Alaska monitored for incidental mortality and serious injury by fisheries observers: The Bering Sea/Aleutian Islands flatfish trawl, Bering Sea/Aleutian Islands pollock trawl, Bering Sea/Aleutian Islands Pacific cod trawl, and Bering Sea/Aleutian Islands Pacific cod longline fisheries (Muto *et al.,* 2016). From May 1, 2011 to December 31, 2016, 657 seals, which included 233 dead stranded seals, 179 subsistence hunted seals, and 245 live seals, were stranded or sampled during permitted health assessments studies. The species involved were primarily ice seals including ringed, bearded, ribbon, and spotted seals in northern and western Alaska. The investigation identified that clinical signs were likely due to an abnormality of the molt, but a definitive cause for the abnormal molt was not determined.

Bearded Seal

Two subspecies of bearded seal have been described: *E. b. barbatus* from the Laptev Sea, Barents Sea, North Atlantic Ocean, and Hudson Bay (Rice 1998); and *E. b. nauticus* from the remaining portions of the Arctic Ocean and the Bering and Okhotsk seas (Ognev, 1935, Scheffer, 1958, Manning, 1974, Heptner *et al.,* 1976). On December 28, 2012, NMFS listed two distinct population segments (DPSs) of the *E. b. nauticus* subspecies of bearded seals—the Beringia DPS and Okhotsk DPS—as threatened under the ESA (77 FR 76740). Similar to ringed seals, the primary concern for these DPSs is the ongoing and projected loss of sea-ice cover stemming from climate change, which is expected to pose a significant threat to the persistence of these seals in the foreseeable future (based on projections through the end of the 21st century; Cameron *et al.,* 2010). Similar to ringed seals, the ESA listing of the Beringia and Okhotsk DPSs of bearded seal was challenged in the U.S. District Court for the District of Alaska, and on July 25, 2014, the court vacated NMFS' listing of those DPSs of bearded seals as threatened under the ESA (*Alaska Oil and Gas Association et al.* v. *Pritzker,* Case No. 4:13–cv–00018–RRB). However, the U.S. Court of Appeals for the Ninth Circuit reversed the district court's 2016 decision on October 24, 2016 (*Alaska Oil & Gas Association* v. *Pritzer,* Case No. 14–35806). As such, the Beringia and Okhotsk DPSs of bearded seal remain listed as threatened under the ESA.

For the purposes of MMPA stock assessments, the Beringia DPS is considered the Alaska stock of the bearded seal (Muto *et al.,* 2016). The Beringia DPS of the bearded seal includes all bearded seals from breeding populations in the Arctic Ocean and adjacent seas in the Pacific Ocean between 145° E longitude (Novosibirskiye) in the East Siberian Sea and 130° W longitude in the Canadian Beaufort Sea, except west of 157° W longitude in the Bering Sea and west of the Kamchatka Peninsula (where the Okhotsk DPS is found). They generally prefer moving ice that produces natural openings and areas of open-water (Heptner *et al.,* 1976, Fedoseev, 1984, Nelson *et al.,* 1984). They usually avoid areas of continuous, thick, shorefast ice and are rarely seen in the vicinity of unbroken, heavy, drifting ice or large areas of multi-year ice (Fedoseev, 1965, Burns and Harbo, 1972, Burns and Frost, 1979, Burns, 1981, Smith, 1981, Fedoseev, 1984, Nelson *et al.,* 1984).

Spring surveys conducted in 1999–2000 along the Alaska coast indicate that bearded seals are typically more abundant 20–100 nautical miles (nmi) from shore than within 20 nmi from shore, except for high concentrations nearshore to the south of Kivalina (Bengtson *et al.,* 2005; Simpkins *et al.,* 2003).

Although bearded seal vocalizations (produced by adult males) have been recorded nearly year-round in the Beaufort Sea (MacIntyre *et al.,* 2013, MacIntyre *et al.,* 2015), most bearded seals overwinter in the Bering Sea. In addition, during late winter and early spring, Foggy Island Bay is covered with shorefast ice and the nearest lead systems are at least several kilometers away, making the area unsuitable habitat for bearded seals. Therefore, bearded seals are not expected to be encountered in or near the LDPI portion of the action area during this time (from late winter through early spring).

During the open-water period, the Beaufort Sea likely supports fewer bearded seals than the Chukchi Sea because of the more extensive foraging habitat available to bearded seals in the Chukchi Sea. In addition, as a result of shallow waters, the sea floor in Foggy Island Bay south of the barrier islands is often scoured by ice, which limits the presence of bearded seal prey species. Nevertheless, aerial and vessel-based surveys associated with seismic programs, barging, and government surveys in this area between 2005 and 2010 reported several bearded seal sightings (Green and Negri. 2005, Green and Negri, 2006, Green *et al.,* 2007, Funk *et al.,* 2008, Hauser *et al.,* 2008, Savarese *et al.,* 2010, Clarke *et al.,* 2011, Reiser *et al.,* 2011). In addition, eight bearded seal sightings were documented during shallow geohazard seismic and seabed mapping surveys conducted in July and August 2014 (Smultea *et al.,* 2014). Frouin-Mouy *et al.* (2016) conducted acoustic monitoring in Foggy Island Bay from early July to late September 2014, and detected pinniped vocalizations on 10 days via the nearshore recorder and on 66 days via the recorder farther offshore. Although the majority of these detections were unidentified pinnipeds, bearded seal vocalizations were positively identified on two days (Frouin-Mouy *et al.,* 2016).

Bearded seals are an important resource for Alaska Native subsistence hunters. Approximately 64 Alaska Native communities in western and northern Alaska, from Bristol Bay to the Beaufort Sea, regularly harvest ice seals (Ice Seal Committee, 2016). However, during 2009–2013, only 12 of 64 coastal communities were surveyed for bearded seals; and, of those communities, only 6 were surveyed for two or more consecutive years (Ice Seal Committee, 2016). Based on the harvest data from these 12 communities (Table 2), a minimum estimate of the average annual harvest of bearded seals in 2009–2013 is 390 seals. Harvest surveys are designed to estimate harvest within the surveyed community, but because of differences in seal availability, cultural hunting practices, and environmental conditions, extrapolating harvest numbers beyond that community is not appropriate (Muto *et al.,* 2016).

Of the 22 federally-regulated U.S. commercial fisheries in Alaska monitored for incidental mortality and serious injury by fisheries observers, 12 fisheries could potentially interact with bearded seals. During 2010–2014, incidental mortality and serious injury of bearded seals occurred in three fisheries: The Bering Sea/Aleutian Islands pollock trawl, Bering Sea/Aleutian Islands flatfish trawl, and Bering Sea/Aleutian Islands Pacific cod trawl fisheries (Muto *et al.,* 2016). This species was also part of the aforementioned 2011–2016 UME.

Spotted Seal

Spotted seals are distributed along the continental shelf of the Bering, Chukchi, and Beaufort seas, and the Sea of Okhotsk south to the western Sea of Japan and northern Yellow Sea. Eight main areas of spotted seal breeding have been reported (Shaughnessy and Fay, 1977) and Boveng *et al.* (2009) grouped those breeding areas into three DPSs:

The Bering DPS, which includes breeding areas in the Bering Sea and portions of the East Siberian, Chukchi, and Beaufort seas that may be occupied outside the breeding period; the Okhotsk DPS; and the Southern DPS, which includes spotted seals breeding in the Yellow Sea and Peter the Great Bay in the Sea of Japan. For the purposes of MMPA stock assessments, NMFS defines the Alaska stock of spotted seals to be that portion of the Bering DPS in U.S. waters.

The distribution of spotted seals is seasonally related to specific life-history events that can be broadly divided into two periods: Late-fall through spring, when whelping, nursing, breeding, and molting occur in association with the presence of sea ice on which the seals haul out, and summer through fall when seasonal sea ice has melted and most spotted seals use land for hauling out (Boveng *et al.,* 2009). Spotted seals are most numerous in the Bering and Chukchi seas (Quakenbush, 1988), although small numbers do range into the Beaufort Sea during summer (Rugh *et al.,* 1997; Lowry *et al.,* 1998).

At Northstar, few spotted seals have been observed. A total of 12 spotted seals were positively identified near the source-vessel during open-water seismic programs in the central Alaskan Beaufort Sea, generally occurring near Northstar from 1996 to 2001 (Moulton and Lawson, 2002). The number of spotted seals observed per year ranged from zero (in 1998 and 2000) to four (in 1999).

During a seismic survey in Foggy Island Bay, PSOs recorded 18 pinniped sightings, of which one was confirmed as a spotted seal (Aerts *et al.,* 2008). Spotted seals were the second most abundant seal species observed by PSOs during Hilcorp's geohazard surveys in July–August 2014 (Smultea *et al.,* 2014) and in July 2015 (Cate *et al.,* 2015). Given their seasonal distribution and low numbers in the nearshore waters of the central Alaskan Beaufort Sea, no spotted seals are expected in the action area during late winter and spring, but they could be present in low numbers during the summer or fall.

Similar to other ice seal species, spotted seals are an important resource for Alaska Native subsistence hunters. Of the 12 communities (out of 64) surveyed during 2010–2014, the minimum annual spotted seal harvest estimates totaled across 12 out of 64 user communities surveyed ranged from 83 (in 2 communities) to 518 spotted seals (in 10 communities). Based on the harvest data from these 12 communities, a minimum estimate of the average annual harvest of spotted seals in 2010–2014 is 328 seals.

From 2011–2015, incidental mortality and serious injury of spotted seals occurred in 2 of the 22 federally-regulated U.S. commercial fisheries in Alaska monitored for incidental mortality and serious injury by fisheries observers: The Bering Sea/Aleutian Islands flatfish trawl and Bering Sea/Aleutian Islands Pacific cod longline fisheries. In 2014, there was one report of a mortality incidental to research on the Alaska stock of spotted seals, resulting in a mean annual mortality and serious injury rate of 0.2 spotted seals from this stock in 2011–2015. This species was also part of the aforementioned 2011–2016 UME.

Marine Mammal Hearing

Hearing is the most important sensory modality for marine mammals underwater, and exposure to anthropogenic sound can have deleterious effects. To appropriately assess the potential effects of exposure to sound, it is necessary to understand the frequency ranges marine mammals are able to hear. Current data indicate that not all marine mammal species have equal hearing capabilities (*e.g.,* Richardson *et al.,* 1995; Wartzok and Ketten, 1999; Au and Hastings, 2008). To reflect this, Southall *et al.* (2007 and 2019) recommended that marine mammals be divided into functional hearing groups based on directly measured or estimated hearing ranges on the basis of available behavioral response data, audiograms derived using auditory evoked potential techniques, anatomical modeling, and other data. Note that no direct measurements of hearing ability have been successfully completed for mysticetes (*i.e.,* low-frequency cetaceans). Subsequently, NMFS (2016) described generalized hearing ranges for these marine mammal hearing groups. Generalized hearing ranges were chosen based on the approximately 65 dB threshold from the normalized composite audiograms, with an exception for lower limits for low-frequency cetaceans where the result was deemed to be biologically implausible and the lower bound from Southall *et al.* (2007) retained. The functional groups and the associated frequencies are indicated below (note that these frequency ranges correspond to the range for the composite group, with the entire range not necessarily reflecting the capabilities of every species within that group):

- *Low-frequency cetaceans (mysticetes):* Generalized hearing is estimated to occur between approximately 7 (hertz) Hz and 35 kHz;
- *Mid-frequency cetaceans (larger toothed whales, beaked whales, and most delphinids):* Generalized hearing is estimated to occur between approximately 150 Hz and 160 kHz;
- *High-frequency cetaceans (porpoises, river dolphins, and members of the genera Kogia and Cephalorhynchus; including two members of the genus Lagenorhynchus, on the basis of recent echolocation data and genetic data):* Generalized hearing is estimated to occur between approximately 275 Hz and 160 kHz;
- *Pinnipeds in water; Phocidae (true seals):* functional hearing is estimated to occur between approximately 50 Hz to 86 kHz; and
- *Pinnipeds in water; Otariidae (eared seals):* functional hearing is estimated to occur between approximately 60 Hz and 39 kHz.

For more detail concerning these groups and associated frequency ranges, please see NMFS (2018) for a review of available information. Six marine mammal species (three cetacean and three phocid pinniped) have the potential to co-occur with Hilcorp's LDPI project. Of the three cetacean species that may be present, two are classified as low-frequency cetaceans (*i.e.,* all mysticete species) and one is classified as a mid-frequency cetacean (beluga whale).

Potential Effects of the Specified Activity on Marine Mammals and Their Habitat

This section includes a summary and discussion of the ways that components of the specified activity may impact marine mammals and their habitat. The *Estimated Take by Incidental Harassment* section later in this document includes a quantitative analysis of the number of individuals that are expected to be taken by this activity. The *Negligible Impact Analysis and Determination* section considers the content of this section, the *Estimated Take by Incidental Harassment* section, and the *Mitigation* section, to draw conclusions regarding the likely impacts of these activities on the reproductive success or survivorship of individuals and how those impacts on individuals are likely to impact marine mammal species or stocks.

The potential impacts of the LDPI on marine mammals involve both non-acoustic and acoustic effects. Potential non-acoustic effects could result from the physical presence of personnel, structures and equipment, construction or maintenance activities, and the occurrence of oil spills. The LDPI

project also has the potential to result in mortality and serious injury of ringed seals via direct physical interaction on ice roads and harass (by Level A harassment and Level B harassment) cetaceans and seals via acoustic disturbance. We first discuss the effects of ice road and ice trail construction and maintenance on ringed seals with respect to direct human interaction followed by an in-depth discussion on sound and potential effects on marine mammals from acoustic disturbance. The potential for and potential impacts from both small and large oil spills are discussed in more detail later in this section; however, please note Hilcorp did not request, nor is NMFS proposing to authorize, takes from oil spills.

Mortality, Serious Injury and Non-Acoustic Harassment—Ice Seals

This section discusses the potential impacts of ice road construction, use, and maintenance on ringed seals, the only species likely to be encountered during this activity. Acoustic impacts from this and other activities (*e.g.,* pile driving) are provided later in the document. To assess the potential impacts from ice roads, one must understand sea ice dynamics, the influence of ice roads on sea ice, and ice seal ecology.

Sea ice is constantly moving and flexing due to winds, currents, and snow load. Sea ice grows (thickens) to its maximum in March, then begins to degrade once solar heating increases above the necessary threshold. Sea ice will thin and crack due to atmospheric pressure and temperature changes. In the absence of ice roads, sea ice is constantly cracking, deforming (creating pressure ridges and hummocks), and thickening or thinning. Ice road construction interrupts this dynamic by permanently thickening and stabilizing the sea ice for the season; however, it thins and weakens sea ice adjacent to ice roads due to the weight of the ice road and use as the speed and load of vehicles using the road creates pressure waves in the ice, cracking natural ice adjacent to the road (pers. comm., M. Williams, August 17, 2018). These cracks and thinned ice, occurring either naturally or adjacent to ice roads, are easily exploitable habitat for ringed seals.

As discussed in the *Description of Marine Mammals* section, ringed seals build lairs which are typically concentrated along pressure ridges, cracks, leads, or other surface deformations (Smith and Stirling 1975, Hammill and Smith, 1989, Furgal *et al.,* 1996). To build a lair, a pregnant female will first excavate a breathing hole, most easily in cracked or thin ice. The lair will then be excavated (snow must be present for lair construction). Later in the season, basking holes may be created from collapsed lairs or new basking holes will be excavated; both of which must have breathing holes and surface access (pers. comm., M. Williams, August 17, 2018).

Williams *et al.* (2006) provides the most in-depth discussion of ringed seal use around Northstar Island, the first offshore oil and gas production facility seaward of the barrier islands in the Alaskan Beaufort Sea. Northstar is located 9.5 km from the mainland on a manmade gravel island in 12 m of water. In late 2000 and early 2001, sea ice in areas near Northstar Island where summer water depth was greater than 1.5 m were searched for ringed seal structures. At Northstar, ringed seals were documented creating and using sea ice structures (basking holes, breathing holes, or birthing lairs) within 11 to 3,500 m (36 to 11,482 ft) of Northstar infrastructure which includes ice roads, pipeline, and the island itself (Williams *et al.,* 2006). Birth lairs closest to Northstar infrastructure were 882 m and 144 m (2,894 and 374 ft) from the island and ice road, respectively (Williams *et al.,* 2006). Two basking holes were found within 11 and 15 m (36 and 49 ft) from the nominal centerline of a Northstar ice road and were still in use by the end of the study (Williams *et al.,* 2006). Although located in deeper water outside of the barrier islands, we anticipate ringed seals would use ice around the LDPI and associated ice roads in a similar manner.

Since 1998, there have been three documented incidents of ringed seal interactions on North Slope ice roads, with one recorded mortality. On April 17, 1998, during a vibroseis on-ice seismic operation outside of the barrier islands east of Bullen Point in the eastern Beaufort Sea, a ringed seal pup was killed when its lair was destroyed by a Caterpillar tractor clearing an ice road. The lair was located on ice over water 9 m (29 ft) deep with an ice thickness of 1.3 m (4.3 ft). It was reported that an adult may have been present in the lair when it was destroyed. Crew found blood on the ice near an open hole approximately 1.3 km (0.8 mi) from the destroyed lair; this could have been from a wounded adult (MacLean, 1998). On April 24, 2018, a Tucker (a tracked vehicle used in snow conditions) traveling on a Northstar sea ice trail broke through a brine pocket. After moving the Tucker, a seal pup climbed out of the hole in the ice, but no adult was seen in the area. The seal pup remained in the area for the next day and a half. This seal was seen in an area with an estimated water depth of 6 to 7 m (20 to 24 ft) (Hilcorp, 2018b). The third reported incident occurred on April 28, 2018, when a contractor performing routine maintenance activities to relocate metal plates beneath the surface of the ice road from Oliktok Point to Spy Island Drill site spotted a ringed seal pup next to what may have been a lair site. No adult was observed in the area. The pup appeared to be acting normally and was seen going in and out of the opening several times (Eni, 2018).

Overall, NMFS does not anticipate the potential for mortality or serious injury of ringed seals to be high given there has been only one documented mortality over 25 years of ice road construction in the Arctic. However, the potential does exist; therefore, we are including a small amount of mortality or serious injury (n = 2) in this rule over the five-year life of the regulations. To mitigate this risk, NMFS and Hilcorp have developed a number of BMPs aimed at reducing the potential of disturbing (*e.g.,* crushing) ice seal structures on ice roads (see Mitigation and Monitoring sections).

Potential Acoustic Impacts—Level A Harassment and Level B Harassment

In the following discussion, we provide general background information on sound before considering potential effects to marine mammals from sound produced by construction and operation of the LDPI.

Description of Sound Sources

This section contains a brief technical background on sound, on the characteristics of certain sound types, and on metrics used in this proposal inasmuch as the information is relevant to the specified activity and to a discussion of the potential effects of the specified activity on marine mammals found later in this document. For general information on sound and its interaction with the marine environment, please see, *e.g.,* Au and Hastings (2008); Richardson *et al.* (1995); Urick (1983).

Sound travels in waves, the basic components of which are frequency, wavelength, velocity, and amplitude. Frequency is the number of pressure waves that pass by a reference point per unit of time and is measured in Hz or cycles per second. Wavelength is the distance between two peaks or corresponding points of a sound wave (length of one cycle). Higher frequency sounds have shorter wavelengths than lower frequency sounds, and typically attenuate (decrease) more rapidly, except in certain cases in shallower

water. Amplitude is the height of the sound pressure wave or the ''loudness'' of a sound and is typically described using the relative unit of the decibel (dB). A sound pressure level (SPL) in dB is described as the ratio between a measured pressure and a reference pressure (for underwater sound, this is 1 microPascal (μPa)), and is a logarithmic unit that accounts for large variations in amplitude; therefore, a relatively small change in dB corresponds to large changes in sound pressure. The source level (SL) represents the SPL referenced at a distance of 1 m from the source (referenced to 1 μPa), while the received level is the SPL at the listener's position (referenced to 1 μPa).

Root mean square (rms) is the quadratic mean sound pressure over the duration of an impulse. Root mean square is calculated by squaring all of the sound amplitudes, averaging the squares, and then taking the square root of the average (Urick, 1983). Root mean square accounts for both positive and negative values; squaring the pressures makes all values positive so that they may be accounted for in the summation of pressure levels (Hastings and Popper, 2005). This measurement is often used in the context of discussing behavioral effects, in part because behavioral effects, which often result from auditory cues, may be better expressed through averaged units than by peak pressures.

Sound exposure level (SEL; represented as dB re 1 μPa^2-s) represents the total energy in a stated frequency band over a stated time interval or event, and considers both intensity and duration of exposure. The per-pulse SEL is calculated over the time window containing the entire pulse (*i.e.,* 100 percent of the acoustic energy). SEL is a cumulative metric; it can be accumulated over a single pulse or calculated over periods containing multiple pulses. Cumulative SEL represents the total energy accumulated by a receiver over a defined time window or during an event. Peak sound pressure (also referred to as zero-to-peak sound pressure or 0-pk) is the maximum instantaneous sound pressure measurable in the water at a specified distance from the source, and is represented in the same units as the rms sound pressure.

When underwater objects vibrate or activity occurs, sound-pressure waves are created. These waves alternately compress and decompress the water as the sound wave travels. Underwater sound waves radiate in a manner similar to ripples on the surface of a pond and may be either directed in a beam or beams or may radiate in all directions (omnidirectional sources), as is the case for sound produced by the pile driving activity considered here. The compressions and decompressions associated with sound waves are detected as changes in pressure by aquatic life and man-made sound receptors such as hydrophones.

Even in the absence of sound from the specified activity, the underwater environment is typically loud due to ambient sound, which is defined as environmental background sound levels lacking a single source or point (Richardson *et al.,* 1995). The sound level of a region is defined by the total acoustical energy being generated by known and unknown sources. These sources may include physical (*e.g.,* wind and waves, earthquakes, ice, atmospheric sound), biological (*e.g.,* sounds produced by marine mammals, fish, and invertebrates), and anthropogenic (*e.g.,* vessels, dredging, construction) sound. A number of sources contribute to ambient sound, including wind and waves, which are a main source of naturally occurring ambient sound for frequencies between 200 Hz and 50 kHz (Mitson, 1995). In general, ambient sound levels tend to increase with increasing wind speed and wave height. Precipitation can become an important component of total sound at frequencies above 500 Hz, and possibly down to 100 Hz during quiet times. Marine mammals can contribute significantly to ambient sound levels, as can some fish and snapping shrimp. The frequency band for biological contributions is from approximately 12 Hz to over 100 kHz. Sources of ambient sound related to human activity include transportation (surface vessels), dredging and construction, oil and gas drilling and production, geophysical surveys, sonar, and explosions. Vessel noise typically dominates the total ambient sound for frequencies between 20 and 300 Hz. In general, the frequencies of anthropogenic sounds are below 1 kHz and, if higher frequency sound levels are created, they attenuate rapidly.

The sum of the various natural and anthropogenic sound sources that comprise ambient sound at any given location and time depends not only on the source levels (as determined by current weather conditions and levels of biological and human activity) but also on the ability of sound to propagate through the environment. In turn, sound propagation is dependent on the spatially and temporally varying properties of the water column and sea floor, and is frequency-dependent. As a result of the dependence on a large number of varying factors, ambient sound levels can be expected to vary widely over both coarse and fine spatial and temporal scales. Sound levels at a given frequency and location can vary by 10–20 decibels (dB) from day to day (Richardson *et al.,* 1995). The result is that, depending on the source type and its intensity, sound from the specified activity may be a negligible addition to the local environment or could form a distinctive signal that may affect marine mammals.

Sounds are often considered to fall into one of two general types: Pulsed and non-pulsed (defined in the following). The distinction between these two sound types is important because they have differing potential to cause physical effects, particularly with regard to hearing (*e.g.,* Ward, 1997 in Southall *et al.,* 2007). See Southall *et al.* (2007) for an in-depth discussion of these concepts. The distinction between these two sound types is not always obvious, as certain signals share properties of both pulsed and non-pulsed sounds. A signal near a source could be categorized as a pulse, but due to propagation effects as it moves farther from the source, the signal duration becomes longer (*e.g.,* Greene and Richardson, 1988).

Pulsed sound sources (*e.g.,* airguns, explosions, gunshots, sonic booms, impact pile driving) produce signals that are brief (typically considered to be less than one second), broadband, atonal transients (ANSI, 1986, 2005; Harris, 1998; NIOSH, 1998; ISO, 2003) and occur either as isolated events or repeated in some succession. Pulsed sounds are all characterized by a relatively rapid rise from ambient pressure to a maximal pressure value followed by a rapid decay period that may include a period of diminishing, oscillating maximal and minimal pressures, and generally have an increased capacity to induce physical injury as compared with sounds that lack these features.

Non-pulsed sounds can be tonal, narrowband, or broadband, brief or prolonged, and may be either continuous or intermittent (ANSI, 1995; NIOSH, 1998). Some of these non-pulsed sounds can be transient signals of short duration but without the essential properties of pulses (*e.g.,* rapid rise time). Examples of non-pulsed sounds include those produced by vessels, aircraft, machinery operations such as drilling or dredging, vibratory pile driving, and active sonar systems. The duration of such sounds, as received at a distance, can be greatly extended in a highly reverberant environment.

The impulsive sound generated by impact hammers is characterized by rapid rise times and high peak levels. Vibratory hammers produce non-impulsive, continuous noise at levels significantly lower than those produced by impact hammers. Rise time is slower, reducing the probability and severity of injury, and sound energy is distributed over a greater amount of time (*e.g.,* Nedwell and Edwards, 2002; Carlson *et al.,* 2005).

Acoustic Effects

We previously provided general background information on marine mammal hearing (see ''Description of Marine Mammals in the Area of the Specified Activity''). Here, we discuss the potential effects of sound on marine mammals.

Potential Effects of Underwater Sound—Note that, in the following discussion, we refer in many cases to a review article concerning studies of noise-induced hearing loss conducted from 1996–2015 (*i.e.,* Finneran, 2015). For study-specific citations, please see that work. Anthropogenic sounds cover a broad range of frequencies and sound levels and can have a range of highly variable impacts on marine life, from none or minor to potentially severe responses, depending on received levels, duration of exposure, behavioral context, and various other factors. The potential effects of underwater sound from active acoustic sources can potentially result in one or more of the following: temporary or permanent hearing impairment, non-auditory physical or physiological effects, behavioral disturbance, stress, and masking (Richardson *et al.,* 1995; Gordon *et al.,* 2004; Nowacek *et al.,* 2007; Southall *et al.,* 2007; Götz *et al.,* 2009). The degree of effect is intrinsically related to the signal characteristics, received level, distance from the source, and duration of the sound exposure. In general, sudden, high level sounds can cause hearing loss, as can longer exposures to lower level sounds. Temporary or permanent loss of hearing will occur almost exclusively for noise within an animal's hearing range. We first describe specific manifestations of acoustic effects before providing discussion specific to pile driving.

Richardson *et al.* (1995) described zones of increasing intensity of effect that might be expected to occur, in relation to distance from a source and assuming that the signal is within an animal's hearing range. First is the area within which the acoustic signal would be audible (potentially perceived) to the animal but not strong enough to elicit any overt behavioral or physiological response. The next zone corresponds with the area where the signal is audible to the animal and of sufficient intensity to elicit behavioral or physiological responsiveness. Third is a zone within which, for signals of high intensity, the received level is sufficient to potentially cause discomfort or tissue damage to auditory or other systems. Overlaying these zones to a certain extent is the area within which masking (*i.e.,* when a sound interferes with or masks the ability of an animal to detect a signal of interest that is above the absolute hearing threshold) may occur; the masking zone may be highly variable in size.

Potential effects from impulsive sound sources can range in severity from effects such as behavioral disturbance or tactile perception to physical discomfort, slight injury of the internal organs and the auditory system, or mortality (Yelverton *et al.,* 1973). Non-auditory physiological effects or injuries that theoretically might occur in marine mammals exposed to high level underwater sound or as a secondary effect of extreme behavioral reactions (*e.g.,* change in dive profile as a result of an avoidance reaction) caused by exposure to sound include neurological effects, bubble formation, resonance effects, and other types of organ or tissue damage (Cox *et al.,* 2006; Southall *et al.,* 2007; Zimmer and Tyack, 2007; Tal *et al.,* 2015). The construction and operational activities associated with the LDPI do not involve the use of devices such as explosives or mid-frequency tactical sonar that are associated with these types of effects.

Auditory Threshold Shifts

NMFS defines threshold shift (TS) as a change, usually an increase, in the threshold of audibility at a specified frequency or portion of an individual's hearing range above a previously established reference level (NMFS, 2018). The amount of threshold shift is customarily expressed in decibels (ANSI, 1995). Threshold shift can be permanent (PTS) or temporary (TTS). As described in NMFS (2018), there are numerous factors to consider when examining the consequence of TS, including, but not limited to, the signal temporal pattern (*e.g.,* impulsive or non-impulsive), likelihood an individual would be exposed for a long enough duration or to a high enough level to induce a TS, the magnitude of the TS, time to recovery (seconds to minutes or hours to days), the frequency range of the exposure (*i.e.,* spectral content), the hearing and vocalization frequency range of the exposed species relative to the signal's frequency spectrum (*i.e.,* how animal uses sound within the frequency band of the signal; *e.g.,* Kastelein *et al.,* 2014b), and their overlap (*e.g.,* spatial, temporal, and spectral).

Marine mammals exposed to high-intensity sound, or to lower-intensity sound for prolonged periods, can experience hearing threshold shift (TS), which is the loss of hearing sensitivity at certain frequency ranges (Finneran, 2015). TS can be permanent (PTS), in which case the loss of hearing sensitivity is not fully recoverable, or temporary (TTS), in which case the animal's hearing threshold would recover over time (Southall *et al.,* 2007). Repeated sound exposure that leads to TTS could cause PTS. In severe cases of PTS, there can be total or partial deafness, while in most cases the animal has an impaired ability to hear sounds in specific frequency ranges (Kryter, 1985).

When PTS occurs, there is physical damage to the sound receptors in the ear (*i.e.,* tissue damage), whereas TTS represents primarily tissue fatigue and is reversible (Southall *et al.,* 2007). In addition, other investigators have suggested that TTS is within the normal bounds of physiological variability and tolerance and does not represent physical injury (*e.g.,* Ward, 1997). Therefore, NMFS does not consider TTS to constitute auditory injury.

Relationships between TTS and PTS thresholds have not been studied in marine mammals, and there is no PTS data for cetaceans, but such relationships are assumed to be similar to those in humans and other terrestrial mammals. PTS typically occurs at exposure levels at least several decibels above (a 40-dB threshold shift approximates PTS onset; *e.g.,* Kryter *et al.,* 1966; Miller, 1974) that inducing mild TTS (a 6-dB threshold shift approximates TTS onset; *e.g.,* Southall *et al.* 2007). Based on data from terrestrial mammals, a precautionary assumption is that the PTS thresholds for impulse sounds (such as impact pile driving pulses as received close to the source) are at least 6 dB higher than the TTS threshold on a peak-pressure basis and PTS cumulative sound exposure level thresholds are 15 to 20 dB higher than TTS cumulative sound exposure level thresholds (Southall *et al.,* 2007). Given the higher level of sound or longer exposure duration necessary to cause PTS as compared with TTS, it is considerably less likely that PTS could occur.

TTS is the mildest form of hearing impairment that can occur during exposure to sound (Kryter, 1985). While

experiencing TTS, the hearing threshold rises, and a sound must be at a higher level in order to be heard. In terrestrial and marine mammals, TTS can last from minutes or hours to days (in cases of strong TTS). In many cases, hearing sensitivity recovers rapidly after exposure to the sound ends. Few data on sound levels and durations necessary to elicit mild TTS have been obtained for marine mammals.

Marine mammal hearing plays a critical role in communication with conspecifics, and interpretation of environmental cues for purposes such as predator avoidance and prey capture. Depending on the degree (elevation of threshold in dB), duration (*i.e.,* recovery time), and frequency range of TTS, and the context in which it is experienced, TTS can have effects on marine mammals ranging from discountable to serious. For example, a marine mammal may be able to readily compensate for a brief, relatively small amount of TTS in a non-critical frequency range that occurs during a time where ambient noise is lower and there are not as many competing sounds present. Alternatively, a larger amount and longer duration of TTS sustained during times when communication is critical for successful mother/calf interactions could have more serious impacts.

Currently, TTS data only exist for four species of cetaceans (bottlenose dolphin (*Tursiops truncatus*), beluga whale (*Delphinapterus leucas*), harbor porpoise, and Yangtze finless porpoise (*Neophocoena asiaeorientalis*)) and three species of pinnipeds (northern elephant seal, harbor seal, and California sea lion) exposed to a limited number of sound sources (*i.e.,* mostly tones and octave-band noise) in laboratory settings (Finneran, 2015). TTS was not observed in trained spotted (*Phoca largha*) and ringed (*Pusa hispida*) seals exposed to impulsive noise at levels matching previous predictions of TTS onset (Reichmuth *et al.,* 2016). In general, harbor seals and harbor porpoises have a lower TTS onset than other measured pinniped or cetacean species (Finneran, 2015). Additionally, the existing marine mammal TTS data come from a limited number of individuals within these species. There are no data available on noise-induced hearing loss for mysticetes. For summaries of data on TTS in marine mammals or for further discussion of TTS onset thresholds, please see Southall *et al.* (2007), Finneran and Jenkins (2012), Finneran (2015), and NMFS (2018).

NMFS defines TTS as ''a temporary, reversible increase in the threshold of audibility at a specified frequency or portion of an individual's hearing range above a previously established reference level'' (NMFS, 2016). A TTS of 6 dB is considered the minimum threshold shift clearly larger than any day-to-day or session-to-session variation in a subject's normal hearing ability (Schlundt *et al.,* 2000; Finneran *et al.,* 2000; Finneran *et al.,* 2002, as reviewed in Southall *et al.,* 2007 for a review). TTS can last from minutes or hours to days (*i.e.,* there is recovery), occur in specific frequency ranges (*i.e.,* an animal might only have a temporary loss of hearing sensitivity between the frequencies of 1 and 10 kHz)), and can be of varying amounts (for example, an animal's hearing sensitivity might be temporarily reduced by only 6 dB or reduced by 30 dB). Currently, TTS measurements exist for only four species of cetaceans (bottlenose dolphins, belugas, harbor porpoises, and Yangtze finless porpoise) and three species of pinnipeds (Northern elephant seal, harbor seal, and California sea lion). These TTS measurements are from a limited number of individuals within these species.

Depending on the degree (elevation of threshold in dB), duration (*i.e.,* recovery time), and frequency range of TTS, and the context in which it is experienced, TTS can have effects on marine mammals ranging from discountable to serious (similar to those discussed in auditory masking, below). For example, a marine mammal may be able to readily compensate for a brief, relatively small amount of TTS in a non-critical frequency range that takes place during a time when the animal is traveling through the open ocean, where ambient noise is lower and there are not as many competing sounds present. Alternatively, a larger amount and longer duration of TTS sustained during time when communication is critical for successful mother/calf interactions could have more serious impacts. We note that reduced hearing sensitivity as a simple function of aging has been observed in marine mammals, as well as humans and other taxa (Southall *et al.,* 2007), so we can infer that strategies exist for coping with this condition to some degree, though likely not without cost.

Behavioral Effects—Behavioral disturbance from elevated noise exposure may include a variety of effects, including subtle changes in behavior (*e.g.,* minor or brief avoidance of an area or changes in vocalizations), more conspicuous changes in similar behavioral activities, and more sustained and/or potentially severe reactions, such as displacement from or abandonment of high-quality habitat. Behavioral responses to sound are highly variable and context-specific and any reactions depend on numerous intrinsic and extrinsic factors (*e.g.,* species, state of maturity, experience, current activity, reproductive state, auditory sensitivity, time of day), as well as the interplay between factors (*e.g.,* Richardson *et al.,* 1995; Wartzok *et al.,* 2003; Southall *et al.,* 2007; Weilgart, 2007). Behavioral reactions can vary not only among individuals but also within an individual, depending on previous experience with a sound source, context, and numerous other factors (Ellison *et al.,* 2012), and can vary depending on characteristics associated with the sound source (*e.g.,* whether it is moving or stationary, number of sources, distance from the source). Please see Appendices B–C of Southall *et al.* (2007) for a review of studies involving marine mammal behavioral responses to sound.

Habituation can occur when an animal's response to a stimulus wanes with repeated exposure, usually in the absence of unpleasant associated events (Wartzok *et al.,* 2003). Animals are most likely to habituate to sounds that are predictable and unvarying. It is important to note that habituation is appropriately considered as a ''progressive reduction in response to stimuli that are perceived as neither aversive nor beneficial,'' rather than as, more generally, moderation in response to human disturbance (Bejder *et al.,* 2009). The opposite process is sensitization, when an unpleasant experience leads to subsequent responses, often in the form of avoidance, at a lower level of exposure. As noted, behavioral state may affect the type of response. For example, animals that are resting may show greater behavioral change in response to disturbing sound levels than animals that are highly motivated to remain in an area for feeding (Richardson *et al.,* 1995; NRC, 2003; Wartzok *et al.,* 2003). Controlled experiments with captive marine mammals have showed pronounced behavioral reactions, including avoidance of loud sound sources (Ridgway *et al.,* 1997; Finneran *et al.,* 2003). Observed responses of wild marine mammals to loud pulsed sound sources (typically airguns or acoustic harassment devices) have been varied but often consist of avoidance behavior or other behavioral changes suggesting discomfort (Morton and Symonds, 2002; see also Richardson *et al.,* 1995; Nowacek *et al.,* 2007). However, many delphinids approach low-frequency airgun source vessels with no apparent discomfort or obvious behavioral change

(*e.g.,* Barkaszi *et al.,* 2012), indicating the importance of frequency output in relation to the species' hearing sensitivity.

Available studies show wide variation in response to underwater sound; therefore, it is difficult to predict specifically how any given sound in a particular instance might affect marine mammals perceiving the signal. If a marine mammal does react briefly to an underwater sound by changing its behavior or moving a small distance, the impacts of the change are unlikely to be significant to the individual, let alone the stock or population. However, if a sound source displaces marine mammals from an important feeding or breeding area for a prolonged period, impacts on individuals and populations could be significant (*e.g.,* Lusseau and Bejder, 2007; Weilgart, 2007; NRC, 2005). However, there are broad categories of potential response, which we describe in greater detail here, that include alteration of dive behavior, alteration of foraging behavior, effects to breathing, interference with or alteration of vocalization, avoidance, and flight.

Changes in dive behavior can vary widely and may consist of increased or decreased dive times and surface intervals as well as changes in the rates of ascent and descent during a dive (*e.g.,* Frankel and Clark, 2000; Costa *et al.,* 2003; Ng and Leung, 2003; Nowacek *et al.;* 2004; Goldbogen *et al.,* 2013a, 2013b). Variations in dive behavior may reflect interruptions in biologically significant activities (*e.g.,* foraging) or they may be of little biological significance. The impact of an alteration to dive behavior resulting from an acoustic exposure depends on what the animal is doing at the time of the exposure and the type and magnitude of the response.

Disruption of feeding behavior can be difficult to correlate with anthropogenic sound exposure, so it is usually inferred by observed displacement from known foraging areas, the appearance of secondary indicators (*e.g.,* bubble nets or sediment plumes), or changes in dive behavior. As for other types of behavioral response, the frequency, duration, and temporal pattern of signal presentation, as well as differences in species sensitivity, are likely contributing factors to differences in response in any given circumstance (*e.g.,* Croll *et al.,* 2001; Nowacek *et al.;* 2004; Madsen *et al.,* 2006; Yazvenko *et al.,* 2007). A determination of whether foraging disruptions incur fitness consequences would require information on or estimates of the energetic requirements of the affected individuals and the relationship between prey availability, foraging effort and success, and the life history stage of the animal.

Variations in respiration naturally vary with different behaviors and alterations to breathing rate as a function of acoustic exposure can be expected to co-occur with other behavioral reactions, such as a flight response or an alteration in diving. However, respiration rates in and of themselves may be representative of annoyance or an acute stress response. Various studies have shown that respiration rates may either be unaffected or could increase, depending on the species and signal characteristics, again highlighting the importance of understanding species differences in the tolerance of underwater noise when determining the potential for impacts resulting from anthropogenic sound exposure (*e.g.,* Kastelein *et al.,* 2001, 2005, 2006; Gailey *et al.,* 2007; Gailey *et al.,* 2016).

Marine mammals vocalize for different purposes and across multiple modes, such as whistling, echolocation click production, calling, and singing. Changes in vocalization behavior in response to anthropogenic noise can occur for any of these modes and may result from a need to compete with an increase in background noise or may reflect increased vigilance or a startle response. For example, in the presence of potentially masking signals, humpback whales and killer whales have been observed to increase the length of their songs (Miller *et al.,* 2000; Foote *et al.,* 2004), while right whales have been observed to shift the frequency content of their calls upward while reducing the rate of calling in areas of increased anthropogenic noise (Parks *et al.,* 2007). In some cases, animals may cease sound production during production of aversive signals (Bowles *et al.,* 1994).

Avoidance is the displacement of an individual from an area or migration path as a result of the presence of a sound or other stressors, and is one of the most obvious manifestations of disturbance in marine mammals (Richardson *et al.,* 1995). For example, gray whales are known to change direction—deflecting from customary migratory paths—in order to avoid noise from airgun surveys (Malme *et al.,* 1984). Avoidance may be short-term, with animals returning to the area once the noise has ceased (*e.g.,* Bowles *et al.,* 1994; Goold, 1996; Stone *et al.,* 2000; Morton and Symonds, 2002; Gailey *et al.,* 2007). Longer-term displacement is possible, however, which may lead to changes in abundance or distribution patterns of the affected species in the affected region if habituation to the presence of the sound does not occur (*e.g.,* Blackwell *et al.,* 2004; Bejder *et al.,* 2006; Teilmann *et al.,* 2006).

A flight response is a dramatic change in normal movement to a directed and rapid movement away from the perceived location of a sound source. The flight response differs from other avoidance responses in the intensity of the response (*e.g.,* directed movement, rate of travel). Relatively little information on flight responses of marine mammals to anthropogenic signals exist, although observations of flight responses to the presence of predators have occurred (Connor and Heithaus, 1996). The result of a flight response could range from brief, temporary exertion and displacement from the area where the signal provokes flight to, in extreme cases, marine mammal strandings (Evans and England, 2001). However, it should be noted that response to a perceived predator does not necessarily invoke flight (Ford and Reeves, 2008), and whether individuals are solitary or in groups may influence the response.

Behavioral disturbance can also impact marine mammals in more subtle ways. Increased vigilance may result in costs related to diversion of focus and attention (*i.e.,* when a response consists of increased vigilance, it may come at the cost of decreased attention to other critical behaviors such as foraging or resting). These effects have generally not been demonstrated for marine mammals, but studies involving fish and terrestrial animals have shown that increased vigilance may substantially reduce feeding rates (*e.g.,* Beauchamp and Livoreil, 1997; Fritz *et al.,* 2002; Purser and Radford, 2011). In addition, chronic disturbance can cause population declines through reduction of fitness (*e.g.,* decline in body condition) and subsequent reduction in reproductive success, survival, or both (*e.g.,* Harrington and Veitch, 1992; Daan *et al.,* 1996; Bradshaw *et al.,* 1998). However, Ridgway *et al.* (2006) reported that increased vigilance in bottlenose dolphins exposed to sound over a five-day period did not cause any sleep deprivation or stress effects.

Many animals perform vital functions, such as feeding, resting, traveling, and socializing, on a diel cycle (24-hour cycle). Disruption of such functions resulting from reactions to stressors such as sound exposure are more likely to be significant if they last more than one diel cycle or recur on subsequent days (Southall *et al.,* 2007). Consequently, a behavioral response lasting less than one day and not recurring on subsequent days is not

considered particularly severe unless it could directly affect reproduction or survival (Southall *et al.,* 2007). Note that there is a difference between multi-day substantive behavioral reactions and multi-day anthropogenic activities. For example, just because an activity lasts for multiple days does not necessarily mean that individual animals are either exposed to activity-related stressors for multiple days or, further, exposed in a manner resulting in sustained multi-day substantive behavioral responses.

Stress Responses—An animal's perception of a threat may be sufficient to trigger stress responses consisting of some combination of behavioral responses, autonomic nervous system responses, neuroendocrine responses, or immune responses (*e.g.,* Seyle, 1950; Moberg, 2000). In many cases, an animal's first and sometimes most economical (in terms of energetic costs) response is behavioral avoidance of the potential stressor. Autonomic nervous system responses to stress typically involve changes in heart rate, blood pressure, and gastrointestinal activity. These responses have a relatively short duration and may or may not have a significant long-term effect on an animal's fitness.

Neuroendocrine stress responses often involve the hypothalamus-pituitary-adrenal system. Virtually all neuroendocrine functions that are affected by stress—including immune competence, reproduction, metabolism, and behavior—are regulated by pituitary hormones. Stress-induced changes in the secretion of pituitary hormones have been implicated in failed reproduction, altered metabolism, reduced immune competence, and behavioral disturbance (*e.g.,* Moberg, 1987; Blecha, 2000). Increases in the circulation of glucocorticoids are also equated with stress (Romano *et al.,* 2004).

The primary distinction between stress (which is adaptive and does not normally place an animal at risk) and ''distress'' is the cost of the response. During a stress response, an animal uses glycogen stores that can be quickly replenished once the stress is alleviated. In such circumstances, the cost of the stress response would not pose serious fitness consequences. However, when an animal does not have sufficient energy reserves to satisfy the energetic costs of a stress response, energy resources must be diverted from other functions. This state of distress will last until the animal replenishes its energetic reserves sufficient to restore normal function.

Relationships between these physiological mechanisms, animal behavior, and the costs of stress responses are well-studied through controlled experiments and for both laboratory and free-ranging animals (*e.g.,* Holberton *et al.,* 1996; Hood *et al.,* 1998; Jessop *et al.,* 2003; Krausman *et al.,* 2004; Lankford *et al.,* 2005). Stress responses due to exposure to anthropogenic sounds or other stressors and their effects on marine mammals have also been reviewed (Fair and Becker, 2000; Romano *et al.,* 2002b) and, more rarely, studied in wild populations (*e.g.,* Romano *et al.,* 2002a). For example, Rolland *et al.* (2012) found that noise reduction from reduced ship traffic in the Bay of Fundy was associated with decreased stress in North Atlantic right whales. These and other studies lead to a reasonable expectation that some marine mammals will experience physiological stress responses upon exposure to acoustic stressors and that it is possible that some of these would be classified as ''distress.'' In addition, any animal experiencing TTS would likely also experience stress responses (NRC, 2003).

Auditory Masking—Sound can disrupt behavior through masking, or interfering with, an animal's ability to detect, recognize, or discriminate between acoustic signals of interest (*e.g.,* those used for intraspecific communication and social interactions, prey detection, predator avoidance, navigation) (Richardson *et al.,* 1995; Erbe *et al.,* 2016). Masking occurs when the receipt of a sound is interfered with by another coincident sound at similar frequencies and at similar or higher intensity, and may occur whether the sound is natural (*e.g.,* snapping shrimp, wind, waves, precipitation) or anthropogenic (*e.g.,* shipping, sonar, seismic exploration) in origin. The ability of a noise source to mask biologically important sounds depends on the characteristics of both the noise source and the signal of interest (*e.g.,* signal-to-noise ratio, temporal variability, direction), in relation to each other and to an animal's hearing abilities (*e.g.,* sensitivity, frequency range, critical ratios, frequency discrimination, directional discrimination, age or TTS hearing loss), and existing ambient noise and propagation conditions.

Under certain circumstances, marine mammals experiencing significant masking could also be impaired from maximizing their performance fitness in survival and reproduction. Therefore, when the coincident (masking) sound is man-made, it may be considered harassment when disrupting or altering critical behaviors. It is important to distinguish TTS and PTS, which persist after the sound exposure, from masking, which occurs during the sound exposure. Because masking (without resulting in TS) is not associated with abnormal physiological function, it is not considered a physiological effect, but rather a potential behavioral effect.

The frequency range of the potentially masking sound is important in determining any potential behavioral impacts. For example, low-frequency signals may have less effect on high-frequency echolocation sounds produced by odontocetes but are more likely to affect detection of mysticete communication calls and other potentially important natural sounds such as those produced by surf and some prey species. The masking of communication signals by anthropogenic noise may be considered as a reduction in the communication space of animals (*e.g.,* Clark *et al.,* 2009) and may result in energetic or other costs as animals change their vocalization behavior (*e.g.,* Miller *et al.,* 2000; Foote *et al.,* 2004; Parks *et al.,* 2007; Di Iorio and Clark, 2009; Holt *et al.,* 2009). Masking can be reduced in situations where the signal and noise come from different directions (Richardson *et al.,* 1995), through amplitude modulation of the signal, or through other compensatory behaviors (Houser and Moore, 2014). Masking can be tested directly in captive species (*e.g.,* Erbe, 2008), but in wild populations it must be either modeled or inferred from evidence of masking compensation. There are few studies addressing real-world masking sounds likely to be experienced by marine mammals in the wild (*e.g.,* Branstetter *et al.,* 2013).

Masking affects both senders and receivers of acoustic signals and can potentially have long-term chronic effects on marine mammals at the population level as well as at the individual level. Low-frequency ambient sound levels have increased by as much as 20 dB (more than three times in terms of SPL) in the world's ocean from pre-industrial periods, with most of the increase from distant commercial shipping (Hildebrand, 2009). All anthropogenic sound sources, but especially chronic and lower-frequency signals (*e.g.,* from vessel traffic), contribute to elevated ambient sound levels, thus intensifying masking.

Potential Effects of Hilcorp's Activity—As described previously (see ''Description of the Specified Activity''), Hilcorp proposes to build ice roads, install a pipeline, construct and operate a gravel island using impact and vibratory pile driving, and drill for oil in Foggy Island Bay. These activities

would occur under ice and open water conditions (with the exception of ice roads). These activities have the potential to harass marine mammals from acoustic disturbance (all species) and via human disturbance/presence on ice (ice seals). There is also potential for ice seals, specifically ringed seals, to be killed in the event a lair is crushed during ice road construction and maintenance in undisturbed areas after March 1, annually.

NMFS analyzed the potential effects of oil and gas activities, including construction of a gravel island and associated infrastructure, in its 2016 EIS on the Effects of Oil and Gas Activities in the Arctic Ocean (NMFS, 2016; available at *https://www.fisheries.noaa.gov/resource/document/effects-oil-and-gas-activities-arctic-ocean-final-environmental-impact*). Although that document focuses on seismic exploration, there is a wealth of information in that document on marine mammal impacts from anthropogenic noise. More specific to the proposed project, BOEM provides a more detailed analysis on the potential impacts of the Liberty LDPI in its EIS on the Liberty Development and Production Plan, Beaufort Sea, Alaska, on which NMFS was a cooperating agency (BOEM, 2018; available at *https://www.boem.gov/Hilcorp-Liberty/*). We refer to those documents, specifically Chapter 4 of each of those documents, as a comprehensive impact assessment but provide a summary and complementary analysis here.

The effects of pile driving on marine mammals are dependent on several factors, including the size, type, and depth of the animal; the depth, intensity, and duration of the pile driving sound; the depth of the water column; the substrate of the habitat; the standoff distance between the pile and the animal; and the sound propagation properties of the environment. With both types of pile driving, it is likely that the onset of pile driving could result in temporary, short term changes in an animal's typical behavioral patterns and/or avoidance of the affected area. These behavioral changes may include (as summarized in Richardson *et al.,* 1995): changing durations of surfacing and dives, number of blows per surfacing, or moving direction and/or speed; reduced/increased vocal activities; changing/cessation of certain behavioral activities (such as socializing or feeding); visible startle response or aggressive behavior (such as tail/fluke slapping or jaw clapping); avoidance of areas where sound sources are located; and/or flight responses.

For all noise-related activities, bowhead and gray whales are not anticipated to be exposed to noise above NMFS harassment threshold often. As previously described, Hilcorp aims to conduct all pile driving during the ice-covered season, as was done at Northstar; however, they are allowing for unforeseen scheduling delays. Bowheads are not present near LDPI during the winter and are not normally found in the development area during mid-summer (July through mid-August) when the whales are further east in the Canadian Beaufort. Therefore, there are no impacts on foraging habitat for bowhead whales during mid-summer. Starting in late August and continuing until late October, bowheads may be exposed to sounds from the proposed activities at LDPI or may encounter vessel traffic to and from the island. It is unlikely that any whales would be displaced from sounds generated by activities at the LDPI due to their distance from the offshore migrating whales, and the effects of buffering from the barrier islands. Any displacement would be subtle and involve no more than a small proportion of the passing bowheads, likely less than that found at Northstar (Richardson, 2003, 2004; Mcdonald *et al.,* 2012). This is due to the baffling-effect of the barrier island between the construction activity and the main migratory pathway of bowhead whales. Moreover, mitigation such as avoiding pile driving during the fall bowhead whale hunt further reduces potential for harassment as whales are migrating offshore.

Ongoing activities such as drilling could harass marine mammals; however, drilling sounds from artificial islands are relatively low. As summarized in Richardson *et al.* (1995), beluga whales (the cetacean most likely to occur in Foggy Island Bay) are often observed near drillsites within 100 to 150 m (328.1 to 492.1 ft) from artificial islands. Drilling operations at Northstar facility during the open-water season resulted in brief, minor localized effects on ringed seals with no consequences to ringed seal populations (Richardson and Williams, 2004). Adult ringed seals seem to tolerate drilling activities. Brewer *et al.* (1993) noted ringed seals were the most common marine mammal sighted and did not seem to be disturbed by drilling operations at the Kuvlum 1 project in the Beaufort Sea. Southall *et al.* (2007) reviewed literature describing responses of pinnipeds to continuous sound and reported that the limited data suggest exposures between ~90 and 140 dB re 1 μPa generally do not appear to induce strong behavioral responses in pinnipeds exposed to continuous sounds in water. Hilcorp will conduct acoustic monitoring during drilling to determine if future incidental take authorizations are warranted from LDPI operation.

The biological significance of many of these behavioral disturbances is difficult to predict, especially if the detected disturbances appear minor. However, the consequences of behavioral modification could be expected to be biologically significant if the change affects growth, survival, or reproduction. Significant behavioral modifications that could lead to effects on growth, survival, or reproduction, such as drastic changes in diving/surfacing patterns or significant habitat abandonment are extremely unlikely in this area (*i.e.,* shallow waters in modified industrial areas).

The onset of behavioral disturbance from anthropogenic sound depends on both external factors (characteristics of sound sources and their paths) and the specific characteristics of the receiving animals (hearing, motivation, experience, demography) and is difficult to predict (Southall *et al.,* 2007).

Whether impact or vibratory driving, sound sources would be active for relatively short durations, with relation to the durations animals use sound (either emitting or receiving) on a daily basis, and over a small spatial scale relative to marine mammal ranges. Therefore, the potential impacts from masking are limited in both time and space. Further, the frequencies output of pile driving are low relative to the range of frequencies used by most species for vital life functions such as communication or foraging. In summary, we expect some masking to occur; however, the biological impacts of any potential masking are anticipated to be negligible. Finally, any masking that might rise to Level B harassment under the MMPA would occur concurrently within the zones of behavioral harassment already estimated for vibratory and impact pile driving, and which have already been taken into account in the exposure analysis.

Oil Spills

During the life of the regulations, Hilcorp would be actively drilling for crude oil in Foggy Island Bay and transporting that oil via a single-phase subsea pipe-in-pipe pipeline from the LDPI to shore, where an above-ground pipeline will transport crude to the existing Badami pipeline. From there, crude will be transported to the Endicott Sales Oil Pipeline, which ties into Pump Station 1 of the TransAlaska Pipeline

System (TAPS) for eventual delivery to a refinery. Whenever oil is being extracted or transported, there is potential for a spill. Accidental oil spills have a varying potential to occur and with varying impacts on marine mammals. For example, if a spill or pipeline leak occurs during the winter, oil would be trapped by the ice. However, response may be more difficult due in part to the presence of ice. If a spill or leak occurs during the open-water season, oil may disperse more widely; however, response time may be more prompt. Spills may also be large or small. Small spills are defined as spills of less than 1,000 barrels (bbls), and a large spill is greater than 1,000 bbls. For reference, 1 bbl equates to 42 gallons.

Based on BOEM's oil spill analyses in its EIS, the only sized spills that are reasonably likely to occur in association with the proposed action are small spills (<1,000 bbls) (BOEM, 2017a). Small spills, although accidental, occur during oil and gas activities with generally routine frequency and are considered likely to occur during development, production, and/or decommissioning activities associated with the proposed action. BOEM estimates about 70 small spills, most of which would be less than 10 bbls, would occur over the life of the Liberty Project. Small crude oil spills would not likely occur before drilling operations begin. Small refined oil spills may occur during development, production, and decommissioning. The majority of small spills are likely to occur during the approximate 22-year production period, which is an average of about 3 spills per year.

The majority of small spills would be contained on the proposed LDPI or landfast ice (during winter). BOEM anticipates that small refined spills that reach the open water would be contained by booms or absorbent pads; these small spills would also evaporate and disperse within hours to a few days. A 3 bbl refined oil spill during summer is anticipated to evaporate and disperse within 24 hours, and a 200 bbl refined oil spill during summer is anticipated to evaporate and disperse within 3 days (BOEM, 2017a).

A large spill is a statistically unlikely event. The average number of large spills for the proposed action was calculated by multiplying the spill rate (Bercha International Inc., 2016; BOEM, 2017a), by the estimated barrels produced (0.11779 bbl or 117.79 Million Barrels). By adding the mean number of large spills from the proposed LDPI and wells (~0.0043) and from pipelines (~0.0024), a mean total of 0.0067 large spills were calculated for the proposed action. Based on the mean spill number, a Poisson distribution indicates there is a 99.33 percent chance that no large spill occurs over the development and production phases of the project, and a 0.67 percent chance of one or more large spills occurring over the same period. The statistical distribution of large spills and gas releases shows that it is much more likely that no large spills or releases occur than that one or more occur over the life of the project. However, a large spill has the potential to seriously harm ESA-listed species and their environment. Assuming one large spill occurs instead of zero allows BOEM to more fully estimate and describe potential environmental effects (BOEM, 2017a).

Hilcorp is currently developing its oil spill response plan in coordination with the Bureau of Safety and Environmental Enforcement (BSEE) who must approve the plan. BSEE oversees oil spill planning and preparedness for oil and gas exploration, development, and production facilities in both state and Federal offshore waters of the U.S. NMFS provided BSEE with its recommended marine mammal oil spill response protocols available at *https://www.fisheries.noaa.gov/resource/document/pinniped-and-cetacean-oil-spill-response-guidelines.* NMFS has provided BSEE with recommended marine mammal protocols should a spill occur. BSEE has indicated that NMFS will have an opportunity to provide comments on Hilcorp's plan during a Federal agency public comment period. As noted above, Hilcorp did not request, and NMFS is not proposing to authorize, takes of marine mammals incidental to oil spills. NMFS does not authorize incidental takes from oil spills under section 101(a)(5)(A) of the MMPA in general, and oil spills are not part of the specified activity in this case.

Cetaceans

While direct mortality of cetaceans is unlikely, exposure to spilled oil could lead to skin irritation, baleen fouling (which might reduce feeding efficiency), respiratory distress from inhalation of hydrocarbon vapors, consumption of some contaminated prey items, and temporary displacement from contaminated feeding areas. Geraci and St. Aubin (1990) summarize the effects of oil on marine mammals, and Bratton *et al.* (1993) provides a synthesis of knowledge of oil effects on bowhead whales. The number of whales that might be contacted by a spill would depend on the size, timing, and duration of the spill. Whales may not avoid oil spills, and some have been observed feeding within oil slicks (Goodale *et al.,* 1981).

The potential effects on cetaceans are expected to be less than those on seals (described later in this section of the document). Cetaceans tend to occur well offshore where cleanup activities (in the open-water season) are unlikely to be as concentrated. Also, cetaceans are transient and, during the majority of the year, absent from the area. Further, drilling would be postponed during the bowhead whale hunt every fall; therefore, the risk to cetaceans during this time, when marine mammal presence and subsistence use is high, has been fully mitigated.

Pinnipeds

Ringed, bearded, and spotted seals are present in open-water areas during summer and early autumn, and ringed seals remain in the area through the ice-covered season. Therefore, an oil spill from LDPI or its pipeline could affect seals. Any oil spilled under the ice also has the potential to directly contact seals. The most relevant data of pinnipeds exposed to oil is from the Exxon Valdez oil spill (EVOS).

The largest documented impact of a spill, prior to the EVOS, was on young seals in January in the Gulf of St. Lawrence (St. Aubin, 1990). Intensive and long-term studies were conducted after the EVOS in Alaska. There may have been a long-term decline of 36 percent in numbers of molting harbor seals at oiled haul-out sites in Prince William Sound following EVOS (Frost *et al.,* 1994a). However, in a reanalysis of those data and additional years of surveys, along with an examination of assumptions and biases associated with the original data, Hoover-Miller *et al.* (2001) concluded that the EVOS effect had been overestimated. Harbor seal pup mortality at oiled beaches was 23% to 26%, which may have been higher than natural mortality, although no baseline data for pup mortality existed prior to EVOS (Frost *et al.,* 1994a).

Adult seals rely on a layer of blubber for insulation, and oiling of the external surface does not appear to have adverse thermoregulatory effects (Kooyman *et al.,* 1976, 1977; St. Aubin, 1990). However, newborn seal pups rely on their fur for insulation. Newborn ringed seal pups in lairs on the ice could be contaminated through contact with oiled mothers. There is the potential that newborn ringed seal pups that were contaminated with oil could die from hypothermia. Further, contact with oil on the external surfaces can potentially cause increased stress and irritation of the eyes of ringed seals (Geraci and Smith, 1976; St. Aubin, 1990). These

effects seemed to be temporary and reversible, but continued exposure of eyes to oil could cause permanent damage (St. Aubin, 1990). Corneal ulcers and abrasions, conjunctivitis, and swollen nictitating membranes were observed in captive ringed seals placed in crude oil-covered water (Geraci and Smith, 1976), and in seals in the Antarctic after an oil spill (Lillie, 1954).

Marine mammals can ingest oil if their food is contaminated. Oil can also be absorbed through the respiratory tract (Geraci and Smith, 1976; Engelhardt *et al.,* 1977). Some of the ingested oil is voided in vomit or feces but some is absorbed and could cause toxic effects (Engelhardt, 1981). When returned to clean water, contaminated animals can depurate this internal oil (Engelhardt, 1978, 1982, 1985). In addition, seals exposed to an oil spill are unlikely to ingest enough oil to cause serious internal damage (Geraci and St. Aubin, 1980, 1982).

Since ringed seals are found year-round in the U.S. Beaufort Sea and more specifically in the project area, an oil spill at any time of year could potentially have effects on ringed seals. However, they are more widely dispersed during the open-water season. Spotted seals are unlikely to be found in the project area during late winter and spring. Therefore, they are more likely to be affected by a spill in the summer or fall seasons. Bearded seals typically overwinter south of the Beaufort Sea. However, some have been reported around Northstar during early spring (Moulton *et al.,* 2003b).

Oil Spill Cleanup Activities

Oil spill cleanup activities could increase disturbance effects on either whales or seals, causing temporary disruption and possible displacement (BOEM, 2018). General issues related to oil spill cleanup activities are discussed earlier in this section for cetaceans. In the event of a large spill contacting and extensively oiling coastal habitats, the presence of response staff, equipment, and the many aircraft involved in the cleanup could (depending on the time of the spill and the cleanup) potentially displace seals. If extensive cleanup operations occur in the spring, they could cause increased stress and reduced pup survival of ringed seals. Oil spill cleanup activity could exacerbate and increase disturbance effects on subsistence species, cause localized displacement of subsistence species, and alter or reduce access to those species by hunters. On the other hand, the displacement of marine mammals away from oil-contaminated areas by cleanup activities would reduce the likelihood of direct contact with oil. Impacts to subsistence uses of marine mammals are discussed later in this document (see the ''Impact on Availability of Affected Species or Stock for Taking for Subsistence Uses'' section).

Potential Take From Oil Spills

Hilcorp did not request, and NMFS is not proposing to authorize, takes of marine mammals incidental to oil spills. Should an oil spill occur and marine mammals are killed, injured, or harassed by the spill, the ''taking'' would be unauthorized. However, NMFS is including mitigation and reporting measures within these regulations to minimize risk to marine mammals. Should an oil spill occur at the drill site and that oil enter the marine environment such that marine mammals are at risk of exposure, NMFS has included a mitigation measure that Hilcorp notify NMFS immediately and cease drilling until NMFS can assess the severity of the spill and potential impacts to marine mammals. Should the pipeline leak, crude oil transport via the pipeline would also cease immediately until the pipeline is repaired. In the case of any spill, Hilcorp would immediately initiate communication and response protocol per its Oil Spill Response Plan. Finally, Hilcorp must maintain the frequency of oil spill response training at no less than one two-hour session per week.

Anticipated Effects on Marine Mammal Habitat

We described the potential impacts to marine mammal habitat, pathways by which the project could affect marine mammal prey and the corresponding potential impact on marine mammals in the proposed rule. No new data has been released or was described in public comments to warrant any additional analysis. Therefore, our analysis remains the same and therefore we do not repeat it here.

Estimated Take

This section provides an estimate of the number of incidental takes anticipated to result from the specified activity and analyzed in this final rule, and which may be authorized in the associated LOA, which will inform both NMFS' consideration of ''small numbers'' and the negligible impact determination. As noted in the *Changes from Proposed to Final Rule* section above, we made minor adjustments to this section based on public comment. None of these changes were substantial as many were related to clarity or only slightly increased takes to account for group size; hence, none of these modifications affected our required findings.

Except with respect to certain activities not pertinent here, section 3(18) of the MMPA defines ''harassment'' as: Any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

Authorized takes would primarily be by Level B harassment, as use of pile hammers, drill rigs, and ice-based equipment (*e.g.,* augers, trucks) have the potential to result in disruption of behavioral patterns for individual marine mammals. There is also some potential for auditory injury (Level A harassment) to result during pile driving. The mitigation and monitoring measures are expected to minimize the severity of such takes to the extent practicable.

No mortality or serious injury is anticipated as a result of exposure to acoustic sources; however, mortality and serious injury of ringed seals may occur from ice road construction, use, and maintenance conducted after March 1, annually. Below we describe how we estimated mortality and serious injury from ice road work followed by a detailed acoustic harassment estimation method.

Mortality/Serious Injury (Ice Seals)

The only species with the potential to incur serious injury or mortality during the proposed project are ringed seals during ice road construction, use, and maintenance. Other ice seal species are not known to use ice roads within the action area. As described in the *Description of Marine Mammals* section, pregnant ringed seals establish lairs in shorefast sea ice beginning in early March where pups are born and nursed throughout spring (March through May).

As described in the *Potential Effects of the Specified Activity on Marine Mammals and Their Habitat* section above, there have been only three documented interactions with ringed seals despite over 20 years of ice road construction on the North Slope; one mortality in 1998 and two non-lethal interactions in 2018. All three animals involved were seal pups in or near their lairs. The two recent interactions in 2018 led NMFS to work with the companies involved in the interactions, including Hilcorp, to better understand

the circumstances behind the interactions and to develop a list of BMPs designed to avoid and minimize potential harassment. Hilcorp has adopted these BMPs (see *Mitigation and Monitoring* section); however, the potential for mortality remains, albeit low. Because lairs can include both a pup and its mother, though interactions with ringed seals are relatively uncommon, NMFS authorizes the taking, by mortality or serious injury, of two ringed seals over the course of five years of ice road construction.

Acoustic Harassment

Generally speaking, we estimate takes by considering: (1) Acoustic thresholds above which NMFS believes the best available science indicates marine mammals will be behaviorally harassed or incur some degree of permanent hearing impairment; (2) the area or volume of water that will be ensonified above these levels in a day; (3) the density or occurrence of marine mammals within these ensonified areas; and, (4) the number of days of activities. We note that while these basic factors can contribute to a basic calculation to provide an initial prediction of takes, additional information that can qualitatively inform take estimates is also sometimes available (*e.g.,* previous monitoring results or average group size). Below, we describe the factors considered here in more detail and present the take estimate.

Acoustic Thresholds

Using the best available science, NMFS has developed acoustic thresholds that identify the received level of underwater sound above which exposed marine mammals would be reasonably expected to be behaviorally harassed (equated to Level B harassment) or to incur PTS of some degree (equated to Level A harassment).

Level B Harassment for non-explosive sources—Though significantly driven by received level, the onset of behavioral disturbance from anthropogenic noise exposure is also informed to varying degrees by other factors related to the source (*e.g.,* frequency, predictability, duty cycle), the environment (*e.g.,* bathymetry), and the receiving animals (*e.g.,* hearing, motivation, experience, demography, behavioral context) and can be difficult to predict (Southall *et al.,* 2007, Ellison *et al.,* 2012). Based on what the available science indicates and the practical need to use a threshold based on a factor that is both predictable and measurable for most activities, NMFS uses a generalized acoustic threshold based on received level to estimate the onset of Level B harassment. NMFS predicts that marine mammals are likely to be harassed in a manner we consider Level B harassment when exposed to underwater anthropogenic noise above received levels of 120 dB re 1 μPa (rms) for continuous (*e.g.,* vibratory pile-driving, drilling) and above 160 dB re 1 μPa (rms) for non-explosive impulsive (*e.g.,* seismic airguns) or intermittent (*e.g.,* scientific sonar) sources.

Hilcorp's Liberty Project includes the use of continuous, non-impulsive (vibratory pile driving, drilling, auguring) and intermittent, impulsive (impact pile driving) sources, and therefore the 120 and 160 dB re 1 μPa (rms) thresholds are applicable.

Level A harassment for non-explosive sources—NMFS' Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (Version 2.0) (Technical Guidance, 2018) identifies dual criteria to assess auditory injury (Level A harassment) to five different marine mammal groups (based on hearing sensitivity) as a result of exposure to noise from two different types of sources (impulsive or non-impulsive). Hilcorp's proposed activity includes the use of impulsive (*e.g.,* impact pile driving) and non-impulsive (*e.g.,* vibratory pile driving, slope shaping, trenching) sources.

These thresholds are provided in Table 3. The references, analysis, and methodology used in the development of the thresholds are described in NMFS 2018 Technical Guidance, which may be accessed at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance.*

TABLE 3—THRESHOLDS IDENTIFYING THE ONSET OF PERMANENT THRESHOLD SHIFT

Hearing group	PTS onset acoustic thresholds * (received level)	
	Impulsive	Non-impulsive
Low-Frequency (LF) Cetaceans	*Cell 1:* $L_{pk,flat}$: 219 dB; $L_{E,LF,24h}$: 183 dB	*Cell 2:* $L_{E,LF,24h}$: 199 dB.
Mid-Frequency (MF) Cetaceans	*Cell 3:* $L_{pk,flat:}$ 230 dB; $L_{E,MF,24h}$: 185 dB	*Cell 4:* $L_{E,MF,24h}$: 198 dB.
High-Frequency (HF) Cetaceans	*Cell 5:* $L_{pk,flat}$: 202 dB; $L_{E,HF,24h}$: 155 dB	*Cell 6:* $L_{E,HF,24h}$: 173 dB.
Phocid Pinnipeds (PW) (Underwater)	*Cell 7:* $L_{pk,flat}$: 218 dB; $L_{E,PW,24h}$: 185 dB	*Cell 8:* $L_{E,PW,24h}$: 201 dB.
Otariid Pinnipeds (OW) (Underwater)	*Cell 9:* $L_{pk,flat}$: 232 dB; $L_{E,OW,24h}$: 203 dB	*Cell 10:* $L_{E,OW,24h}$: 219 dB.

* Dual metric acoustic thresholds for impulsive sounds: Use whichever results in the largest isopleth for calculating PTS onset. If a non-impulsive sound has the potential to exceed the peak sound pressure level thresholds associated with impulsive sounds, these thresholds should also be considered.

Note: Peak sound pressure (L_{pk}) has a reference value of 1 μPa, and cumulative sound exposure level (L_E) has a reference value of 1μPa²s. In this Table, thresholds are abbreviated to reflect American National Standards Institute standards (ANSI 2013). However, peak sound pressure is defined by ANSI as incorporating frequency weighting, which is not the intent for this Technical Guidance. Hence, the subscript "flat" is being included to indicate peak sound pressure should be flat weighted or unweighted within the generalized hearing range. The subscript associated with cumulative sound exposure level thresholds indicates the designated marine mammal auditory weighting function (LF, MF, and HF cetaceans, and PW and OW pinnipeds) and that the recommended accumulation period is 24 hours. The cumulative sound exposure level thresholds could be exceeded in a multitude of ways (*i.e.,* varying exposure levels and durations, duty cycle). When possible, it is valuable for action proponents to indicate the conditions under which these acoustic thresholds will be exceeded.

Ensonified Area

Here, we describe operational and environmental parameters of the activity that will feed into identifying the area ensonified above the acoustic thresholds, which include source levels and transmission loss coefficient.

In shallow water noise propagation is highly dependent on the properties of the bottom and the surface, among other things. Parameters such as depth and the bottom properties can vary with distance from the source. There is a low-frequency cut-off related to the water depth, below which energy is transferred directly into the sea floor. Overall, the transmission loss in shallow water is a combination of cylindrical spreading effects, bottom interaction effects at lower frequencies and scattering losses at high frequencies. To estimate ensonified area, Hilcorp used the parabolic

equation (PE) modelling algorithm RAMGeo (Collins, 1993) to calculate the transmission loss between the source and the receiver (SLR, 2017). The full modeling report, including details on modeling methodology and procedure and ensonification area figures, can be found in the Underwater and Airborne Noise Modelling Report attached as Appendix A in Hilcorp's application. We provide a summary here.

RAMGeo is an efficient and reliable PE algorithm for solving range-dependent acoustic problems with fluid seabed geo-acoustic properties. The noise sources were assumed to be omnidirectional and modelled as point sources. In practice many sources are directional, this assumption is conservative. To estimate Level A harassment and Level B harassment threshold distances, Hilcorp first obtained one-third octave source spectral levels via reference spectral curves with their subsequent corrections based on their corresponding overall source levels. Table 4 contains estimated source levels and Appendix B in Hilcorp's acoustic modeling report contains source spectrum shape used in the model (SLR, 2018).

TABLE 4—ESTIMATED SOURCE LEVELS AND DURATION

Activity	Underwater source levels (db re: 1 μPa)		Airborne (db re: 20 μPa)	Number of piles per day	Maximum duration per day
	Ice-covered season	Open-water season			
Pipeline installation (trucks on ice, backhoe, ditchwitch).	169.6–179.1	N/A	74.8–78 @100 m	N/A	12 hrs.
Sheet pile—*vibratory*	221	185	81 @100 m	20	2.5 hrs.[1]
Sheet pile—*impact*	235.7	210	93 @160 m		40 min.[2]
Conductor pipe-*vibratory*				16	2.5 hrs (proxy from sheet piles).
Conductor pipes/foundation piles—*impact*	171.7	196			2 hrs.[3]
Slope shaping/armoring	n/a	167	64.7 @100 m	n/a	9.6 hrs.
Drilling and production	170.5	151	80 @200 m	n/a	24 hrs.

[1] Estimated based on 20 piles per day, 7.5 min per pile.
[2] Average duration estimate is 20 min per day.
[3] Hilcorp estimates 440–6300 strikes per day.

Hilcorp relied on operational data from Northstar construction activities to estimate LDPI construction activity methods and durations. Greene *et al.* (2008) indicates impact pile driving at Northstar was required only to finish off each pile after vibratory driving it into the frozen material of old Seal Island. Since Liberty will be a newly constructed gravel island, driving sheet piles should be easier than was the case at Northstar. Impact sheet pile driving therefore may not be required at Liberty and is included in the application as a precaution. Hilcorp assumed approximately 2 minutes and 100 strikes per pile with a maximum of 20 piles installed per day. Blackwell *et al.* (2004a) observed impact pipe driving at Northstar. On most days, one conductor pipe was driven in a day over a period of 5 to 8.5 hours. The longest day of observation was 10.5 hours in which time two pipes were driven. The observation period each day included all pipe driving time, but driving was never continuous during the entire observation period. Hilcorp applied a correction factor to the Northstar duration, assuming pipe driving at the LDPI would actually occur for 20 percent of the total installation time logged at Northstar.

The scenarios with theoretical potential for PTS onset are slope shaping, vibratory driving, and impact pile driving and pipe driving during the open-water season. Hilcorp did not model distances to PTS thresholds during ice-covered conditions because no cetaceans are present in the region during this time and noise levels are expected to attenuate very rapidly under ice conditions. Hilcorp did not request, nor does NMFS anticipate, takes by Level A harassment (PTS) during island construction conducted under ice conditions. The following discussion on PTS potential is limited to the open-water season.

Table 5 summarizes Hilcorp's modeled distances to NMFS PTS thresholds using the maximum durations identified above (see also Tables 16 through 18 in Appendix A of Hilcorp's application for shorter durations). We note that marine mammals would have to be extremely close to the island during slope shaping and pile driving for an extended period of time to potentially incur PTS. We find these durations at distance are highly unlikely and have concluded the potential for PTS from slope shaping and vibratory pile driving for any marine mammal hearing group does not exist. Table 6 summarizes distances and ensonified areas to NMFS Level B harassment thresholds during ice-covered and open water conditions.

TABLE 5—RADIAL DISTANCES TO NMFS LEVEL A HARASSMENT THRESHOLDS AND ENSONIFIED AREA DURING THE OPEN-WATER SEASON

Marine mammal hearing group (species)	Activity (duration) and distance to threshold (ensonified area)			
	Slope shaping (9.6 hrs)	Vibratory sheet piling (2.5 hrs)	Impact sheet piling (40 min)	Impact pipe driving (2 hrs)
Low frequency cetaceans (bowhead, gray whales).	<10 m (0 km^2)	50 m (164 ft)	1,940 (11.8 km^2)	87 m (2.38 km^2).
Mid frequency cetaceans (belugas)	n/a	<10 m (0 km^2)	60 m (0.01 km^2)	27 m (0.002 km^2).

TABLE 5—RADIAL DISTANCES TO NMFS LEVEL A HARASSMENT THRESHOLDS AND ENSONIFIED AREA DURING THE OPEN-WATER SEASON—Continued

Marine mammal hearing group (species)	Activity (duration) and distance to threshold (ensonified area)			
	Slope shaping (9.6 hrs)	Vibratory sheet piling (2.5 hrs)	Impact sheet piling (40 min)	Impact pipe driving (2 hrs)
Phocid Pinnipeds (bearded, ringed, spotted seals).	<10 m (0 km^2)	20 m (66 ft)	526 m (0.87 km^2)	240 m (0.18 km^2).

TABLE 6—RADIAL DISTANCES TO NMFS LEVEL B HARASSMENT THRESHOLDS AND ENSONIFIED AREAS

Activity	Ice-covered season	Open-water season [1]	Airborne
Ice road construction and maintenance	170 m (0.09 km^2)	n/a	<15 m (<0.001 km^2).
Pipeline construction	210 m (0.14km^2)	n/a.	
Sheet pile driving—vibratory	390 m (0.48 km^2)	14,800 m (63.9 km^2) [2].	
Sheet pile driving—impact	90 m (0.03 km^2)	2050 m (13.20 km^2)	100 m (0.031 km^2).
Conductor pipe/foundation pile driving—impact	11 m (<0.01 km^2)	315 m (0.31 km^2).	
Slope shaping/armoring	n/a	1160 m (4.23 km^2)	<15 m (<0.001 km^2).
Helicopter (take-off/landing)	n/a	n/a	67 m (0.041 km^2).
Drilling and Production	230 m (0.17 km^2)	55 m (<0.01 km^2)	30 m (0.003 km^2).

[1] Open water modeling results in the proposed rule were presented as minimum, median and maximum distances to the appropriate noise threshold across all depths calculated in the direction of maximum noise propagation from the source, away from shore. For this final rule, NMFS determined the median distance was appropriate to implement as the Level B harassment area. As in the proposed rule, these median distances were used to estimate take.

[2] The ensonified area considers the noise absorption effect of the McClure Islands.

Marine Mammal Occurrence

Each fall and summer, NMFS and BOEM conduct an aerial survey in the Arctic, the Aerial Survey of Arctic Marine Mammals (ASAMM) surveys. The goal of these surveys is to document the distribution and relative abundance of bowhead, gray, right, fin and beluga whales and other marine mammals in areas of potential oil and natural gas exploration, development, and production activities in the Alaskan Beaufort and northeastern Chukchi Seas. Traditionally, only fall surveys were conducted but then, in 2011, the first dedicated summer survey effort began in the ASAMM Beaufort Sea study area. Hilcorp used these ASAMM surveys as the data source to estimate seasonal densities of cetaceans (bowhead, gray and beluga whales) in the project area. The ASAMM surveys are conducted within blocks that overlay the Beaufort and Chukchi Seas oil and gas lease sale areas offshore of Alaska (Figure 6–1 in Hilcorp's application), and provide sighting data for bowhead, gray, and beluga whales during summer and fall months. During the summer and fall, NMFS observed for marine mammals on effort for 10,993 km and 11,047 km, respectively, from 2011 through 2017 (Table 7). Data from those surveys are used for this analysis. We note the location of the proposed LDPI project is in ASAMM survey block 1; the inshore boundary of this block terminates at the McClure Island group. It was not until 2016 that on-effort surveys began inside the McClure Island group (*i.e.,* Foggy Island Bay) since bowhead whales, the focus of the surveys, are not likely to enter the bay. No marine mammals have been observed during ASAMM surveys in Foggy Island Bay. Therefore, the density estimates provided here are an overestimate because they rely on offshore surveys where marine mammals are concentrated.

Bowhead Whale

Summer and fall bowhead whale densities were calculated using the results from ASAMM surveys from 2011 through 2017. The surveys provided sightings and effort data by month and season (summer and fall), as well as each survey block (Clarke *et al.,* 2012, 2013a, 2014, 2015, 2017). Bowhead whale densities were calculated in a two-step approach; they first calculated a sighting rate of whales per km, then they multiplied the transect length by the effective strip width using the modeled species-specific effective strip width for an aero commander aircraft calculated by Ferguson and Clarke (2013). Where the effective strip width is the half-strip width, it must be multiplied by 2 in order to encompass both sides of the transect line. Thus whale density was calculated as follows: Whales per km^2 = whales per kilometer/(2 × the effective strip width). The effective strip width for bowhead whales was calculated to be 1.15 km (CV = 0.08). Table 7 contains pooled data from 2011 through 2017 Block 1 ASAMM surveys and resulting densities.

The resulting densities are expected to be overestimates for the LDPI analysis because data is based on sighting effort outside the barrier islands, and bowhead and gray whales rarely occur within the barrier islands, while belugas also are found in higher abundance outside of Foggy Island Bay.

TABLE 7—BOWHEAD WHALE SIGHTING DATA FROM 2011 THROUGH 2017 AND RESULTING DENSITIES

Year	Season	Month	Transect effort (km)	Number whale sighted	whale/km	whale/km^2
2011	Summer	Jul–Aug	346	1	0.003	0.001
	Fall	Sept–Oct	1,476	24	0.016	0.007
2012	Summer	Jul–Aug	1,493	5	0.003	0.001
	Fall	Sept–Oct	1,086	14	0.013	0.006

TABLE 7—BOWHEAD WHALE SIGHTING DATA FROM 2011 THROUGH 2017 AND RESULTING DENSITIES—Continued

Year	Season	Month	Transect effort (km)	Number whale sighted	whale/km	whale/km²
2013	Summer	Jul–Aug	1,582	21	0.013	0.006
	Fall	Sept–Oct	1,121	21	0.019	0.008
2014	Summer	Jul –Aug	1,393	17	0.012	0.005
	Fall	Sept–Oct	1,538	79	0.051	0.022
2015	Summer	Jul–Aug	1,262	15	0.012	0.005
	Fall	Sept–Oct	1,663	17	0.010	0.004
2016	Summer	Jul–Aug	1,914	74	0.039	0.017
	Fall	Sept–Oct	2,360	19	0.008	0.004
2017	Summer	Jul–Aug	3,003	8	0.003	0.001
	Fall	Sept–Oct	1,803	85	0.047	0.020
Total	Summer		10,993	141	[1] 0.012	[1] 0.005
	Fall		11,047	259	[1] 0.023	[1] 0.0010

[1] Value represents average, not total, across all years per relevant season.

Gray Whales

Gray whales are rare in the project area and ASAMM aerial survey block 1. From 2011 through 2017 only two gray whales have been observed during ASAMM block 1 surveys despite over 21,000 miles of trackline effort, for a resulting density of zero (Table 8). However, a group of baleen whales comprised of both bowhead and gray whales was observed during industry marine mammal surveys in Foggy Island Bay in 2008. Therefore, Hilcorp has requested, and NMFS proposes to authorize, the take, by Level B harassment, of two gray whales annually during the effective period of the regulations on the chance gray whales enter the ensonified zone during LDPI activities.

TABLE 8—GRAY WHALE SIGHTING DATA FROM 2011 THROUGH 2017 AND RESULTING DENSITIES

Year	Season	Month	Transect effort (km)	Number whale sighted	whale/km	whale/km²
2011	Summer	Jul–Aug	346	0	0.000	0.000
	Fall	Sept–Oct	1,476	0	0.000	0.000
2012	Summer	Jul–Aug	1,493	0	0.000	0.000
	Fall	Sept–Oct	1,086	0	0.000	0.000
2013	Summer	Jul–Aug	1,582	0	0.000	0.000
	Fall	Sept–Oct	1,121	0	0.000	0.000
2014	Summer	Jul–Aug	1,393	0	0.000	0.000
	Fall	Sept–Oct	1,538	1	0.001	0.000
2015	Summer	Jul–Aug	1,262	0	0.000	0.000
	Fall	Sept–Oct	1,663	0	0.000	0.000
2016	Summer	Jul–Aug	1,914	1	0.001	0.000
	Fall	Sept–Oct	2,360	0	0.000	0.000
2017	Summer	Jul–Aug	3,003	0	0.001	0.000
	Fall	Sept–Oct	1,803	0	0.000	0.000
Total	Summer		10,993	1	0	0.000
	Fall		11,047	1	0	0.000

Beluga Whales

As with the large whales, beluga whale presence is anticipated to be higher outside the barrier islands. Sighting data collected during industry marine mammal surveys in Foggy Island Bay (as described in the *Description of Marine Mammals* section) are used to estimate likelihood of presence when deriving final take numbers; however, these data were not collected in a manner that allows for a derivation of density inside the bay or integration into the ASAMM survey data. The ASAMM surveys were recently extended into Foggy Island Bay; however, no beluga whales or any other cetaceans were observed while within the Bay. Table 9 presents block 1 ASAMM survey data and resulting densities for beluga whales. We note the 2012 and 2013 ASAMM reports stratified beluga whale sightings by depth rather than by survey block. Because the final beluga whale take numbers presented in this rule are adjusted based on expected presence in the entire bay based on marine mammal monitoring by industry in Foggy Island Bay, NMFS did not pursue investigating the raw data further and believe the values here are a reasonable and conservative representation of density in survey block 1 based on comparison to other ASAMM survey year sighting rates where sightings by blocks are available.

TABLE 9—BELUGA WHALE SIGHTING DATA FROM 2011 THROUGH 2017 AND RESULTING DENSITIES

Year	Season	Month	Transect effort (km)	Number whale sighted	whale/km	whale/km²
2011	Summer	Jul–Aug	346	0	0.000	0.000
	Fall	Sept–Oct	1,476	0	0.000	0.000
2012	Summer	Jul–Aug	5,001	47	0.009	0.008
	Fall	Sept–Oct	4,868	5	0.001	0.001
2013	Summer	Jul–Aug	4,270	75	0.018	0.014
	Fall	Sept–Oct	3,372	2	0.001	0.001
2014	Summer	Jul–Aug	1,393	13	0.009	0.008
	Fall	Sept–Oct	1,538	9	0.006	0.005
2015	Summer	Jul–Aug	1,262	37	0.029	0.024
	Fall	Sept–Oct	1,663	3	0.002	0.001
2016	Summer	Jul–Aug	1,914	[1] 0	[1] 0.00	[1] 0.000
	Fall	Sept–Oct	2,360	[1] 1	[1] 0.000	[1] 0.000
2017	Summer	Jul–Aug	3,003	4	0.001	0.001
	Fall	Sept–Oct	1,803	0	0.000	0.000
Total	Summer		17,189	521	0	[1] 0.008
	Fall		17,080	34	0	[1] 0.001

[1] The proposed rule contained an error in reporting the 2016 sighting data. Fewer whales were observed than reported, overestimating density. However, the amount of beluga whale take authorized has not changed from the proposed rule because take numbers were increased from the calculated density estimates.

Ringed Seals

Limited data are available on ringed seal densities in the southern Beaufort Sea during the winter months; however, ringed seals winter ecology studies conducted in the 1980s (Kelly *et al.,* 1986, Frost and Burns, 1989) and surveys associated with the Northstar development (Williams *et al.,* 2001) provide information on both seal ice-structure use (where ice structures include both breathing holes and subnivean lairs), and on the density of ice structures.

Kelly *et al.* (1986) found that in the southern Beaufort Sea and Kotzebue Sound, radio-tagged seals used between 1 and at least 4 subnivean lairs. The distances between lairs was up to 4 km (10 mi), with numerous breathing holes in-between (Kelly *et al.,* 1986). While Kelly *et al.* (1986) calculated the average number of lairs used per seal to be 2.85, they also suggested that this was likely to be an underestimate. To estimate winter ringed seal density within the project area, sea-ice structure density surveyed in 1982 (3.6 structures/km²; Frost and Burns, 1982), 1983 (0.81 structures/km²; Kelly et al., 1983), 1999 (0.71 structures/km², Williams et al., 2001), and 2000 (1.2 structures/km², Williams et al., 2001) were averaged to produce an average ice structure density of 1.58/km². That was divided by the average number of ice structures used by an individual seal of 2.85 (SD = 2.51; Kelly *et al.,* 1986), resulting in an estimated density of 0.55 ringed seals/km² during the winter months. This density is likely to be overestimated due to Kelly *et al.* (1986)'s suggestion that their estimate of the average number of lairs used by a seal was an underestimate (the denominator used).

For spring ringed seal densities, aerial surveys flown in 1997 through 2002 over Foggy Island Bay and west of Prudhoe Bay during late May and early June (Frost *et al.,* 2002, Moulton *et al.,* 2002b, Richardson and Williams, 2003), when the greatest percentage of seals have abandoned their lairs and are hauled out on the ice (Kelly *et al.,* 2010), provides the best available information on ringed seal densities.

Because densities were consistently very low where water depth was less than 3 m (and these areas are generally frozen solid during the ice-covered season), densities have been calculated where water depth was greater than 3 m deep (Moulton *et al.,* 2002a, Moulton *et al.,* 2002b, Richardson and Williams, 2003). Based on the average density of surveys flown between 1997 and 2002, the uncorrected average density of ringed seals during the spring is expected to be 0.548 ringed seals/km². Because the number of seals is expected to be much lower during the open-water season, we estimated summer (open-water) ringed seal density to be 50 percent of the spring densities, resulting in an estimated density of 0.27 ringed seals/km². Ringed seals remain in the water through the fall and in to the winter, however, due to the lack of available data on fall densities within the LDPI action area we have assumed the same density of ringed seals as in the summer; 0.27 ringed seals/km² (see Hilcorp's application and NMFS (2018) for more data details).

Bearded Seals

Industry monitoring surveys for the Northstar development during the spring seasons in 1999 (Moulton *et al.,* 2000), 2000 (Moulton *et al.,* 2001), 2001 (Moulton *et al.,* 2002a), and 2002 (Moulton *et al.,* 2003) counted 47 bearded seals (annual mean of 11.75 seals during an annual mean of 3,997.5 km² of effort); these data were insufficient to calculate a reliable density estimate in each year, no other data on bearded seal presence were available. Annual reports (Richardson, 2008) for years 2000 through 2002 include similar figures. A winter and spring density using the four years of Northstar development data equates to 0.003 bearded seals per km².

For the open-water season (summer and fall), bearded seal density was calculated as a proportion of the ringed seal summer density based on the percentage of pinniped sightings during monitoring surveys in 1996 (Harris *et al.,* 2001), 2008 (Aerts *et al.,* 2008, Hauser *et al.,* 2008), and 2012 (HDR, 2012). During these surveys, 63 percent were ringed seals, 17 percent were bearded seals, and 20 percent were spotted seals. Thus, the density of bearded seals during the open-water season (summer and fall) was calculated as 17 percent of the ringed seal density of 0.27 seals/km². This results in an estimated summer density for bearded seals of 0.05 seals/km².

Spotted Seals

Given their seasonal distribution and low numbers in the nearshore waters of the central Alaskan Beaufort Sea, no spotted seals are expected in the action

area during late winter and spring, but a few individuals could be expected during the summer or fall. Using the same monitoring data described in the bearded seal section above, spotted seal density during the open-water season (summer and fall) was calculated as 20 percent of the ringed seal summer density estimate (0.27 seals/km^2) in the LDPI Project Area. This results in an estimated density of 0.05 seals/km^2.

A summary of marine mammal densities used to estimate exposures is provided, by season and species, in Table 10.

TABLE 10—SUMMARY OF MARINE MAMMAL DENSITIES

Species	Stock	Winter (Nov–Mar)	Spring (Apr–Jun)	Summer (Jul–Aug)	Fall (Sept–Oct)
Bowhead whale	Western Arctic	0	0	0.005	0.01
Gray whale	Eastern N Pacific	0	0	0	0
Beluga whale	Beaufort Sea	0	0	0.008	0.001
Ringed seal	Alaska	0.548	0.548	0.27	0.27
Bearded seal	Alaska	0.003	0.003	0.05	0.05
Spotted seal	Alaska	0	0	0.05	0

Exposure Estimates

To quantitatively assess exposure of marine mammals to noise from the various activities associated with the Liberty Project, Hilcorp used the median range to which Level A harassment and Level B harassment thresholds were reached for ice road construction and maintenance, island construction, vibratory and impact sheet pile driving, impact conductor pipe driving, slope shaping, drilling, and production. Hilcorp considered the potential for takes on any given day based on the largest Level B harassment zone for that day.

For each species, exposure estimates were calculated in a multi-step process. On any given day of the year, the expected take for that day per species was calculated as: *density* × *ensonified area* (of the largest Level B harassment zone for that day). Results were then summed for the year to provide total exposure estimates per species.

In some cases, however, the calculated densities alone do not reflect the full potential of exposure. For example, beluga whale densities are quite low; however, previous marine mammal surveys in Foggy Island Bay have identified the potential for them to be there in greater numbers than reflected based on NMFS survey data alone. In other cases, the potential for exposure is almost discountable (*e.g.,* calculated gray whale takes are zero) but given they could appear in Foggy Island Bay, Hilcorp has requested take authorization. Hilcorp also requested take authorization for bowhead whales despite the lack of project-related noise above NMFS harassment thresholds extending much beyond the McClure Islands (*e.g.,* see Figure 02 in Appendix D of Hilcorp's application), where bowheads are more likely to be found. As described in the *Marine Mammal Occurrence* section, we used density based on surveys conducted outside of the McClure Islands; therefore, Hilcorp has likely overestimated potential takes. However, given the sensitivities surrounding species in the Arctic, we believe a precautionary approach is appropriate here to conservatively assess the potential effects on the stock and subsistence use.

Bowhead, gray, and beluga whales have the potential to be present and exposed to noise during the open-water season. Work during ice conditions (*e.g.,* pipeline installation, ice road construction) does not have the potential to harass cetaceans because they are not present in the action area. Hilcorp anticipates conducting a maximum of 15 days of open-water pile driving and could conduct slope shaping throughout the summer. The method described above was used to estimate take, by Level B harassment, in year 1 when the LDPI would be constructed.

There is a very low potential for large whale Level A harassment (PTS) from the specified activities given the rarity of bowhead and gray whales entering Foggy Island Bay. However, in an abundance of caution, Hilcorp has requested, and NMFS authorizes, limited Level A harassment takes per year of each species potentially exposed to impact pile driving noise (Table 11). Group size was considered in Level B harassment take requests in cases where sighting data and group size indicate potential for a greater amount of takes than calculated based on density (*e.g.,* beluga whale take request is higher than calculated take estimate). A small amount of the Level B harassment exposures were allocated to Level A harassment for the first year of work (*i.e.,* pile driving during open water).

For seals, a straight density estimate was used following the method described above. In assessing the calculated results; there was no need to adjust take numbers for Level B harassment.

The amount and manner of takes Hilcorp requested, and NMFS authorizes, for each species is summarized in Table 11 below. There was a slight adjustment to the number of Level B harassment takes for bowhead whales and gray whales from the proposed to final rule to account for an average group size of 2 and 5 animals, respectively, should these species come within Foggy Island Bay. NMFS also slightly adjusted ringed seal takes in years 2–5 as the calculations previously presented by Hilcorp mistakenly omitted 15 days of work and used drilling as the dominant noise source in the take equations in lieu of ice road construction in December and January in years 4 and 5. These changes resulted in an insignificant increase in the number of animals potentially taken from the proposed rule (no more than 5 additional takes in years 2–5). Given the very low density of bearded and spotted seals in the area, no changes to the take estimate were necessary for these species given this slight modification to the take calculations. Therefore, all other takes remains the same as in the proposed rule. In addition to the takes listed below, Hilcorp requests, and NMFS authorizes, a total of two ringed seal mortalities over the life of the regulations incidental to ice road construction, use, and maintenance.

TABLE 11—ANNUAL AND TOTAL AMOUNT OF TAKES, BY LEVEL A HARASSMENT AND LEVEL B HARASSMENT, AUTHORIZED INCIDENTAL TO HILCORP'S LDPI PROJECT

Year	Species (stock)					
	Bowhead (W Arctic)	Gray (ENP)	Beluga (Beaufort)	Ringed seal (AK)	Bearded seal (AK)	Spotted seal (AK)
Level A harassment						
1	2	2	10	5	2	2
2	0	0	0	0	0	0
3	0	0	0	0	0	0
4	0	0	0	0	0	0
5	0	0	0	0	0	0
Total Level A harassment	2	2	10	5	2	2
Level B harassment						
1	6	2	40	336	58	58
2	5	2	20	9	1	1
3	5	2	20	23	1	1
4	5	2	20	23	1	1
5	5	2	20	20	1	1
Total Level B harassment	26	10	120	411	62	62

Mitigation

In order to issue an ITA under Section 101(a)(5)(A) and (D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking for certain subsistence uses.

NMFS regulations require applicants for incidental take authorizations to include information about the availability and feasibility (economic and technological) of equipment, methods, and manner of conducting such activity or other means of effecting the least practicable adverse impact upon the affected species or stocks and their habitat (50 CFR 216.104(a)(11)).

In evaluating how mitigation may or may not be appropriate to ensure the least practicable adverse impact on species or stocks and their habitat, as well as subsistence uses where applicable, we carefully consider two primary factors:

(1) The manner in which, and the degree to which, the successful implementation of the measure(s) is expected to reduce impacts to marine mammals, marine mammal species or stocks, and their habitat, as well as subsistence uses. This considers the nature of the potential adverse impact being mitigated (likelihood, scope, range). It further considers the likelihood that the measure will be effective if implemented (probability of accomplishing the mitigating result if implemented as planned), and the likelihood of effective implementation (probability implemented as planned), and;

(2) the practicability of the measures for applicant implementation, which may consider such things as cost, impact on operations, and, in the case of a military readiness activity, personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

The mitigation measures presented here are a product of Hilcorp's application, recommendations from the Arctic peer-review panel (available at *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act*), NMFS' recommendations, and public comments on the **Federal Register** Notice of Receipt and the proposed rule.

Construction Mitigation Measures

Hilcorp will aim to construct the island, including the completion of all pile driving, during the ice-covered season (as was done for Northstar). Should an ice seal be observed on or near the LDPI by any Hilcorp personnel, the sighting will be reported to Hilcorp's Environmental Specialist. No construction activity should occur within 10 m of an ice seal and any vehicles used should use precaution and not approach any ice seal within 10 m.

During the open-water season, the following mitigation measures apply: Hilcorp will station two protected species observers (PSOs) on elevated platforms on the island during all pile driving in open-water conditions (see Monitoring and Reporting for more details). Marine mammal monitoring shall take place from 30 minutes prior to initiation of pile driving activity through 30 minutes post-completion of pile driving activity. Pre-activity monitoring shall be conducted for 30 minutes to ensure that the shutdown zone is clear of marine mammals, and pile driving may commence when observers have declared the shutdown zone (which equates to the Level A harassment zone in Table 5) is clear of marine mammals. In the event of a delay or shutdown of activity resulting from marine mammals in the shutdown zone, animals shall be allowed to remain in the shutdown zone (*i.e.,* must leave of their own volition) and their behavior shall be monitored and documented.

If a marine mammal is approaching a Level A harassment zone and pile driving has not commenced, pile driving shall be delayed. Pile driving may not commence or resume until either the animal has voluntarily left and been visually confirmed beyond the shutdown zone; 15 minutes have passed without subsequent detections of small cetaceans and pinnipeds; or 30 minutes have passed without subsequent detections of large cetaceans. NMFS may adjust the shutdown zones pending review and approval of an acoustic

monitoring report (see Monitoring and Reporting).

Hilcorp will use soft start techniques when impact pile driving. Soft start requires contractors to provide an initial set of strikes at reduced energy, followed by a thirty-second waiting period, then two subsequent reduced energy strike sets. A soft start must be implemented at the start of each day's impact pile driving and at any time following cessation of impact pile driving for a period of thirty minutes or longer.

In the unlikely event a low frequency cetacean (bowhead or gray whale) approaches or enters the Level A harassment zone, pile driving would be shut down. If a mid-frequency cetacean (beluga) or pinniped (seal) enters the Level A harassment zone during pile driving, Hilcorp proposes to complete setting the pile (which takes ten to fifteen minutes from commencement) but will not initiate additional pile driving of new piles until the marine mammal has left and is on a path away from the Level A harassment zone. Hilcorp would not commence pile driving if any species is observed approaching or within the Level A harassment zone during the pre-construction monitoring period.

If a species for which authorization has not been granted, or a species for which authorization has been granted but the authorized takes are met, is observed approaching or within the monitoring zone (which equates to the Level B harassment zone in Table 6), pile driving and removal activities must shut down immediately using delay and shut-down procedures. Activities must not resume until the animal has been confirmed to have left the area or the observation time period, as indicated above, has elapsed.

Hilcorp shall install the pipeline during the ice-covered season, thereby minimizing noise impacts to marine mammals as noise does not propagate well in ice and cetaceans are not present in the action area during winter.

Mitigation for Ice Road Construction, Maintenance, and Use

During ice road construction, Hilcorp would follow several BMPs recently developed through a collaborative effort with NMFS. These BMPs are informed by the best available information on how ice roads are constructed and maintained and ice seal lairing knowledge. They are designed to minimize disturbance and set forth a monitoring and reporting plan to improve knowledge. The complete BMP document is available on our website at *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.*

The ice road BMPs are applicable to construction and maintenance of Liberty sea ice roads and sea ice trails in areas where water depth is greater than 10 feet (ft) (the minimum depth required to establish ringed seal lairs) as well as any open leads in the sea ice requiring a temporary bridge during the ice road season. They are organized into the following categories: (1) Wildlife training; (2) general BMPs implemented throughout the ice road season; (3) BMPs to be implemented prior to March 1st; (4) BMPs to be implemented after March 1; and (5) reporting. We refer the reader to the complete BMP document on our website but provide a summary of provisions here.

Timing—Hilcorp will construct sea ice roads as early as possible (typically December 1 through mid-February) so that the entire corridor is disturbed prior to March 1, the known onset of lairing season. Blading and snow blowing of ice roads/trails will be limited to the previously disturbed and delineated areas to the extent safe and practicable. Snow will be plowed or blown from the ice surface so as to preserve the safety and integrity of the ice surface for continued use.

After March 1, annually, blading and snow blowing of ice roads will be limited to the previously disturbed ice road/shoulder areas to the extent safe and practicable. However, when safety requires a new ice trail to be constructed after March 1st, construction activities such as drilling holes in the ice to determine ice quality and thickness, will be conducted only during daylight hours with good visibility. All identified ringed seal structures will be avoided by a minimum of 150 m during ice road construction and maintenance.

Personnel—Hilcorp will employ a NMFS-approved, trained environmental field specialist who will serve as the primary ice seal monitor and main point of contact for any ice seal observations made by other Hilcorp staff, employees, or contractors. This person shall be in charge of conducting monitoring surveys every other day while the ice road is being actively used. The specialist will also be responsible for alerting all crew to ice seal sightings and reporting to the appropriate officials.

Training—Prior to initiation of annual sea ice road activities, all project personnel associated with ice road construction or use (*i.e.,* construction workers, surveyors, vehicle drivers security personnel, and the environmental team) will receive annual training on these BMPs. Annual training also includes reviewing the company's Wildlife Interaction Plan, which has been modified to include reference to the BMPs and reporting protocol. In addition to the BMPs, other topics in the training may include ringed seal reproductive ecology (*e.g.,* temporal and spatial lairing behavior, habitat characteristics, potential disturbance effect, etc.) and a summary of applicable laws and regulatory requirements including, but not limited to, MMPA incidental take authorization requirements.

General BMPs To Be Implemented Throughout Season—Hilcorp would establish ice road speed limits, delineate the roadways with highly visible markers (to avoid vehicles from driving off roadway where ice seals may be more likely to lair), and clearly mark corners of rig mats, steel plates, and other materials used to bridge sections of hazardous ice (to allow for easy location of materials when removed, minimizing disturbance to potentially nearby ice seals). Construction, maintenance or decommissioning activities associated with ice roads and trails will not occur within 50 m of any observed ring seal, but may proceed as soon as the ringed seal, of its own accord, moves farther than 50 m distance away from the activities or has not been observed within that area for at least 24 hours. All personnel would be prohibited from closely approaching any seal and would be required to report all seals sighted within 50 m of the center of the ice road to the designated Environmental Specialist.

Once the new ice trail is established, tracked vehicle operation will be limited to the disturbed area to the extent practicable and when the safety of personnel is ensured. If an ice road or trail is being actively used under daylight conditions with good visibility, a dedicated observer (not the vehicle operator) will conduct a survey along the sea ice road/trail to observe if any ringed seals are within 150 m of the roadway corridor.

Mitigation for Subsistence Uses of Marine Mammals or Plan of Cooperation

Regulations at 50 CFR 216.104(a)(12) further require incidental take authorization (ITA) applicants conducting activities that take place in Arctic waters to provide a Plan of Cooperation (POC) or information that identifies what measures have been taken and/or will be taken to minimize adverse effects on the availability of marine mammals for subsistence purposes. A plan must include the following:

• A statement that the applicant has notified and provided the affected subsistence community with a draft plan of cooperation;

• A schedule for meeting with the affected subsistence communities to discuss proposed activities and to resolve potential conflicts regarding any aspects of either the operation or the plan of cooperation;

• A description of what measures the applicant has taken and/or will take to ensure that proposed activities will not interfere with subsistence whaling or sealing; and

• What plans the applicant has to continue to meet with the affected communities, both prior to and while conducting the activity, to resolve conflicts and to notify the communities of any changes in the operation.

Hilcorp submitted a POC to NMFS, dated April 18, 2018, which includes all the required elements included in the aforementioned regulations (available at *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act*). The POC documents Hilcorp's stakeholder engagement activities, which began in 2014 for this project, with subsistence communities within the North Slope Region including Nuiqsut, Barrow and Kaktovik, the closest villages to the Project Area. The POC includes a description of the project, how access to the Project Area will occur, pipeline and island construction techniques, and drilling operations. The plan also describes the ongoing community outreach cooperation and coordination and measures that will be implemented by Hilcorp to minimize adverse effects on marine mammal subsistence. The POC is a living document and will be updated throughout the LDPI review and permitting process. As such, Hilcorp intends to maintain open communication with all stakeholders throughout the Liberty permitting and development process. In addition, Hilcorp, along with several other North Slope Industry participants, has entered into a Conflict Avoidance Agreement (CAA) with the AEWC for all North Slope oil and gas activities to minimize potential interference with bowhead subsistence hunting. By nature of the measures, the mitigation described above also minimizes impacts to subsistence users and is not repeated here. Additional mitigation measures specific to subsistence use were included in the proposed rule; however, we made minor modifications to better align with BOEM's permit conditions. The proposed rule included the measure to avoid impact pile and pipe driving during the Cross Island bowhead whale hunt, which usually occurs from the last week of August through mid-September. We have modified this measure to align with BOEM's permitting measure, which requires Hilcorp to cease all pile- and pipe-driving (both impact and vibratory) starting August 1, annually. This restriction is in place until the official end of the hunt or until the quota has been met, whichever occurs first.

We have also modified the measure included in the proposed rule that stated Hilcorp must schedule all non-essential boat, hovercraft, barge, and air traffic to avoid conflicting with the timing of the Cross Island bowhead hunt. The new measure requires Hilcorp to avoid operating LDPI-support vessels seaward of the barrier islands starting August 1, annually, to better align with BOEM's permitting requirement. This restriction is in place until the official end of the hunt or until the quota has been met, whichever occurs first.

During the comment period on BOEM's EIS for this project and our NOR announcing receipt of Hilcorp's application, the AEWC submitted comments pertaining to potential effects on subsistence use. The AEWC indicated that Hilcorp's continued participation in the Open Water Season CAA and the Good Neighbor Policy (GNP), along with its willingness to work with the Nuiqsut Whaling Captains to mitigate subsistence harvest concerns, are central to the AEWC's support for the Liberty Project. Further, the peer-review panel recommended the existing POC and CAA should be renewed and implemented annually to ensure that project activities are coordinated with the North Slope Borough and Alaska Native whaling captains. Therefore, in addition to the activity specific mitigation measures above, NMFS is requiring Hilcorp to abide by the POC and remain committed to the GNP throughout the life of the regulations. In addition, Hilcorp has committed to following the CAA.

Based on our evaluation of the measures incorporated in this final rule, NMFS has determined that the mitigation measures provide the means of effecting the least practicable impact on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for subsistence uses.

Monitoring and Reporting

In order to issue an LOA for an activity, Section 101(a)(5)(A) of the MMPA states that NMFS must set forth requirements pertaining to the monitoring and reporting of the authorized taking. NMFS' MMPA implementing regulations further describe the information that an applicant should provide when requesting an authorization (50 CFR 216.104(a)(13)), including the means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and the level of taking or impacts on populations of marine mammals.

Monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

• Occurrence of significant interactions with marine mammal species in action area (*e.g.,* animals that came close to the vessel, contacted the gear, or are otherwise rare or displaying unusual behavior);

• Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) Action or environment (*e.g.,* source characterization, propagation, ambient noise); (2) affected species (*e.g.,* life history, dive patterns); (3) co-occurrence of marine mammal species with the action; or (4) biological or behavioral context of exposure (*e.g.,* age, calving or feeding areas);

• Individual marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors;

• How anticipated responses to stressors impact either: (1) Long-term fitness and survival of individual marine mammals; or (2) populations, species, or stocks;

• Effects on marine mammal habitat (*e.g.,* marine mammal prey species, acoustic habitat, or important physical components of marine mammal habitat); and

• Mitigation and monitoring effectiveness.

Marine Mammal Monitoring During the Open-Water Season

Hilcorp shall employ NMFS approved PSOs and conduct marine mammal monitoring per the Marine Mammal Monitoring Plan, dated February 12, 2019. Two PSOs will be placed on either side of the island where pile/pipe-driving or slope shaping activities are occurring. For example, one PSO would be placed on the side where construction activities are taking place and the other placed on the opposite side to provide complete observer

coverage around the island. PSO stations will be moved around the island as needed during construction activities to provide full coverage. PSOs will be switched out such that they will observe for no more than 4 hours at a time and no more than 12 hours in a 24-hour period.

A third island-based PSO will work closely with an aviation specialist to monitor the Level B harassment zone during all open-water pile and pipe driving using an unmanned aircraft system (UAS). This third PSO and the UAS pilot will be located on the island. UAS monitoring will also be used during slope shaping, which may occur in open water intermittently until August 31 the first year the regulations are valid. Should foundation piles be installed the subsequent year, the requirement for UAS will be dependent upon the success of the program in the previous year and results of any preliminary acoustic analysis during year 1 construction (*e.g.,* impact driving conductor pipes). Should UAS not be deemed effective and construction is ongoing during the open-water season, a vessel-based PSO shall observe the monitoring zone during pile and pipe driving.

During the open-water season, marine mammal monitoring will take place from 30 minutes prior to initiation of pile and pipe driving activity through 30 minutes post-completion of pile driving activity. Pile driving may commence when observers have declared the shutdown zone clear of marine mammals. In the event of a delay or shutdown of activity resulting from marine mammals in the shutdown zone, animals must be allowed to remain in the shutdown zone (*i.e.,* must leave of their own volition) and their behavior must be monitored and documented.

During the ice-covered season, in addition to ice road monitoring (see below), Hilcorp personnel will report any ice seal sightings on or near the LDPI to Hilcorp's Environmental Specialist.

Acoustic Monitoring During the Open-Water Season

Hilcorp will conduct acoustic monitoring of island construction activities during the open-water season in accordance with its Acoustic Monitoring Plan available on our website. In summary, Hilcorp proposes to annually conduct underwater acoustic monitoring during the open-water season (July through the beginning of October) using Directional Autonomous Seafloor Acoustic Recorders (DASARs). One or more DASARs will be deployed at a pre-determined GPS location(s) away from the LDPI. Each DASAR will be connected by a ground line to an anchor on the seafloor. At the end of the open water season, the DASAR will be retrieved by dragging grappling hooks on the seafloor, perpendicular to and over the location of the ground line, as defined by the GPS locations of the anchor and DASAR. All activities conducted during the open-water season will be monitored. Goals of the acoustic monitoring plan are to characterize LDPI construction and operation noises, ambient sound levels, and verify (or amend) modeled distances to NMFS harassment thresholds. Recorder arrangement will be configured each year based on the anticipated activities for that season and the modelled sound propagation estimates for the relevant sources. Hilcorp's acoustic monitoring plan can be found at *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.*

Marine Mammal Monitoring During Ice Road Construction, Maintenance and Use

Hilcorp has prepared a comprehensive ice seal monitoring and mitigation plan via development of a BMP document which is available at *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.* Hilcorp would be required to implement these BMPs; we provide a summary here but encourage the public to review the full BMP document.

Seal surveys will be conducted every other day during daylight hours. Observers for ice road activities need not be trained PSOs, but they must have received the species observation training and understand the applicable sections of Hilcorp's Wildlife Management Plan. In addition, they must be capable of detecting, observing and monitoring ringed seal presence and behaviors, and accurately and completely recording data. Observers will have no other primary duty than to watch for and report observations related to ringed seals during this survey. If weather conditions become unsafe, the observer may be removed from the monitoring activity.

Construction, maintenance or decommissioning activities associated with ice roads and trails will not occur within 50 m of the observed ring seal, but may proceed as soon as the ringed seal, of its own accord, moves farther than 50 m distance away from the activities or has not been observed within that area for at least 24 hours. Transport vehicles (*i.e.,* vehicles not associated with construction, maintenance or decommissioning) may continue their route within the designated road/trail without stopping.

If a ringed seal structure (*i.e.,* breathing hole or lair) is observed within 150 m of the ice road/trail, the location of the structure will be reported to the Environmental Specialist who will then carry out a notification protocol. A qualified observer will monitor the structure every six hours on the day of the initial sighting to determine whether a ringed seal is present. Monitoring for the seal will occur every other day the ice road is being used unless it is determined the structure is not actively being used (*i.e.,* a seal is not sighted at that location during monitoring).

Monitoring Plan Peer Review

The MMPA requires that monitoring plans be independently peer reviewed where the proposed activity may affect the availability of a species or stock for taking for subsistence uses (16 U.S.C. 1371(a)(5)(D)(ii)(III)). Regarding this requirement, NMFS' implementing regulations state, upon receipt of a complete monitoring plan, and at its discretion, NMFS will either submit the plan to members of a peer-review panel for review or, within 60 days of receipt of the monitoring plan, schedule a workshop to review the plan (50 CFR 216.108(d)).

NMFS established an independent peer review panel (PRP) to review Hilcorp's 4MP for the proposed LDPI project in Foggy Island Bay. NMFS provided the PRP with Hilcorp's ITA application and monitoring plan and asked the panel to answer the following questions:

1. Will the applicant's stated objectives effectively further the understanding of the impacts of their activities on marine mammals and otherwise accomplish the goals stated above? If not, how should the objectives be modified to better accomplish the goals above?

2. Can the applicant achieve the stated objectives based on the methods described in the plan?

3. Are there technical modifications to the proposed monitoring techniques and methodologies proposed by the applicant that should be considered to better accomplish their stated objectives?

4. Are there techniques not proposed by the applicant (*i.e.,* additional monitoring techniques or methodologies) that should be considered for inclusion in the applicant's monitoring program to better accomplish their stated objectives?

5. What is the best way for an applicant to present their data and results (formatting, metrics, graphics, etc.) in the required reports that are to be submitted to NMFS (*i.e.,* 90-day report and comprehensive report)?

The PRP met in May 2018 and subsequently provided a final report to NMFS containing recommendations that the panel members felt were applicable to Hilcorp's monitoring plans. The PRP concluded that the objectives for both the visual and acoustic monitoring are appropriate, and agrees that the objective of real-time mitigation of potential disturbance of marine mammals would be met through visual monitoring. The PRP's primary recommendations and comments are summarized and addressed below. The PRP's full report is available on our website at *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.*

The PRP recommended Hilcorp consult with biologists at the NMFS Marine Mammal Laboratory and other scientists and users familiar with the use and limitations of UAS technology for studying marine mammals at sea regarding appropriate protocols and procedures for the proposed project. Hilcorp will implement a safe, effective UAS monitoring program, as described in the Marine Mammal Monitoring Plan.

The PRP noted marine mammal monitoring would not be conducted during the ice-covered season. Since the PRP met, Hilcorp has developed a marine mammal monitoring plan that would be enacted during ice-covered months along the ice roads and ice trails. These roads lead up to the LDPI; therefore, marine mammal monitoring would occur during the ice-covered season and occur at the LDPI. NMFS has also included a provision requiring that any ice seals observed on or near the LDPI be reported to Hilcorp's Environmental Specialist, and that no personnel shall approach or operate equipment within 10 m of the seal.

The PRP was concerned that no acoustic monitoring would be conducted during the winter months and recommended Hilcorp deploy multiple acoustic recorders during ice-covered periods to obtain data on both the presence of marine mammals and sound levels generated during pile driving activities. Hilcorp is not deploying long-term bottom mounted hydrophones, but will collect measurements using hand-held hydrophones lowered in a hole drilled through the ice.

The PRP also encouraged Hilcorp to consider deployment of additional acoustic recorders during the open-water season approximately 15 km northwest of the project area to facilitate a broader, multi-year approach to analyzing the effect of sound exposure on marine mammals by various LDPI and non-LDPI sources. The deployment of multiple recorders would provide a measure of redundancy and avoid the risk of losing all of the season's data if the recorders are lost or malfunction. Hilcorp will position multiple recorders simultaneously to record sound levels at multiple ranges from the project activities. Data recorded during times with no project activities, if such times exist, will be analyzed for ambient sound level statistics. The recorder arrangement will be configured each year based on the anticipated activities for that season.

The PRP recommended that the existing POC and CAA be renewed and implemented annually to ensure that project activities are coordinated with the North Slope Borough and Alaska Native whaling captains. Hilcorp is required to implement the POC and has agreed to implement a CAA with the AEWC.

Reporting

General—Hilcorp will submit a draft report to NMFS within 90 days of the completion of monitoring for each year the regulations are valid. The report will include marine mammal observations pre-activity, during-activity, and post-activity during pile driving days, and will also provide descriptions of any behavioral responses to construction activities by marine mammals, a complete description of all mitigation shutdowns and the results of those actions, and an extrapolated total take estimate based on the number of marine mammals observed during the course of construction. A final report must be submitted within 30 days following resolution of comments on the draft report. Hilcorp will also submit a comprehensive annual summary report covering all activities conducted under the incidental take regulations no more than 90 days after the regulations expire.

Ice Road Reporting

On an annual basis, Hilcorp will also submit a draft report to NMFS AKR and OPR compiling all ringed seal observations within 90 days of decommissioning the ice road and ice trails. The report will include information about activities occurring at time of sighting, ringed seal age class and behavior, and actions taken to mitigate disturbance. In addition, the report will include an analysis of the effectiveness of the BMPs recently developed in coordination with NMFS and any proposed updates to the BMPs or Wildlife Management Plan as a result of the encounter. A final report shall be prepared and submitted within thirty days following the resolution of comments on the draft report from NMFS.

Hilcorp must submit more immediate reports to NMFS should a marine mammal be unexpectedly killed or seriously injured by the specified activity or a dead or injured marine mammal is observed by a PSO or Hilcorp personnel. These are standard measures required by NMFS; details on reporting timelines and information can be found in the regulations.

LDPI Construction and Operation Reporting

Each day of marine mammal monitoring, PSOs will complete field sheets containing information NMFS typically requires for pile driving and construction activities. The full list of data is provided in Hilcorp's Marine Mammal Monitoring and Mitigation Plan and in the regulations below. Data include, but are not limited to, information on daily activities occurring, marine mammal sighting information (*e.g.,* species, group size, and behavior), manner and amount of take, and any mitigation actions taken. Data in these field sheets will be summarized and Hilcorp will provide a draft annual report to NMFS no later than 90 days post marine mammal monitoring efforts. Hilcorp would also submit an annual acoustic monitoring report no later than 90 days after acoustic recorders are recovered each season. The acoustic monitoring reports shall contain measured dB rms, SEL, and peak values as well as ambient noise levels, per the Acoustic Monitoring Plan and as described below in the regulations.

Hilcorp will also submit to NMFS a draft final report on all marine mammal monitoring conducted under the regulations no later than ninety calendar days of the completion of marine mammal and acoustic monitoring or sixty days prior to the issuance of any subsequent regulations, if necessary, for this project, whichever comes first. A final report shall be prepared and submitted within thirty days following the resolution of comments on the draft report from NMFS.

Negligible Impact Analysis and Determination

Introduction

NMFS has defined negligible impact as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.,* population-level effects). An estimate of the number of takes alone is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be ''taken'' by mortality, serious injury, and Level A harassment or Level B harassment, we consider other factors, such as the likely nature of any behavioral responses (*e.g.,* intensity, duration), the context of any such responses (*e.g.,* critical reproductive time or location, migration), as well as effects on habitat, and the likely effectiveness of mitigation. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status. Consistent with the 1989 preamble for NMFS' implementing regulations (54 FR 40338; September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into this analysis via their impacts on the environmental baseline (*e.g.,* as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality, and specific consideration of take by M/SI previously authorized for other NMFS research activities).

Serious Injury and Mortality

NMFS is proposing to authorize a very small number of serious injuries or mortalities that could occur incidental to ice road construction, use, and maintenance. We note here that the takes from ice road construction, use, and maintenance enumerated below could result in non-serious injury, but their worst potential outcome (mortality) is analyzed for the purposes of the negligible impact determination.

In addition, we discuss here the connection, and differences, between the legal mechanisms for authorizing incidental take under section 101(a)(5) for activities such as LDPI construction and operation, and for authorizing incidental take from commercial fisheries. In 1988, Congress amended the MMPA's provisions for addressing incidental take of marine mammals in commercial fishing operations. Congress directed NMFS to develop and recommend a new long-term regime to govern such incidental taking (see MMC, 1994). The need to develop a system suited to the unique circumstances of commercial fishing operations led NMFS to suggest a new conceptual means and associated regulatory framework. That concept, PBR, and a system for developing plans containing regulatory and voluntary measures to reduce incidental take for fisheries that exceed PBR were incorporated as sections 117 and 118 in the 1994 amendments to the MMPA. In *Conservation Council for Hawaii* v. *National Marine Fisheries Service,* 97 F. Supp.3d 1210 (D. Haw. 2015), which concerned a challenge to NMFS' regulations and LOAs to the Navy for activities assessed in the 2013–2018 Hawaii-Southern California Training and Testing (HSTT) MMPA rulemaking, the Court ruled that NMFS' failure to consider PBR when evaluating lethal takes in the negligible impact analysis under section 101(a)(5)(A) violated the requirement to use the best available science.

PBR is defined in section 3 of the MMPA as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population (OSP) and, although not controlling, can be one measure considered among other factors when evaluating the effects of M/SI on a marine mammal species or stock during the section 101(a)(5)(A) process. OSP is defined in section 3 of the MMPA as the number of animals which will result in the maximum productivity of the population or the species, keeping in mind the carrying capacity of the habitat and the health of the ecosystem of which they form a constituent element. Through section 2, an overarching goal of the statute is to ensure that each species or stock of marine mammal is maintained at or returned to its OSP.

PBR values are calculated by NMFS as the level of annual removal from a stock that will allow that stock to equilibrate within OSP at least 95 percent of the time, and is the product of factors relating to the minimum population estimate of the stock (N_{min}), the productivity rate of the stock at a small population size, and a recovery factor. Determination of appropriate values for these three elements incorporates significant precaution, such that application of the parameter to the management of marine mammal stocks may be reasonably certain to achieve the goals of the MMPA. For example, calculation of the minimum population estimate (N_{min}) incorporates the level of precision and degree of variability associated with abundance information, while also providing reasonable assurance that the stock size is equal to or greater than the estimate (Barlow *et al.,* 1995), typically by using the 20th percentile of a log-normal distribution of the population estimate. In general, the three factors are developed on a stock-specific basis in consideration of one another in order to produce conservative PBR values that appropriately account for both imprecision that may be estimated, as well as potential bias stemming from lack of knowledge (Wade, 1998).

Congress called for PBR to be applied within the management framework for commercial fishing incidental take under section 118 of the MMPA. As a result, PBR cannot be applied appropriately outside of the section 118 regulatory framework without consideration of how it applies within the section 118 framework, as well as how the other statutory management frameworks in the MMPA differ from the framework in section 118. PBR was not designed and is not used as an absolute threshold limiting commercial fisheries. Rather, it serves as a means to evaluate the relative impacts of those activities on marine mammal stocks. Even where commercial fishing is causing M/SI at levels that exceed PBR, the fishery is not suspended. When M/SI exceeds PBR in the commercial fishing context under section 118, NMFS may develop a take reduction plan, usually with the assistance of a take reduction team. The take reduction plan will include measures to reduce and/or minimize the taking of marine mammals by commercial fisheries to a level below the stock's PBR. That is, where the total annual human-caused M/SI exceeds PBR, NMFS is not required to halt fishing activities contributing to total M/SI but rather utilizes the take reduction process to further mitigate the effects of fishery activities via additional bycatch reduction measures. In other words, under section 118 of the MMPA, PBR does not serve as a strict cap on the operation of commercial fisheries that may incidentally take marine mammals.

Similarly, to the extent PBR may be relevant when considering the impacts of incidental take from activities other than commercial fisheries, using it as the sole reason to deny (or issue) incidental take authorization for those activities would be inconsistent with Congress's intent under section

101(a)(5), NMFS' long-standing regulatory definition of ''negligible impact,'' and the use of PBR under section 118. The standard for authorizing incidental take for activities other than commercial fisheries under section 101(a)(5) continues to be, among other things that are not related to PBR, whether the total taking will have a negligible impact on the species or stock. Nowhere does section 101(a)(5)(A) reference use of PBR to make the negligible impact finding or authorize incidental take through multi-year regulations, nor does its companion provision at 101(a)(5)(D) for authorizing non-lethal incidental take under the same negligible-impact standard. NMFS' MMPA implementing regulations state that take has a negligible impact when it does not ''adversely affect the species or stock through effects on annual rates of recruitment or survival''—likewise without reference to PBR. When Congress amended the MMPA in 1994 to add section 118 for commercial fishing, it did not alter the standards for authorizing non-commercial fishing incidental take under section 101(a)(5), implicitly acknowledging that the negligible impact standard under section 101(a)(5) is separate from the PBR metric under section 118. In fact, in 1994 Congress also amended section 101(a)(5)(E) (a separate provision governing commercial fishing incidental take for species listed under the ESA) to add compliance with the new section 118 but retained the standard of the negligible impact finding under section 101(a)(5)(A) (and section 101(a)(5)(D)), showing that Congress understood that the determination of negligible impact and application of PBR may share certain features but are, in fact, different.

Since the introduction of PBR in 1994, NMFS had used the concept almost entirely within the context of implementing sections 117 and 118 and other commercial fisheries management-related provisions of the MMPA. Prior to the Court's ruling in *Conservation Council for Hawaii* v. *National Marine Fisheries Service* and consideration of PBR in a series of section 101(a)(5) rulemakings, there were a few examples where PBR had informed agency deliberations under other MMPA sections and programs, such as playing a role in the issuance of a few scientific research permits and subsistence takings. But as the Court found when reviewing examples of past PBR consideration in *Georgia Aquarium* v. *Pritzker,* 135 F. Supp. 3d 1280 (N.D. Ga. 2015), where NMFS had considered PBR outside the commercial fisheries context, ''it has treated PBR as only one 'quantitative tool' and [has not used it] as the sole basis for its impact analyses.'' Further, the agency's thoughts regarding the appropriate role of PBR in relation to MMPA programs outside the commercial fishing context have evolved since the agency's early application of PBR to section 101(a)(5) decisions. Specifically, NMFS' denial of a request for incidental take authorization for the U.S. Coast Guard in 1996 seemingly was based on the potential for lethal take in relation to PBR and did not appear to consider other factors that might also have informed the potential for ship strike in relation to negligible impact (61 FR 54157; October 17, 1996).

The MMPA requires that PBR be estimated in SARs and that it be used in applications related to the management of take incidental to commercial fisheries (*i.e.,* the take reduction planning process described in section 118 of the MMPA and the determination of whether a stock is ''strategic'' as defined in section 3), but nothing in the statute requires the application of PBR outside the management of commercial fisheries interactions with marine mammals. Nonetheless, NMFS recognizes that as a quantitative metric, PBR may be useful as a consideration when evaluating the impacts of other human-caused activities on marine mammal stocks. Outside the commercial fishing context, and in consideration of all known human-caused mortality, PBR can help inform the potential effects of M/SI requested to be authorized under 101(a)(5)(A). As noted by NMFS and the U.S. Fish and Wildlife Service in our implementation regulations for the 1986 amendments to the MMPA (54 FR 40341, September 29, 1989), the Services consider many factors, when available, in making a negligible impact determination, including, but not limited to, the status of the species or stock relative to OSP (if known); whether the recruitment rate for the species or stock is increasing, decreasing, stable, or unknown; the size and distribution of the population; and existing impacts and environmental conditions. In this multi-factor analysis, PBR can be a useful indicator for when, and to what extent, the agency should take an especially close look at the circumstances associated with the potential mortality, along with any other factors that could influence annual rates of recruitment or survival.

When considering PBR during evaluation of effects of M/SI under section 101(a)(5)(A), we first calculate a metric for each species or stock that incorporates information regarding ongoing anthropogenic M/SI from all sources into the PBR value (*i.e.,* PBR minus the total annual anthropogenic mortality/serious injury estimate in the SAR), which is called ''residual PBR.'' (Wood *et al.*, 2012). We first focus our analysis on residual PBR because it incorporates anthropogenic mortality occurring from other sources. If the ongoing human-caused mortality from other sources does not exceed PBR, then residual PBR is a positive number, and we consider how the anticipated or potential incidental M/SI from the activities being evaluated compares to residual PBR using the framework in the following paragraph. If the ongoing anthropogenic mortality from other sources already exceeds PBR, then residual PBR is a negative number and we consider the M/SI from the activities being evaluated as described further below.

When ongoing total anthropogenic mortality from the applicant's specified activities does not exceed PBR and residual PBR is a positive number, as a simplifying analytical tool we first consider whether the specified activities could cause incidental M/SI that is less than 10 percent of residual PBR (the ''insignificance threshold,'' see below). If so, we consider M/SI from the specified activities to represent an insignificant incremental increase in ongoing anthropogenic M/SI for the marine mammal stock in question that alone (*i.e.,* in the absence of any other take) will not adversely affect annual rates of recruitment and survival. As such, this amount of M/SI would not be expected to affect rates of recruitment or survival in a manner resulting in more than a negligible impact on the affected stock unless there are other factors that could affect reproduction or survival, such as Level A and/or Level B harassment, or other considerations such as information that illustrates the uncertainty involved in the calculation of PBR for some stocks. In a few prior incidental take rulemakings, this threshold was identified as the ''significance threshold,'' but it is more accurately labeled an insignificance threshold, and so we use that terminology here, as we did in the Atlantic Fleet Training and Testing (AFTT) Proposed (83 FR 10954; March 13, 2017) and Final Rules (83 FR 57076; November 14, 2018). Assuming that any additional incidental take by Level A or Level B harassment from the activities in question would not combine with the effects of the authorized M/SI to exceed the negligible impact level, the anticipated M/SI caused by the

activities being evaluated would have a negligible impact on the species or stock. However, M/SI above the 10 percent insignificance threshold does not indicate that the M/SI associated with the specified activities is approaching a level that would necessarily exceed negligible impact. Rather, the 10 percent insignificance threshold is meant only to identify instances where additional analysis of the anticipated M/SI is not required because the negligible impact standard clearly will not be exceeded on that basis alone.

Where the anticipated M/SI is near, at, or above residual PBR, consideration of other factors (positive or negative), including those outlined above, as well as mitigation is especially important to assessing whether the M/SI will have a negligible impact on the species or stock. PBR is a conservative metric and not sufficiently precise to serve as an absolute predictor of population effects upon which mortality caps would appropriately be based. For example, in some cases stock abundance (which is one of three key inputs into the PBR calculation) is underestimated because marine mammal survey data within the U.S. Exclusive Economic Zone (EEZ) are used to calculate the abundance even when the stock range extends well beyond the U.S. EEZ. An underestimate of abundance could result in an underestimate of PBR. Alternatively, we sometimes may not have complete M/SI data beyond the U.S. EEZ to compare to PBR, which could result in an overestimate of residual PBR. The accuracy and certainty around the data that feed any PBR calculation, such as the abundance estimates, must be carefully considered to evaluate whether the calculated PBR accurately reflects the circumstances of the particular stock. M/SI that exceeds PBR may still potentially be found to be negligible in light of other factors that offset concern, especially when robust mitigation and adaptive management provisions are included.

In *Conservation Council for Hawaii* v. *National Marine Fisheries Service,* which involved the challenge to NMFS' issuance of LOAs to the Navy in 2013 for activities in the HSTT Study Area, the Court reached a different conclusion, stating, ''Because any mortality level that exceeds PBR will not allow the stock to reach or maintain its OSP, such a mortality level could not be said to have only a 'negligible impact' on the stock.'' As described above, the Court's statement fundamentally misunderstands the two terms and incorrectly indicates that these concepts (PBR and ''negligible impact'') are directly connected, when in fact nowhere in the MMPA is it indicated that these two terms are equivalent.

Specifically, PBR was designed as a tool for evaluating mortality and is defined as the number of animals that can be removed while ''allowing that stock to reach or maintain its OSP.'' OSP is defined as a population that falls within a range from the population level that is the largest supportable within the ecosystem to the population level that results in maximum net productivity, and thus is an aspirational management goal of the overall statute with no specific timeframe by which it should be met. PBR is designed to ensure minimal deviation from this overarching goal, with the formula for PBR typically ensuring that growth towards OSP is not reduced by more than 10 percent (or equilibrates to OSP 95 percent of the time). As PBR is applied by NMFS, it provides that growth toward OSP is not reduced by more than 10 percent, which certainly allows a stock to ''reach or maintain its OSP'' in a conservative and precautionary manner—and we can therefore clearly conclude that if PBR were not exceeded, there would not be adverse effects on the affected species or stocks. Nonetheless, it is equally clear that in some cases the time to reach this aspirational OSP level could be slowed by more than 10 percent (*i.e.,* total human-caused mortality in excess of PBR could be allowed) without adversely affecting a species or stock through effects on its rates of recruitment or survival. Thus even in situations where the inputs to calculate PBR are thought to accurately represent factors such as the species' or stock's abundance or productivity rate, it is still possible for incidental take to have a negligible impact on the species or stock even where M/SI exceeds residual PBR or PBR.

As noted above, PBR is helpful in informing the analysis of the effects of mortality on a species or stock because it is important from a biological perspective to be able to consider how the total mortality in a given year may affect the population. However, section 101(a)(5)(A) of the MMPA indicates that NMFS shall authorize the requested incidental take from a specified activity if we find that the total of such taking *i.e.,* from the specified activity will have a negligible impact on such species or stock. In other words, the task under the statute is to evaluate the applicant's anticipated take in relation to their take's impact on the species or stock, not other entities' impacts on the species or stock. Neither the MMPA nor NMFS' implementing regulations call for consideration of other unrelated activities and their impacts on the species or stock. In fact, in response to public comments on the implementing regulations NMFS explained that such effects are not considered in making negligible impact findings under section 101(a)(5), although the extent to which a species or stock is being impacted by other anthropogenic activities is not ignored. Such effects are reflected in the baseline of existing impacts as reflected in the species' or stock's abundance, distribution, reproductive rate, and other biological indicators.

NMFS guidance for commercial fisheries provides insight when evaluating the effects of an applicant's incidental take as compared to the incidental take caused by other entities. Parallel to section 101(a)(5)(A), section 101(a)(5)(E) of the MMPA provides that NMFS shall allow the incidental take of ESA-listed endangered or threatened marine mammals by commercial fisheries if, among other things, the incidental M/SI from the commercial fisheries will have a negligible impact on the species or stock. As discussed earlier, the authorization of incidental take resulting from commercial fisheries and authorization for activities other than commercial fisheries are under two separate regulatory frameworks. However when it amended the statute in 1994 to provide a separate incidental take authorization process for commercial fisheries, Congress kept the requirement of a negligible impact determination for this one category of species, thereby applying the standard to both programs. Therefore, while the structure and other standards of the two programs differ such that evaluation of negligible impact under one program may not be fully applicable to the other program (*e.g.,* the regulatory definition of ''negligible impact'' at 50 CFR 216.103 applies only to activities other than commercial fishing), guidance on determining negligible impact for commercial fishing take authorizations can be informative when considering incidental take outside the commercial fishing context. In 1999, NMFS published criteria for making a negligible impact determination pursuant to section 101(a)(5)(E) of the MMPA in a notice of proposed permits for certain fisheries (64 FR 28800; May 27, 1999). Criterion 2 stated ''If total human-related serious injuries and mortalities are greater than PBR, and fisheries-related mortality is less than 0.1 PBR, individual fisheries may be permitted if management measures are being taken to address non-fisheries-related serious injuries and mortalities.

When fisheries-related serious injury and mortality is less than 10 percent of the total, the appropriate management action is to address components that account for the major portion of the total.'' This criterion addresses when total human-caused mortality is exceeding PBR, but the activity being assessed is responsible for only a small portion of the mortality. In incidental take authorizations in which NMFS has recently articulated a fuller description of how we consider PBR under section 101(a)(5)(A), this situation had not arisen, and NMFS' description of how we consider PBR in the section 101(a)(5) authorization process did not, therefore, include consideration of this scenario. However, the analytical framework we use here appropriately incorporates elements of the one developed for use under section 101(a)(5)(E) and because the negligible impact determination under section 101(a)(5)(A) focuses on the activity being evaluated, it is appropriate to utilize the parallel concept from the framework for section 101(a)(5)(E).

Accordingly, we are using a similar criterion in our negligible impact analysis under section 101(a)(5)(A) to evaluate the relative role of an applicant's incidental take when other sources of take are causing PBR to be exceeded, but the take of the specified activity is comparatively small. Where this occurs, we may find that the impacts of the taking from the specified activity may (alone) be negligible even when total human-caused mortality from all activities exceeds PBR if (in the context of a particular species or stock): the authorized mortality or serious injury would be less than or equal to 10 percent of PBR and management measures are being taken to address serious injuries and mortalities from the other activities (*i.e.,* other than the specified activities covered by the incidental take authorization under consideration). We must also determine, though, that impacts on the species or stock from other types of take (*i.e.,* harassment) caused by the applicant do not combine with the impacts from mortality or serious injury to result in adverse effects on the species or stock through effects on annual rates of recruitment or survival.

As discussed above, however, while PBR is useful in informing the evaluation of the effects of M/SI in section 101(a)(5)(A) determinations, it is just one consideration to be assessed in combination with other factors and is not determinative, including because, as explained above, the accuracy and certainty of the data used to calculate PBR for the species or stock must be considered. And we reiterate the considerations discussed above for why it is not appropriate to consider PBR an absolute cap in the application of this guidance. Accordingly, we use PBR as a trigger for concern while also considering other relevant factors to provide a reasonable and appropriate means of evaluating the effects of potential mortality on rates of recruitment and survival, while acknowledging that it is possible to exceed PBR (or exceed 10 percent of PBR in the case where other human-caused mortality is exceeding PBR but the specified activity being evaluated is an incremental contributor, as described in the last paragraph) by some small amount and still make a negligible impact determination under section 101(a)(5)(A).

Regarding the impacts of the specified activities analyzed here, a stock-wide PBR for ringed seals is unknown; however, Muto et al. (2018) estimate that PBR for ringed seals in the Bering Sea alone is 5,100 seals. Total annual mortality and serious injury is 1,054 for an r-PBR of 4,046, which means that the 10 percent insignificance threshold is 405 seals. No mortality or serious injury of ringed seals is currently authorized under any other incidental take authorization issued pursuant to section 101(a)(5)(A) of the MMPA. In the case of the LDPI, the authorized taking, by mortality, of two ringed seals over the course of 5 years, which equates to 0.4 mortality takes annually, is less than 10 percent r-PBR when considering mortality and serious injury caused by other anthropogenic sources. This takings amount, by mortality and serious injury, is considered insignificant and therefore supports our negligible impact finding.

Harassment

Hilcorp requests, and NMFS authorizes takes, by Level A harassment and Level B harassment, of six species of marine mammals. The amount of taking analyzed, and which may be authorized pursuant to these regulations, is low compared to marine mammal abundance. Potential impacts of LDPI activities include PTS, TTS, and behavioral changes due to exposure to construction and operation noise. The potential for Level A harassment occurs during impact pile driving. As discussed in the *Potential Effects of the Specified Activity on Marine Mammals and Their Habitat* section, PTS is a permanent shift in hearing threshold and the severity of the shift is determined by a myriad of factors. Here, we expect cetaceans to incur only a slightly elevated shift in hearing threshold because we do not expect them to be close to the source (especially large whales who primarily stay outside the McClure Island group) and impact pile driving (the source with the greatest potential to cause PTS) would only occur for a maximum of 40 minutes per day. Therefore, the potential for large threshold shifts is unlikely. Further, the frequency range of hearing that may be impaired is limited to the frequency bands of the source. Pile driving exhibits energy in lower frequencies. While low-frequency baleen whales are most susceptible to such bands, these are the species that are unlikely to come very close to the source. Mid-frequency cetaceans and phocids do not hear best within these lower frequency bands; therefore, the resulting impact of any threshold shift is less likely to impair vital hearing. All other noise generated from the project is expected to be low level from activities such as slope-shaping and drilling and not result in PTS.

Cetaceans are infrequent visitors to Foggy Island Bay with their primary habitat lying outside the McClure Islands. Any taking within Foggy Island Bay is not expected to impact reproductive or survival activities as the bay is not known to contain such critical areas as rookeries, mating grounds, or other areas of similar significance. Some ringed seals do lair in Foggy Island Bay; however, the area impacted by the project is small compared to available habitat. Further, to offset impacts to reproductive behaviors by ringed seals (*e.g.,* lairing, pupping), Hilcorp would follow a number of ice road BMPs developed in coordination with NMFS ringed seal experts. Hilcorp would also not impact pile drive during the bowhead whale hunt, thereby minimizing impacts to whales during peak migration periods (we note the peak migratory pathway for bowhead whales is well outside the McClure Islands). Finally, for reasons described above, the taking of two ringed seals, by mortality, over the course of 5 years is not expected to have impacts on the species' rates of recruitment and survival.

In summary and as described above, the following factors primarily support our preliminary determination that the impacts resulting from this activity are not expected to adversely affect the species or stock through effects on annual rates of recruitment or survival:

- Only two ringed seals are authorized to be taken by mortality over 5 years;
- Any PTS would be of a small degree;

• The amount of takes, by harassment, is low compared to population sizes;

• The area ensonified by Hilcorp's activities does not occur in any known important areas for marine mammals and is a de minimis subset of habitat used by and available to marine mammals;

• Impacts to critical behaviors such as lairing and pupping by ringed seals would be avoided and minimized through implementation of ice road BMPs; and

• Hilcorp would avoid noise-generating activities during the bowhead whale hunt; thereby minimizing impact to critical behavior (*i.e.,* migration).

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the monitoring and mitigation measures, NMFS finds that the total marine mammal taking from the proposed activity will have a negligible impact on all affected marine mammal species or stocks.

Small Numbers

As noted above, only small numbers of incidental takes may be authorized under Section 101(a)(5)(A) of the MMPA for specified activities. The MMPA does not define small numbers and so, in practice, where estimated numbers are available NMFS compares the number of individuals taken to the most appropriate estimation of abundance of the relevant species or stock in our determination of whether an authorization is limited to small numbers of marine mammals. Additionally, other qualitative factors may be considered in the analysis, such as the temporal or spatial scale of the activities.

The amount of total taking (*i.e.,* Level A harassment, Level B harassment, and, for ringed seals, mortality) of any marine mammal stock over the course of 5 years, is less than one percent of any population (Table 12).

TABLE 12—AMOUNT OF TAKING, BY SPECIES, AUTHORIZED RELATIVE TO POPULATION ESTIMATES (N_{best})

Species	Stock	Population estimate	Total taking	Percent of population
Bowhead whale	Arctic	16,820	28	<1
Gray whale	ENP	20,990	12	<1
Beluga whale	Beaufort Sea	39,258	130	<1
Ringed seal	Alaska	170,000	416	<1
Bearded seal	Alaska	299,174	64	<1
Spotted seal	Alaska	423,625	64	<1

Based on the analysis contained herein of the proposed activity (including the mitigation and monitoring measures) and the anticipated taking of marine mammals, NMFS finds that small numbers of marine mammals will be taken relative to the population sizes of the affected species or stocks.

Impact on Availability of Affected Species for Taking for Subsistence Uses

As described in the *Marine Mammal* section of the document, all species potentially taken by Hilcorp's specified activities are key subsistence species, in particular the bowhead whales and ice seals. Hilcorp has proposed and NMFS has included several mitigation measures to address potential impacts on the availability of marine mammals for subsistence use. The AEWC expressed support for Hilcorp's efforts to reduce impacts to subsistence use and offered no objection to the final rule. Hilcorp is required to abide by the POC. In addition, mitigation measures designed to minimize impacts on marine mammals also minimize impacts to subsistence users (*e.g.,* avoid impact pile driving during the fall bowhead whale hunt). Hilcorp and NMFS have also developed a comprehensive set of BMPs to minimize impacts to ice seals during ice-covered months. Considering the coordination with the AEWC, Hilcorp's proposed work schedule (*i.e.,* conducting the majority of work in winter when bowhead whales are not present), and the incorporation of several mitigation measures, we have determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

Adaptive Management

The regulations governing the taking of marine mammals incidental to Hilcorp's LPDI construction and operational activities would contain an adaptive management component.

The reporting requirements associated with this rule are designed to provide NMFS with monitoring data from the previous year to allow consideration of whether any changes are appropriate. The use of adaptive management allows NMFS to consider new information from different sources to determine (with input from Hilcorp regarding practicability) on an annual or biennial basis if mitigation or monitoring measures should be modified (including additions or deletions). Mitigation measures could be modified if new data suggests that such modifications would have a reasonable likelihood of reducing adverse effects to marine mammals and if the measures are practicable.

The following are some of the possible sources of applicable data to be considered through the adaptive management process: (1) Results from monitoring reports, as required by MMPA authorizations; (2) results from general marine mammal and sound research; and (3) any information which reveals that marine mammals may have been taken in a manner, extent, or number not authorized by these regulations or subsequent LOAs. In addition, results of the annual peer-review panel, of which Hilcorp has agreed to participate, may warrant modifications through the adaptive management process.

National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216–6A, NMFS must evaluate our proposed action (*i.e.,* the promulgation of regulations and subsequent issuance of incidental take authorization) and alternatives with respect to potential impacts on the human environment.

On August 23, 2018, the Bureau of Ocean Energy Management (BOEM) released a Final Environmental Impact Statement (EIS) analyzing the possible environmental impacts of Hilcorp's proposed Liberty development and production plan (DPP). BOEM's Draft EIS was made available for public comment from August 18, 2017 through December 8, 2017. The final EIS may be found at *https://www.boem.gov/hilcorp-*

liberty/. NMFS is a cooperating agency on the EIS. NMFS has conducted an independent evaluation of the EIS, including consideration of public comments on the proposed rule, and found that the EIS includes adequate information analyzing the effects on the human environment of issuing this final rule. Therefore, NMFS has adopted the EIS and signed a Record of Decision documenting NMFS' finding. All NEPA documents are available on the project's website at *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.*

Endangered Species Act (ESA)

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA: 16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of ITAs, NMFS consults internally, in this case with the Alaska Regional Office, whenever we propose to authorize take for endangered or threatened species. Specific to the LDPI, the bowhead whale, ringed seal, and bearded seal (Beringia DPS) are listed under the ESA (see Table 2).

The Permit and Conservation Division requested initiation of Section 7 consultation with the Alaska Regional Office on the promulgation of five-year regulations and the subsequent issuance of LOAs to Hilcorp under section 101(a)(5)(A) of the MMPA. On August 30, 2019, NMFS Alaska Region (AKR) issued a Biological Opinion on the Liberty Oil and Gas Development and Production Plan Activities, Beaufort Sea, Alaska to NMFS OPR concluding the promulgation of regulations and subsequent issuance of the LOA would not jeopardize the continued existence of any endangered or threatened species or destroy or adversely modify any designated critical habitat.

Classification

Pursuant to the procedures established to implement Executive Order 12866, the Office of Management and Budget has determined that this final rule is not significant.

Pursuant to section 605(b) of the Regulatory Flexibility Act (RFA), the Chief Counsel for Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration that this final rule would not have a significant economic impact on a substantial number of small entities. Hilcorp is the sole entity that is subject to the requirements in these regulations, and Hilcorp is not a small governmental jurisdiction, small organization, or small business, as defined by the RFA. Because of this certification, a regulatory flexibility analysis is not required and none has been prepared.

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act (PRA) unless that collection of information displays a currently valid OMB control number. This final rule contains collection-of-information requirements subject to the provisions of the PRA. These requirements have been approved by OMB under control number 0648–0151 and include applications for regulations, subsequent LOAs, and reports.

List of Subjects in 50 CFR Part 217

Administrative practice and procedure, Alaska, Endangered and threatened species, Indians, Marine mammals, Oil and gas exploration, Reporting and recordkeeping requirements, Wildlife.

Dated: December 11, 2019.

Samuel D. Rauch III,

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

For reasons set forth in the preamble, 50 CFR part 217 is amended as follows:

PART 217—REGULATIONS GOVERNING THE TAKE OF MARINE MAMMALS INCIDENTAL TO SPECIFIED ACTIVITIES

■ 1. The authority citation for part 217 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.,* unless otherwise noted.

■ 2. Add subpart D to part 217 to read as follows:

Subpart D—Taking Marine Mammals Incidental to Construction and Operation of the Liberty Drilling and Production Island

Sec.

217.30 Specified activity and specified geographical region.
217.31 Effective dates.
217.32 Permissible methods of taking.
217.33 Prohibitions.
217.34 Mitigation requirements.
217.35 Requirements for monitoring and reporting.
217.36 Letters of Authorization.
217.37 Renewals and modifications of Letters of Authorization.
217.38–217.39 [Reserved]

Subpart D—Taking Marine Mammals Incidental to Construction and Operation of the Liberty Drilling and Production Island

§ 217.30 Specified activity and specified geographical region.

(a) Regulations in this subpart apply only to Hilcorp LLC (Hilcorp) and those persons it authorizes or funds to conduct activities on its behalf for the taking of marine mammals that occurs in the areas outlined in paragraph (b) of this section and that occurs incidental to construction, maintenance, and operation of the Liberty Drilling and Production Island (LDPI) and associated infrastructure.

(b) The taking of marine mammals by Hilcorp may be authorized in a Letter of Authorization (LOA) only if it occurs within the Beaufort Sea, Alaska.

§ 217.31 Effective dates.

Regulations in this subpart are effective from December 1, 2021, through November 30, 2026.

§ 217.32 Permissible methods of taking.

Under LOAs issued pursuant to §§ 216.106 of this chapter and 217.36, the Holder of the LOA (hereinafter ''Hilcorp'') may incidentally, but not intentionally, take marine mammals within the area described in § 217.30(b) by mortality, serious injury, Level A harassment, or Level B harassment associated with the LDPI construction and operation activities, including associated infrastructure, provided the activities are in compliance with all terms, conditions, and requirements of the regulations in this subpart and the appropriate LOA.

§ 217.33 Prohibitions.

Notwithstanding takings contemplated in § 217.32 and authorized by an LOA issued under §§ 216.106 of this chapter and 217.36, no person in connection with the activities described in § 217.30 may:

(a) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or an LOA issued under §§ 216.106 of this chapter and 217.36;

(b) Take any marine mammal not specified in such LOAs;

(c) Take any marine mammal specified in such LOAs in any manner other than as specified;

(d) Take a marine mammal specified in such LOAs if the National Marine Fisheries Service (NMFS) determines such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(e) Take a marine mammal specified in such LOAs if NMFS determines such

taking results in an unmitigable adverse impact on the species or stock of such marine mammal for taking for subsistence uses.

§ 217.34 Mitigation requirements.

When conducting the activities identified in § 217.30(a), the mitigation measures contained in any LOA issued under § 216.106 of this chapter must be implemented. These mitigation measures shall include but are not limited to:

(a) *General conditions.* (1) Hilcorp must renew, on an annual basis, the Plan of Cooperation (POC), throughout the life of the regulations in this subpart;

(2) A copy of any issued LOA must be in the possession of Hilcorp, its designees, and work crew personnel operating under the authority of the issued LOA;

(3) Hilcorp must conduct briefings for construction and ice road supervisors and crews, and the marine mammal and acoustic monitoring teams prior to the start of annual ice road or LDPI construction, and when new personnel join the work, in order to explain responsibilities, communication procedures, the marine mammal monitoring protocol, and operational procedures;

(4) Hilcorp must allow subsistence hunters to use the LDPI for safe harbor during severe storms, if requested by hunters;

(5) In the unanticipated event of an oil spill during LDPI operational years, Hilcorp must notify NMFS of the spill within 48 hours, regardless of size, and implement measures contained within the Liberty Oil Spill Response Plan; and

(6) Hilcorp must strive to complete pile driving and pipeline installation during the ice-covered season.

(7) Except during takeoff and landing and in emergency situations, aircraft must maintain an altitude of at least 457 m (1,500 ft). If a marine mammal is observed, then a horizontal distance of 305 m (100 ft) of whales or seals will be maintained between the aircraft and the observed marine mammals.

(b) *Ice road construction, maintenance, and operation.* (1) Hilcorp must implement the NMFS-approved Ice Road and Ice Trail Best Management Practices (BMPs) and the Wildlife Action Plan. These documents may be updated as needed throughout the life of the regulations in this subpart, in consultation with NMFS.

(2) Hilcorp must not approach ringed seal structures (*i.e.,* lairs or breathing holes) within 150 m or ringed seals within 50 m.

(c) *Liberty Drilling Production Island construction.* (1) For all pile driving and construction activities involving heavy equipment, Hilcorp must implement a minimum shutdown zone of 10 meters (m) from any marine mammal in water or seals on land. If a marine mammal comes within or is about to enter the shutdown zone, such operations must cease immediately;

(2) For all pile driving activity, Hilcorp shall implement shutdown zones with radial distances as identified in any LOA issued under §§ 216.106 of this chapter and 217.36. If a marine mammal comes within or is about to enter the shutdown zone, such operations must cease immediately. NMFS may adjust the shutdown zones pending review and approval of an acoustic monitoring report (see § 217.35);

(3) Hilcorp must employ NMFS-approved protected species observers (PSOs) and designate monitoring zones with radial distances as identified in any LOA issued under §§ 216.106 of this chapter and 217.36. NMFS may adjust the monitoring zones pending review and approval of an acoustic monitoring report (see § 217.35);

(4) If a bowhead whale or other low frequency cetacean enters the Level A harassment zone, pile or pipe driving must be shut down immediately. If a beluga whale or pinniped enters the Level A harassment zone while pile driving is ongoing, work may continue until the pile is completed (estimated to require approximately 15–20 minutes), but additional pile driving must not be initiated until the animal has left the Level A harassment zone. During this time, PSOs must monitor the animal and record behavior;

(5) If a marine mammal is approaching a Level A harassment zone and pile driving has not commenced, pile driving must be delayed. Pile driving may not commence or resume until either the animal has voluntarily left and been visually confirmed beyond the shutdown zone; 15 minutes have passed without subsequent detections of small cetaceans and pinnipeds; or 30 minutes have passed without subsequent detections of large cetaceans;

(6) If a species for which authorization has not been granted, or a species for which authorization has been granted but the authorized takes are met, is observed approaching or within the monitoring zone (which equates to the Level B harassment zone), pile driving and removal activities must shut down immediately using delay and shut-down procedures. Activities must not resume until the animal has been confirmed to have left the area or the observation time period, as indicated in paragraph (c)(5) of this section, has elapsed;

(7) Hilcorp must use soft start techniques when impact pile driving. Soft start requires contractors to provide an initial set of strikes at reduced energy, followed by a thirty-second waiting period, then two subsequent reduced energy strike sets. A soft start must be implemented at the start of each day's impact pile driving and at any time following cessation of impact pile driving for a period of thirty minutes or longer;

(8) All pipe- and pile-driving activities (impact and vibratory) and LDPI support vessel traffic outside the barrier islands must cease by August 1, annually, and not resume until the official end of the hunt or until the quota has been met, whichever occurs first. Hilcorp must coordinate annually with subsistence users on the dates of these hunts; and

(9) Should an ice seal be observed on or near the LDPI by any Hilcorp personnel, during construction or operation, the sighting must be reported to Hilcorp's Environmental Specialist. No construction activity should occur within 10 m of an ice seal and any vehicles used should use precaution and not approach any ice seal within 10 m.

(d) *Vessel restrictions.* When operating vessels, Hilcorp must:

(1) Reduce vessel speed to 5 knots (kn) if a whale is observed within 500 m (1641 feet (ft)) of the vessel and is on a potential collision course with the vessel, or if a vessel is within 275 m (902 ft) of whales, regardless of course relative to the vessel;

(2) Avoid multiple changes in vessel direction;

(3) Not approach within 800 m (2,624 ft) of a North Pacific right whale or within 5.6 km (3 nautical miles) of Steller sea lion rookeries or major haulouts; and

(4) Avoid North Pacific right whale critical habitat or, if critical habitat cannot be avoided, reduce vessel speed during transit.

§ 217.35 Requirements for monitoring and reporting.

(a) All marine mammal and acoustic monitoring must be conducted in accordance to Hilcorp's Marine Mammal Mitigation and Monitoring Plan (4MP) and Acoustic Monitoring Plan, which includes acoustic monitoring during both the open-water and ice-covered seasons. These plans may be modified throughout the life of

the regulations in this subpart upon NMFS review and approval.

(b) Monitoring must be conducted by NMFS-approved PSOs, who must have no other assigned tasks during monitoring periods and be equipped with, at minimum, binoculars and rangefinders. At minimum, two PSOs must be placed on elevated platforms on the island during the open-water season when island construction activities are occurring. These observers will monitor for marine mammals and implement shutdown or delay procedures when applicable through communication with the equipment operator.

(c) One PSO will be placed on the side where construction activities are taking place and the other placed on the opposite side of the LDPI; both observers will be on elevated platforms.

(d) PSOs will rotate duties such that they will observe for no more than 4 hours at a time and no more than 12 hours in a 24-hour period.

(e) An additional island-based PSO will work with an aviation specialist to use an unmanned aircraft system (UAS) to detect marine mammals in the monitoring zones during pile and pipe driving and slope shaping. Should UAS monitoring not be feasible or be deemed ineffective, a boat-based PSO must monitor for marine mammals during pile and pipe driving.

(f) During the open-water season, marine mammal monitoring must take place from 30 minutes prior to initiation of pile and pipe driving activity through 30 minutes post-completion of pile driving activity. Pile driving may commence when observers have declared the shutdown zone clear of marine mammals. In the event of a delay or shutdown of activity resulting from marine mammals in the shutdown zone, animals must be allowed to remain in the shutdown zone (*i.e.,* must leave of their own volition) and their behavior must be monitored and documented.

(g) After island construction is complete but drilling activities are occurring, a PSO will be stationed on the LDPI for approximately 4 weeks during the month of August to monitor for the presence of marine mammals around the island in the monitoring zone.

(1) Marine mammal monitoring during pile driving and removal must be conducted by NMFS-approved PSOs in a manner consistent with the following:

(i) At least one observer must have prior experience working as an observer;

(ii) Other observers may substitute education (degree in biological science or a related field) or training for experience;

(iii) Where a team of three or more observers are required, one observer must be designated as lead observer or monitoring coordinator. The lead observer must have prior experience working as an observer; and

(iv) Hilcorp must submit PSO curricula vitae (CVs) for approval by NMFS prior to the onset of pile driving.

(2) PSOs must have the following additional qualifications:

(i) Ability to conduct field observations and collect data according to assigned protocols;

(ii) Experience or training in the field identification of marine mammals, including the identification of behaviors;

(iii) Sufficient training, orientation, or experience with the construction operation to provide for personal safety during observations;

(iv) Writing skills sufficient to prepare a report of observations including, but not limited to, the number and species of marine mammals observed; dates and times when in-water construction activities were conducted; dates, times, and reason for implementation of mitigation (or why mitigation was not implemented when required); and marine mammal behavior; and

(v) Ability to communicate orally, by radio or in person, with project personnel to provide real-time information on marine mammals observed in the area as necessary.

(h) Hilcorp must deploy autonomous sound recorders on the seabed to conduct underwater passive acoustic monitoring in the open-water season the first four years of the project such that island construction activities, including pile driving, and drilling operations are recorded. Acoustic monitoring will be conducted for the purposes of sound source verification to verify distances from noise sources at which underwater sound levels reach thresholds for potential marine mammal harassment.

(i) Hilcorp must submit incident and monitoring reports.

(1) Hilcorp must submit a draft annual marine mammal and acoustic summary report to NMFS not later than 90 days following the end of each calendar year. Hilcorp must provide a final report within 30 days after receipt of NMFS' comments on the draft report. The reports must contain, at a minimum, the following:

(i) Date and time that monitored activity begins or ends;

(ii) Description of construction activities occurring during each observation period;

(iii) Weather parameters (*e.g.,* wind speed, percent cloud cover, visibility);

(iv) Water conditions (*e.g.,* sea state, tide state);

(v) Species, numbers, and, if possible, sex and age class of marine mammals observed;

(vi) Description of any observable marine mammal behavior patterns, including bearing and direction of travel and distance from construction activity;

(vii) Distance from construction activities to marine mammals and distance from the marine mammals to the observation point;

(viii) An extrapolated total take estimate for each species based on the number of marine mammals observed and the extent of the harassment zones during the applicable construction activities;

(ix) Histograms of the perpendicular distance at which marine mammals were sighted by the PSOs;

(x) Description of implementation of mitigation measures (*e.g.,* shutdown or delay);

(xi) Locations of all marine mammal observations;

(xii) An estimate of the effective strip width of the island-based PSOs and the UAS imagery; and

(xiii) Sightings and locations of marine mammals associated with acoustic detections.

(2) Annually, Hilcorp must submit a report within 90 days of ice road decommissioning. The report must include the following:

(i) Date, time, location of observation;

(ii) Ringed seal characteristics (*i.e.,* adult or pup, behavior (avoidance, resting, etc.));

(iii) Activities occurring during observation, including equipment being used and its purpose, and approximate distance to ringed seal(s);

(iv) Actions taken to mitigate the effects of interaction, emphasizing: which BMPs were successful; which BMPs may need to be improved to reduce interactions with ringed seals; the effectiveness and practicality of implementing BMPs; any issues or concerns regarding implementation of BMPs; and potential effects of interactions based on observation data;

(v) Proposed updates (if any) to the NMFS-approved Wildlife Management Plan(s) or the ice-road BMPs; and

(vi) Reports should be able to be queried for information.

(3) Hilcorp must submit a final 5-year comprehensive summary report to NMFS not later than 90 days following the expiration of this subpart and LOA.

(4) Hilcorp must submit acoustic monitoring reports per the Acoustic Monitoring Plan.

(5) Hilcorp must report on observed injured or dead marine mammals.

(i) In the unanticipated event that the activity defined in § 217.30 clearly causes the take of a marine mammal in a prohibited manner, Hilcorp must immediately cease such activity and report the incident to the Office of Protected Resources (OPR), NMFS, and to the Alaska Regional Stranding Coordinator, NMFS. Activities must not resume until NMFS is able to review the circumstances of the prohibited take. NMFS will work with Hilcorp to determine what measures are necessary to minimize the likelihood of further prohibited take and ensure Marine Mammal Protection Act (MMPA) compliance. Hilcorp may not resume their activities until notified by NMFS. The report must include the following information:

(A) Time, date, and location (latitude/longitude) of the incident;

(B) Description of the incident;

(C) Environmental conditions (*e.g.,* wind speed and direction, Beaufort sea state, cloud cover, visibility);

(D) Description of all marine mammal observations in the 24 hours preceding the incident;

(E) Species identification or description of the animal(s) involved;

(F) Fate of the animal(s); and

(G) Photographs or video footage of the animal(s). Photographs may be taken once the animal has been moved from the waterfront area.

(H) In the event that Hilcorp discovers an injured or dead marine mammal and determines that the cause of the injury or death is unknown and the death is relatively recent (*e.g.,* in less than a moderate state of decomposition), Hilcorp must immediately report the incident to OPR and the Alaska Regional Stranding Coordinator, NMFS. The report must include the information identified in paragraph (i)(5)(i) of this section. Activities may continue while NMFS reviews the circumstances of the incident. NMFS will work with Hilcorp to determine whether additional mitigation measures or modifications to the activities are appropriate.

(ii) In the event Hilcorp discovers an injured or dead marine mammal and determines that the injury or death is not associated with or related to the activities defined in § 217.30 (*e.g.,* previously wounded animal, carcass with moderate to advanced decomposition, scavenger damage), Hilcorp must report the incident to OPR and the Alaska Regional Stranding Coordinator, NMFS, within 24 hours of the discovery. Hilcorp must provide photographs or video footage or other documentation of the stranded animal sighting to NMFS. Photographs may be taken once the animal has been moved from the waterfront area.

§ 217.36 Letters of Authorization.

(a) To incidentally take marine mammals pursuant to this subpart, Hilcorp must apply for and obtain an LOA.

(b) An LOA, unless suspended or revoked, may be effective for a period of time not to exceed the expiration date of this subpart.

(c) If an LOA expires prior to the expiration date of this subpart, Hilcorp may apply for and obtain a renewal of the LOA.

(d) In the event of projected changes to the activity or to mitigation and monitoring measures required by an LOA, Hilcorp must apply for and obtain a modification of the LOA as described in § 217.37.

(e) The LOA shall set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact (*i.e.,* mitigation) on the species, its habitat, and on the availability of the species for subsistence uses; and

(3) Requirements for monitoring and reporting.

(f) Issuance of the LOA shall be based on a determination that the level of taking will be consistent with the findings made for the total taking allowable under this subpart.

(g) Notice of issuance or denial of an LOA shall be published in the **Federal Register** within thirty days of a determination.

§ 217.37 Renewals and modifications of Letters of Authorization.

(a) An LOA issued under §§ 216.106 of this chapter and 217.36 for the activity identified in § 217.30(a) shall be renewed or modified upon request by the applicant, provided that:

(1) The proposed specified activity and mitigation, monitoring, and reporting measures, as well as the anticipated impacts, are the same as those described and analyzed for this subpart (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section); and

(2) NMFS determines that the mitigation, monitoring, and reporting measures required by the previous LOA under this subpart were implemented.

(b) For LOA modification or renewal requests by the applicant that include changes to the activity or the mitigation, monitoring, or reporting (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section) that do not change the findings made for this subpart or result in no more than a minor change in the total estimated number of takes (or distribution by species or years), NMFS may publish a notice of proposed LOA in the **Federal Register**, including the associated analysis of the change, and solicit public comment before issuing the LOA.

(c) An LOA issued under §§ 216.106 of this chapter and 217.36 for the activity identified in § 217.30(a) may be modified by NMFS under the following circumstances:

(1) *Adaptive management.* NMFS may modify (including augment) the existing mitigation, monitoring, or reporting measures (after consulting with Hilcorp regarding the practicability of the modifications) if doing so creates a reasonable likelihood of more effectively accomplishing the goals of the mitigation and monitoring set forth in this subpart.

(i) Possible sources of data that could contribute to the decision to modify the mitigation, monitoring, or reporting measures in an LOA:

(A) Results from Hilcorp's monitoring from the previous year(s).

(B) Results from other marine mammal and/or sound research or studies.

(C) Any information that reveals marine mammals may have been taken in a manner, extent, or number not authorized by this subpart or subsequent LOAs.

(ii) If, through adaptive management, the modifications to the mitigation, monitoring, or reporting measures are substantial, NMFS will publish a notice of proposed LOA in the **Federal Register** and solicit public comment.

(2) *Emergencies.* If NMFS determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in LOAs issued pursuant to §§ 216.106 of this chapter and 217.36, an LOA may be modified without prior notice or opportunity for public comment. Notice would be published in the **Federal Register** within thirty days of the action.

§ § 217.38–217.39 [Reserved]

[FR Doc. 2019–27049 Filed 12–19–19; 8:45 am]

BILLING CODE 3510–22–P

FEDERAL REGISTER

Vol. 84 Friday,

No. 245 December 20, 2019

Part III

Department of Defense

Department of the Army

32 CFR Part 651

Environmental Analysis of Army Actions; Proposed Rule

DEPARTMENT OF DEFENSE

Department of the Army

32 CFR Part 651

[Docket ID: USA–2019–HQ–0017]

RIN 0702–AB02

Environmental Analysis of Army Actions

AGENCY: Department of the Army, DoD.

ACTION: Proposed rule.

SUMMARY: The Department of the Army is revising its procedures for implementing the National Environmental Policy Act of 1969 (NEPA) and the Council on Environmental Quality (CEQ) NEPA regulations. These proposed revisions clarify and update the regulation, incorporate current Army NEPA procedures and practices, and revise and add categorical exclusions (CXs), reduce paperwork and delays, and promote better decisions consistent with national environmental policy set forth in NEPA.

DATES: Consideration will be given to all comments received by February 18, 2020.

ADDRESSES: You may submit comments, identified by 32 CFR part 651, Docket No. USA–2019–HQ–0017 and/or by Regulatory Information Number (RIN) 0702–AB02 or by any of the following methods:

☐ *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

☐ *Mail:* Department of Defense, Office of the Chief Management Officer, Directorate for Oversight and Compliance, 4800 Mark Center Drive, Mailbox #24, Suite 08D09, Alexandria, VA 22350–1700.

Instructions: All submissions received must include the agency name and docket number or RIN for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: David Guldenzopf, Ph.D., Office of the Deputy Assistant Secretary of the Army, Environmental, Safety, and Occupational Health, Director for Environmental Quality, (571) 256–7822.

SUPPLEMENTARY INFORMATION:

A. Background and Authority for This Rulemaking

This rule is a revision of the Department of the Army procedures at 32 Code of Federal Regulations (CFR) part 651 for implementing the National Environmental Policy Act of 1969 (NEPA) last revised on March 29, 2002 and the Council on Environmental Quality (CEQ) NEPA regulations, CFR parts 1500–1508.

NEPA establishes national policy and goals for protection of the environment. Section 102(2) of NEPA contains certain procedural requirements for the attainment of these goals. In particular, all Federal agencies are required to give appropriate consideration to the environmental effects of their proposed actions in their decision-making and to prepare detailed environmental statements on recommendations or reports significantly affecting the quality of the human environment.

Authorities for this rule are 5 U.S.C. 301, NEPA, and 40 CFR parts 1500–1508. Under 5 U.S.C. 301, the head of a military department may prescribe regulations for the government of the department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. NEPA requires Federal agencies to analyze their proposed actions to determine if they could have significant environmental effects. The CEQ NEPA implementing regulations (40 CFR parts 1500–1508) require Federal agencies to adopt supplemental NEPA implementing procedures, including agency-specific CXs, and to provide opportunity for public review prior to adoption (40 CFR 1507.3).

B. Process Used by Army in the Development of the Proposed Revisions

The Assistant Secretary of the Army for Installations, Energy and Environment, as the Army proponent of this regulation, directed the revision of this part to align the regulation with current Army practices and procedures, and update CXs.

A subject matter expert team was formed to analyze and contribute to the development of the revision. The professionals comprising the team were current Army environmental experts with significant NEPA planning and compliance experience, including the preparation of environmental documentation such as CX records of environmental consideration, environmental assessments (EAs), environmental impact statements (EISs), findings of no significant impact, and records of decision. Army subject matter experts were supported by a legal working group comprised of experienced environmental law attorneys from the Army's Office of the General Counsel, Office of the Judge Advocate General, and Command-level Staff Judge Advocates with advanced education and experience, providing legal and policy advice to Federal agency decision-makers, managers, and practitioners on environmental planning and compliance responsibilities.

To determine if changes should be considered for existing CXs and if new CXs should be considered, Army environmental subject matter experts reviewed numerous existing NEPA documents to determine classes of actions which, when implemented, resulted in no significant individual or cumulative environmental effects. The Army reviewed other federal agency CXs to identify actions similar to those frequently carried out by the Army, and evaluated these other agency CXs to determine classes of actions for which a similar Army CX would be appropriate. Each CX that currently appears in the existing 32 CFR part 651, in addition to the proposed new CXs, was carefully reviewed in concept, coverage, applicability, and wording. Each revised and new CX was cautiously crafted with the goal of balancing increased administrative efficiency in NEPA compliance while avoiding the potential for misinterpretations and misapplications of exclusionary language that could lead to non-compliance with NEPA requirements. The Army carefully considered the anticipated cumulative impacts of each proposed new or revised CX, relying upon either the experiences of other Federal agencies' application of their own CXs, the cumulative effects analyses contained within the Army's NEPA analyses (both site-specific/project-level and programmatic), or both. In summary, the Army developed the proposed new and modified CXs and associated administrative records to conform to the requirements of NEPA as well as the Administrative Procedure Act (APA), its implementing regulations, and the subsequent body of case law pertaining to the APA's application as it relates to NEPA.

The CEQ was integral in the process to ensure that proposed changes to the Army's CXs meet NEPA requirements. Army provided the CEQ with proposed draft changes and justifications for each proposed change to 32 CFR part 651. Many of the changes that the Army is proposing are administrative in nature to clarify application of a particular CX.

All changes to the CXs are substantiated within the ''Administrative Record for Revisions to Department of the Army Categorical Exclusions'', available for review at *https://denix.osd.mil/army-32cfr651/.*

C. Summary of the Proposed Changes

1. Proposed Revisions Generally

The proposed rule fully revises the Department of the Army NEPA procedures. The revisions to the proposed regulation include a reorganization and consolidation of the subparts. The changes were made to reduce repetitive language, to simplify and streamline the rule, and to update procedures to align with current Army organization and policies. The proposed revisions and rationale are provided in Table 1.

TABLE 1—PROPOSED REVISIONS GENERALLY

Subpart	Section	Proposed subpart	Proposed section	Rationale
A—Introduction	651.1 Purpose	A	651.1 Purpose, Scope, and Applicability.	Update section title and content, reorganization and reduction of section paragraphs to simplify and organize requirements.
	651.2 References	A	651.2 References	Minor updates to content.
	651.3 Explanation of abbreviations and terms.	A	651.3 Definitions, Terms, and Abbreviations.	Update section title and content, addition of section paragraphs introduce key terms upfront to eliminate confusion.
	651.4 Responsibilities	A	651.5 Army NEPA Compliance Responsibilities.	Reorganization of sections to list responsibilities prior to policy, new section title, new section number, and update of content to incorporate current Army organization and policy.
	651.5 Army Policies	A	651.4 Army NEPA Policy	Reorganization of sections and update of content to incorporate current Army organization and policy.
	651.6 NEPA analysis staffing.	A	651.5 Army NEPA Compliance Responsibilities.	Reorganization of sections to consolidate all responsibilities and update of content to incorporate current Army organization and policy.
	651.7 Delegation of authority for non-acquisition systems.	A	651.5 Army NEPA Compliance Responsibilities.	Reorganization of sections to consolidate all responsibilities into one section and update of content to incorporate current Army organization and policy.
	651.8 Disposition of final documents.	A	651.5 Army NEPA Compliance Responsibilities.	Reorganization of sections to consolidate all responsibilities into one section to incorporate current Army organization and policy
B—NEPA and the Decision Process.	651.9 Introduction	.....	Removed	Language/section obsolete.
	651.10 Actions Requiring environmental analysis.	B	651.6 Army NEPA Review	Reorganization of sections to consolidate NEPA procedures into one section, update of content to incorporate current Army procedures.
	651.11 Environmental review categories.	B	651.6 Army NEPA Review	Reorganization of sections to consolidate NEPA procedures into one section, update of content to incorporate current Army procedures.
	651.12 Determining appropriate level of NEPA analysis.	B	651.6 Army NEPA Review	Reorganization of sections to consolidate NEPA procedures into one section, update of content to incorporate current Army procedures.
	651.13 Classified actions	B	651.8 Security Review and Clearance Policy for NEPA Documents.	Reorganization of section (new title and new section number) and update of content to incorporate current Army procedures for security reviews.
	651.14 Integration with Army planning.	B	651.7 NEPA Principles and Practices.	Reorganization of sections to consolidate NEPA principles and practices into one section, update of content to incorporate current Army procedures.
	651.15 Mitigation and monitoring.	B	651.7 NEPA Principles and Practices.	Reorganization of sections to consolidate NEPA principles and practices into one section, update of content to incorporate current Army procedures.
	651.16 Cumulative impacts	B	651.7 NEPA Principles and Practices.	Reorganization of sections to consolidate NEPA principles and practices into one section, update of content to incorporate current Army procedures.
	651.17 Environmental justice.	.....	Deleted	Environmental justice addressed through other compliance processes.
C—Records and Documents	651.18 Introduction	.....	Removed	Language/section obsolete.
	651.19 Record of environmental consideration.	B	651.6 Army NEPA Review	Reorganization of sections to consolidate NEPA review procedures into one section.
	651.20 Environmental assessment.	B	651.6 Army NEPA Review	Reorganization of sections to consolidate NEPA review procedures into one section.
	651.21 Finding of No Significant Impact.	B	651.6 Army NEPA Review	Reorganization of sections to consolidate NEPA review procedures into one section.
	651.22 Notice of intent	B	651.6 Army NEPA Review	Reorganization of sections to consolidate NEPA review procedures into one section.
	651.23 Environmental Impact Statement.	B	651.6 Army NEPA Review	Reorganization of sections to consolidate NEPA review procedures into one section.
	651.24 Supplemental EAs and Supplemental EISs.	B	651.7 NEPA Principles and Practices.	Reorganization of sections to consolidate NEPA principles and practices into one section, update of content to incorporate current Army procedures.
	651.25 Notice of availability	B	651.6 Army NEPA Review	Reorganization of sections to consolidate NEPA review procedures into one section.
	651.26 Record of Decision	B	651.6 Army NEPA Review	Reorganization of sections to consolidate NEPA review procedures into one section.
	651.27 Programmatic NEPA Analyses.	B	651.6 Army NEPA Review	Reorganization of sections to consolidate NEPA review procedures into one section.
D—Categorical Exclusions	651.28 Introduction	.....	Removed	Language/section obsolete.
	651.29 Determining when to use a CX (screening criteria).	C	651.11 Army CX Screening Criteria.	Changes to extraordinary circumstances are provided in the Categorical Exclusions Administrative Record (*https://denix.osd.mil/army-32cfr651*).

TABLE 1—PROPOSED REVISIONS GENERALLY—Continued

Subpart	Section	Proposed subpart	Proposed section	Rationale
	651.30 CX actions	C	651.12 Army CXs	Administrative change: Section number change, title change
	651.31 Modification to the CX list.	C	651.12 Army CXs	Administrative change: Section number change, title change.
E—Environmental Assessment.	651.32 Introduction	D	651.13 Introduction	Section number update due to regulation reorganization.
	651.33 Actions normally requiring an EA.	D	651.14 Actions Normally Requiring an EA.	Section number update due to regulation reorganization.
	651.34 EA Components	D	651.15 Contents of the EA. 651.16 Contents of the FONSI.	Reorganization of sections to clarify EA requirements.
	651.35 Decision process	D	651.17 EA Review Process	Reorganization of sections to clarify EA requirements.
	651.36 Public involvement	D	651.17 EA Review Process	Reorganization of sections to clarify EA requirements.
	651.37 Public availability	D	651.17 EA Review Process	Reorganization of sections to clarify EA requirements.
	651.38 Existing Environmental Assessments.	B	651.7 NEPA Principles and Practices.	Reorganization of sections to consolidate NEPA principles and practices into one section, update of content to incorporate current Army procedures.
	651.39 Significance	E	651.19 Actions Normally Requiring an EIS.	Moved to the EIS section to consolidate with actions normally requiring EIS discussion.
F—Environmental Impact Statement.	651.40 Introduction	.....	651.18 Introduction	Section number update due to regulation reorganization.
	651.41 Conditions requiring an EIS.	E E	651.19 Actions Normally Requiring an EIS.	Section number update due to regulation reorganization. Section number and title update due to regulation reorganization.
	651.42 Actions normally requiring an EIS.	E	651.19 Actions Normally Requiring an EIS.	Section number and title update due to regulation reorganization.
	651.43 Format of the EIS		651.20 Contents of the EIS	
	651.44 Incomplete Information.		651.21 Incomplete or Unavailable Information.	Section number and title update due to regulation reorganization.
	651.45 Steps in preparing and processing an EIS.	E	651.22 EIS Process, 651.23 Record of Decision, 651.24 Implementation of Decision, 651.25 **Federal Register** Publication of Army Actions.	Reorganization and breakdown of EIS requirements for clarity.
	651.46 Existing EISs	B	651.7 NEPA Principles and Practices.	Reorganization of sections to consolidate NEPA principles and practices into one section.
G—Public Involvement and the Scoping Process.	651.47 Public involvement	A, D and E	651.4 Army NEPA Policy, 651.5 Army NEPA Compliance Responsibilities, 651.16 Contents of the FONSI, 651.22 EIS Process.	Incorporation of public involvement procedures for various NEPA activities throughout the regulation.
	651.48 Scoping Process	E	651.22 EIS Process	Reorganization of sections to consolidate EIS requirements.
	651.49 Preliminary Phase	E	651.22 EIS Process	Reorganization of sections to consolidate EIS requirements.
	651.50 Public interaction phase.	E	651.22 EIS Process	Reorganization of sections to consolidate EIS requirements.
	651.51 The Final phase	E	651.22 EIS Process	Reorganization of sections to consolidate EIS requirements.
	651.52 Aids to information gathering.	E	651.22 EIS Process	Reorganization of sections to consolidate EIS requirements.
	651.53 Modifications of the scoping process.	.....	Deleted	Language/section obsolete.
H—Environmental effects of major army action abroad.	651.54 Introduction	G	651.28 Overview	Section number and title update due to regulation reorganization.
	651.55 Categorical exclusions.	G	654.29 Use of Categorical Exclusions.	Section number and title update due to regulation reorganization.
	651.56 Responsibilities	A	651.5 Army NEPA Compliance Responsibilities.	Reorganization of sections to consolidate responsibilities into one section to incorporate current Army organization and policy.
Appendices	Appendix A—References	.....	Appendix A—References	Appendix updated to incorporate current references.
	Appendix B—Categorical exclusions.	C	Subpart C (651.9–651.12)	Reorganization of the regulation for ease of use—CX list incorporated into Subpart C. Changes to CXs are discussed on page 11.
	Appendix C—Mitigation and monitoring.	.....	Subpart F (651.26 Mitigation and 651.27 Mitigation and Monitoring).	Incorporated within Subpart F for consolidation purposes.
	Appendix D—Public participation plan.	.....	Subpart F (651.22)	Incorporated within Subpart F for consolidation purposes.
	Appendix E—Content of the Environmental Impact Statement.	.....	Subpart F (651.22)	Incorporated within Subpart F for consolidation purposes.
	Appendix F—Glossary	.....	Appendix B	Appendix number update due to regulation reorganization, definitions updated.

2. Proposed Revisions to Categorical Exclusions

32 CFR part 651, appendix B, lists the current Army CXs. The CX list has been integrated into the proposed subpart C, ''Categorical Exclusions and Records of Environmental Consideration''.

D. Expected Impact of the Proposed Rule

The proposed rule revises internal Army procedures allowing for consistent implementation across the Army for NEPA responsibilities. Promulgating CXs will reduce government spending on compliance and shorten project timelines for those activities that do not need a detailed analysis. The Army currently prepares approximately 8,000 CXs annually. The Army expects the proposed changes will increase use of CXs and shorten project approvals.

E. Executive Order 12866 (Regulatory Planning and Review) and Executive Order 13563 (Improving Regulation and Regulatory Review)

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). This rule has been designated a ''significant regulatory action'', although not economically significant, under section 3(f) of Executive Order 12866 and was submitted to OMB for review. The revision is not a ''major'' rule within the meaning of Executive Order 12866 and the Congressional Review Act.

F. Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs)

This proposed rule is not expected to be subject to the requirements of E.O. 13771 (82 FR 9339, February 3, 2017) because it is expected to be related to agency organization and management.

G. Alternatives

1. No Action. No action would result in continued use of the current regulation that contains outdated roles, responsibilities, procedures, and a limited CX list. This would result in increasing inefficiencies in Army NEPA analyses and could unnecessarily delay Army actions which do not individually or cumulatively have a significant effect on the human environment.

2. Next Best Alternative. The next best alternative to a complete revision of the regulation would be a revision of the CXs only. This would allow for use of new CXs instead of preparation of environmental assessments, but would not address changes and resulting inefficiencies in Army roles, responsibilities and procedures that have changed significantly since the regulation was first published in 2002.

H. The Regulatory Flexibility Act

The Army has determined this this action is not subject to the relevant provisions of the Regulatory Flexibility Act, 5, U.S.C. 601.

I. Unfunded Mandates Reform Act

The Army has determined that the Unfunded Mandates Reform Act does not apply because the proposed rule does not include a mandate that may result in estimated costs to State, local, or tribal governments in the aggregate, or the private sector, of $100 million or more.

J. National Environmental Policy Act and Executive Order 12898 (Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations)

This Part implements the National Environmental Policy Act of 1969 (NEPA), and specifies the Army's policies and responsibilities for the early integration of environmental considerations into planning and decision-making. Army has determined that the proposed regulations would not have a significant effect on the environment because they do not authorize any activity or commit resources to a project that may affect the environment. Therefore, Army does not intend to conduct a NEPA analysis of these proposed regulations for the same reason that CEQ does not require any Federal agency to conduct NEPA analysis for the development of agency procedures for the implementation of NEPA and the CEQ regulations.

E.O. 12898 requires agencies to make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations. Army has analyzed this proposed rule and determined that it would not cause disproportionately high and adverse human health or environmental effects on minority populations and low-income populations.

K. Paperwork Reduction Act

The Army has determined that this proposed rule does not impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995.

L. Executive Order 12630 (Government Actions and Interference With Constitutionally Protected Property Rights)

The Army has determined that Executive Order 12630 does not apply because the proposed rule does not impair private property rights.

M. Executive Order 13045 (Protection of Children From Environmental Health Risk and Safety Risks)

The rule is issued with respect to existing environmental guidelines and laws. Therefore, this rule should not directly impact this executive order.

N. Executive Order 13132 (Federalism)

Executive Order 13132 requires that Executive departments and agencies identify regulatory actions that have significant federalism implications. A regulation has federalism implications if it has substantial direct effects on the States, on the relationship or distribution of power between the Federal Government and the States, or on the distribution of power and responsibilities among various levels of Government. This organization has determined that this rule has no federalism implications that warrant the preparation of a Federalism Assessment in accordance with Executive Order 13132.

List of Subjects in 32 CFR Part 651

Categorical exclusions, Environmental analysis, Environmental assessments, Environmental impact statements.

■ For reasons stated in the preamble, the Department of the Army proposes to revise 32 CFR part 651 to read as follows:

PART 651—ENVIRONMENTAL ANALYSIS OF ARMY ACTIONS

Sec.

Subpart A–Introduction

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651.2 References.
651.3 Definitions, terms, and abbreviations.
651.4 Army NEPA policy.
651.5 Army NEPA compliance responsibilities.

Subpart B—Army National Environmental Policy Act Implementation

651.6 Army NEPA review.
651.7 NEPA principles and practices.
651.8 Security Review and Clearance Policy for NEPA documents.

Subpart C—Categorical Exclusions and Records of Environmental Consideration

651.9 Categorical exclusions and screening criteria general information.
651.10 Record of environmental consideration.
651.11 Army CX screening criteria.
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Subpart D—Environmental Assessments

651.13 Introduction.
651.14 Actions normally requiring an EA.
651.15 Contents of the EA.
651.16 Contents of the FONSI.
651.17 EA review process.

Subpart E—Environmental Impact Statements

651.18 Introduction.
651.19 Actions normally requiring an EIS.
651.20 Contents of the EIS.
651.21 Incomplete or unavailable information.
651.22 EIS process.
651.23 Record of decision.
651.24 Implementation of decision.
651.25 **Federal Register** publication of Army actions.

Subpart F—Mitigation and Monitoring

651.26 Mitigation.
651.27 Mitigation monitoring and enforcement.

Subpart G—Environmental Effects of Major Army Actions Abroad

651.28 Overview.
651.29 Use of categorical exclusions.

Appendix A to Part 651—References

Appendix B to Part 651—Glossary

Authority: 42 U.S.C. 4321 *et seq.;* 40 CFR parts 1500–1508; E.O. 12114, 44 FR 1957, 3 CFR, 1979 Comp., p. 356.

Subpart A—Introduction

§ 651.1 Purpose, scope, and applicability.

(a) This part implements: The provisions of the National Environmental Policy Act (NEPA) of 1969, as amended, 42 U.S.C. 4321, *et seq.;* the Council on Environmental Quality (CEQ) regulations for implementing NEPA, 40 CFR parts 1500 through 1508; and establishes the Army's procedures for NEPA compliance. If there are any inconsistencies between this part and 40 CFR parts 1500 through 1508, as may be subsequently amended, the requirements of 40 CFR parts 1500 through 1508 shall prevail. The Army proponent for this part shall review this part every five years after publication to determine if such amendments or other circumstances require revision of this part.

(b) This part requires analysis and systematic examination of the environmental consequences associated with implementing proposed Army actions, public participation, and integration of environmental considerations into Army planning and decision-making.

(c) This part applies to the: Department of the Army, Active Army, Army Reserve, Joint Bases for which the Army is the lead component, the Army's Acquisition process, functions of the Army National Guard (ARNG) involving Federal funding, and functions for which the Army is the Department of Defense (DoD) executive agent (hereinafter, the term ''Army'' has the meaning described in this section). This part does not apply to Civil Works functions of the US Army Corps of Engineers (USACE) or to combat or combat-related activities in a combat or hostile fire zone. This part applies to relevant actions within the United States, which is defined as all States; the District of Columbia; territories and possessions of the United States; and all waters and airspace subject to the territorial jurisdiction of the United States.

§ 651.2 References.

Required and related publications are listed in appendix A of this part.

§ 651.3 Definitions, terms, and abbreviations.

(a) The following definitions apply to this part:

(1) *Army proponent (proponent)*—The Army unit, element, or organization that has the requirement for a proposed Army action and is responsible for initiating and/or carrying the action out is the *proponent.* The proponent is responsible for compliance with NEPA and this part, and for ensuring that the appropriate NEPA analyses, public participation, and documentation is completed prior to a decision on the proposed action. The proponent or designee signs Records of Environmental Consideration, (RECs) Environmental Assessments (EAs), and Environmental Impact Statements (EISs), and is responsible for development and retention of the administrative record documenting NEPA compliance.

(2) *Army approving official (approving official)*—The *approving official* is the Army military or civilian official who on behalf of the Army approves and signs decision documents (Findings of No Significant Impact (FONSIs), and Records of Decision (RODs)). The proponent may function as the approving official, and approve and sign decision documents.

(3) *Active Guard and Reserve Duty*—The term ''active Guard and Reserve duty'' means active duty performed by a member of a reserve component of the Army, Navy, Air Force, or Marine Corps, or full-time National Guard duty performed by a member of the National Guard pursuant to an order to full-time National Guard duty, for a period of 180 consecutive days or more for the purpose of organizing, administering, recruiting, instructing, or training the reserve components. See 10 U.S.C. 101(d)(6)(A).

(4) *Adverse (impact or effect)*—Impacts or effects of an action that are detrimental and may require some degree of mitigation to address the impact or to reduce the impact to a level that is not significant.

(5) *Categorical exclusion*—A category of action that the Army has determined has no individual or cumulative significant effect on the human or natural environment, and for which no formal analysis under NEPA is required.

(6) *Controversy/controversial*—Within the meaning of NEPA, and as used in this part, ''controversy'' and ''controversial'' refers to a major disagreement regarding the factual evidence pertaining to the effects of a proposed action on the quality of the human environment, rather than to the unpopularity or the amount of public opposition to a proposed action. Public opposition to a proposed action does not make that action controversial so as to require an EIS.

(7) *Environmental harm*—Environmental harm results when an action may cause wide-scale, unmitigated, irreparable and irreversible detrimental effects, degradation, or damage to environmentally sensitive resources.

(8) *Decision documents:* NEPA decision documents are Findings of No Significant Impact (FONSIs), and Records of Decision (RODs). The proponent may function as the approving official.

(9) *Environmental officer*—An individual assigned to a table of organization and equipment (TO&E), or table of distributions and allowances (TDA) organization, or unit to accomplish environmental compliance requirements on behalf of his or her responsible commander, director, or supervisor. For the ARNG, environmental officers may serve in Federal positions under title 32 of the CFR or as a Federal Technician in Active Guard and Reserve Duty (AGR) status. In the event that the ARNG environmental officer is not a Federal civilian employee or a Federal Technician in AGR status, NEPA related actions requiring signature must be signed by a Federal Technician, AGR, or Federal civilian employee in the ARNG

environmental officer's chain of command.

(10) *Environmental planning*—Actively incorporating environmental considerations into informed decision-making in order to balance environmental concerns with mission requirements, technical requirements, economic feasibility, and long-term sustainability of Army operations.

(11) *Environmentally sensitive resources*—Includes but is not limited to: Species that are federally listed as threatened or endangered or are candidates for such listing; threatened or endangered species critical habitat; migratory birds; Bald and Golden Eagles; prime or unique agricultural lands; coastal zones; designated wilderness or wilderness study areas; National Wildlife Refuges and National Parks; wild and scenic rivers; floodplains; wetlands; riparian areas; sole source aquifers; other natural resources of concern; paleontological resources, historic properties including sites, buildings, structures, districts, and objects eligible for or included in the National Register of Historic Places; Native American human remains and cultural items; archeological resources; Indian sacred sites; protected tribal resources including tribal trust resources, natural resources, and properties of traditional or customary religious or cultural importance retained by or reserved by or for Indian tribes through treaties, statutes, judicial decisions, or E.O.s.

(12) *Effect*—Effects and impacts as used in this part are synonymous. Effects or impacts includes ecological, aesthetic, historic, cultural, economic, social, or health, whether direct, indirect or cumulative. Effects or impacts may be detrimental or adverse, and/or beneficial.

(13) *Extraordinary circumstances*—Factors or circumstances in which a normally excluded action may have a significant environmental effect that then requires further analysis in an environmental assessment (EA) or an environmental impact statement (EIS).

(14) *Federal agency*—Means all agencies of the Federal Government. It also includes for the purposes of this part those federally-recognized Indian tribes, States, and units of local governments that have assumed NEPA responsibilities for a Federal agency action under appropriate authority. It does not mean the Congress, the Judiciary, or the President.

(15) *Foreign nations*—Any geographic area (land, water, and airspace) that is under the jurisdiction of one or more foreign governments. It also refers to any area under military occupation by the United States alone or jointly with any other foreign government. Includes any area that is the responsibility of an international organization of governments; also includes contiguous zones and fisheries zones of foreign nations.

(16) *Global commons*—Geographical areas outside the jurisdiction of any nation. They include the oceans outside territorial limits and Antarctica. They do not include contiguous zones and fisheries zones of foreign nations.

(17) *Impact*—Impacts and effects as used in this part are synonymous. Impacts or effects includes ecological, aesthetic, historic, cultural, economic, social, or health, whether direct, indirect or cumulative. Effects or impacts may be detrimental or adverse, and/or beneficial.

(18) *Major Federal action*—The term ''major Federal action'' has the same definition as that stated in 40 CFR 1508.18.

(19) *Mitigated FONSI*—When mitigation is a component or factor of the proposed action (*e.g.,* mitigation by design) and is so identified in the FONSI in order to reduce impacts to less than significant levels.

(20) *NEPA analysis*—NEPA analysis is the analytic process involved in NEPA review.

(21) *Approving official (also Army approving official)*—The approving official is the Army military or civilian official who on behalf of the Army approves and signs.

(22) *NEPA document*—A NEPA document is the report that documents the NEPA analysis and its results.

(23) *Proponent (also Army proponent)*—The Army unit, element, or organization that has the requirement for a proposed Army action and is responsible for initiating and/or carrying the action out is the Army proponent. The proponent is responsible for compliance with NEPA and this part, and for ensuring that the appropriate NEPA analyses, public participation, and documentation is completed prior to a decision on the proposed action. The proponent or designee signs RECs, EAs, and EISs, and is responsible for development and retention of the administrative record documenting NEPA compliance.

(24) *NEPA review*—NEPA review is the process of project and program review under NEPA.

(25) *Non-developmental item (NDI)*—An NDI is any previously developed item of supply used exclusively for government purposes by a Federal Agency, a State or local government, or a foreign government with which the United States has a mutual defense cooperation agreement; any item described above that requires only minor modifications or modifications of the type customarily available in the commercial marketplace in order to meet the requirements of the processing department or agency.

(26) *Preparers*—Government or contract personnel from a variety of disciplines who prepare NEPA documents. They are primarily responsible for the accuracy of the document. May include key government subject matter expert document reviewers and contributors who provide substantive language for inclusion or whose editorial directions drive the substantive contents of the final NEPA document.

(27) *Previously disturbed land*—Land that has been changed such that its functioning ecological processes have been and remain altered by human activity. The phrase encompasses areas that have been transformed from native vegetation to nonnative species or a managed state.

(28) *Significance (of effects or impacts)*—The significance of environmental effects or impacts is determined by examining both the context and intensity of the proposed action. All effects should be evaluated to determine the intensity or severity of impacts or effects and the analysis should establish, for each environmental resource warranting analysis, the threshold at which significance is reached. The threshold enables the determination of significant or less-than-significant impact. The evaluation of impacts must consider direct and indirect effects, short-term and long-term effects, adverse and beneficial effects, and cumulative effects. Potential impacts that may occur when a proposed action will have an overall beneficial effect must be analyzed for significance. If the proposed action could result in significant effects to the environment that cannot be mitigated to a level below significance, an EIS must be prepared prior to initiating action. Significant effects of socioeconomic consequences alone do not require an EIS. Significant beneficial effects alone do not require an EIS.

(29) *Staff or staffing*—When used as a verb in this part, the term refers to the coordination of an action to obtain concurrence or approval.

(30) *Tiering*—Tiering refers to the coverage of general matters such as a proposed DoD-wide or Army-wide program or policy in a broad EIS or Programmatic EA, with subsequent narrower environmental analyses (such as Command, installation, or site-

specific levels) adopting by reference the general discussions and concentrating solely on the issues specific to the analysis subsequently prepared.

(31) *Undisturbed land*—Land in its natural state or land which has reverted to its natural state where ecological processes remain unattended by human activity.

(b) Abbreviations used in this part are explained in the glossary in appendix B of this part.

§ 651.4 Army NEPA policy.

(a) The regulatory procedures in this part must be met by proponents prior to implementing a proposed Army action affecting the environment. Army proponents will integrate NEPA review into Army project and program planning at the earliest possible time to ensure: Army actions are implemented in compliance with environmental laws, regulations, Executive orders (E.O.), Army and DoD policies and directives; delays and issues are minimized; and stakeholder and public involvement occurs as required. NEPA compliance does not substitute for or replace the need to comply with other independent environmental statutes (such as the Clean Water Act (CWA), Clean Air Act (CAA), Endangered Species Act (ESA), National Historic Preservation Act (NHPA), among others, Executive orders (E.O.s)), and other state and Federal agency requirements. All applicable environmental requirements that must be met for proposed Army actions should be taken into account in the NEPA analysis.

(b) The success of the Army's war-fighting readiness mission relies on access to and use of realistic natural landscapes and environmental conditions that would be experienced during combat. The NEPA evaluation of these critical environmental resources enables effective military readiness training, material development; and the ability to rapidly acquire, test, and field critical war-fighting materiel for our Soldiers. NEPA also supports the Army's ability to effectively implement military construction activities, industrial operations, and Army modernization and future capabilities.

(c) The Army NEPA review process in this part defines responsibilities, appropriate levels of NEPA review, ensures alternatives are considered in Army decision-making, makes certain the public is involved in the NEPA review process as required, and that the analysis of environmental and socioeconomic impacts occurs in a manner that avoids, minimizes, or mitigates environmental impacts. The proponent will use the NEPA review process to inform Federal and state agencies, local governments, federally-recognized Indian Tribes, Alaska Natives, Native Hawaiians, non-governmental stakeholders, and members of the public about the potential environmental and socioeconomic impacts of proposed Army actions and proposed measures to address those impacts. Communication, cooperation, government-to-government consultation with federally-recognized Indian Tribes, and, as appropriate, collaboration between governmental and non-governmental entities are important elements of the NEPA review.

(d) Army decision-makers will use the results of the NEPA review in order to be informed, and to inform the public about the impacts that their decisions may have on environmental resources such as natural resources including soils, forests, rangelands, fish and wildlife, threatened and endangered species, wetlands, water quality, air quality, cultural resources including historic buildings, archeological sites, other historic properties, Native American sacred sites, and other resources under Army stewardship. The NEPA process will also inform decision-makers and the public of the potential socioeconomic impacts that their decisions may have on surrounding communities. Army decision-makers will balance mission requirements with socioeconomic and environmental concerns, technical requirements, economic feasibility, and long term resiliency, will inform stakeholders and the public, and will document their decisions using the NEPA process and appropriate decision documents.

(e) Proponents will ensure that NEPA compliance is timely, effective, efficient, and adequately resourced, and will implement measures to optimize the NEPA process whenever possible. NEPA optimizing measures achieve more effective NEPA reviews and timely conclusion of the NEPA process. Measures to optimize the NEPA process include but are not limited to: A planning and coordination process for EISs to develop and confirm the description of the proposed action and alternatives prior to publication of the Notice of Intent; use of programmatic NEPA documents and tiering where appropriate; reduced attention on minor issues and extraneous background data and increased focus on critical issues; inclusion of information by reference to other documents; reduction of internal Army review-cycle times; adoption of other independent statutory requirements into the NEPA process where appropriate and allowed; and using categorical exclusions and mitigated FONSIs whenever applicable; and by reducing the length of environmental documents by means such as meeting appropriate page limits.

§ 651.5 Army NEPA compliance responsibilities.

(a) *The Assistant Secretary of the Army (Installations, Energy and Environment) (ASA (IE&E)).* (1) The ASA (IE&E) is the Army's responsible official for NEPA policy and compliance, and is the proponent for this part.

(2) The ASA (IE&E) ensures the Army's actions affecting or impacting the environment are executed consistent with law, regulation, and policy. The ASA (IE&E) will, through the Deputy Assistant Secretary of the Army for Environment, Safety and Occupational Health (DASA (ESOH)):

(i) Represent the Army NEPA Program to counterpart offices in the Office of the Secretary of Defense (OSD), the military services, CEQ, and Environmental Protection Agency (EPA), among others.

(ii) Communicate and advocate Army NEPA policies and programs to Congressional members and oversight committees, other Federal agencies, non-governmental organizations, federally-recognized Indian Tribes, Alaska Natives, Native Hawaiians, and the public.

(iii) Approve **Federal Register** (FR) publication of Army NEPA Notices of Intent (NOIs) and Notices of Availability (NOAs), Information for Members of Congressional Delegations, Questions and Answers, and Press Releases in accordance with § 651.25.

(iv) Coordinate FR publication of Army actions with the Army **Federal Register** Liaison Officer.

(v) Serve as the Secretary of the Army's (SA) responsible official for environmental analyses abroad.

(vi) Address exemption requests and emergency actions according to § 651.6(b).

(vii) Review this part every five years after publication and determine if amendments to 40 CFR parts 1500 through 1508 or other circumstances require revision of this part.

(b) *The Assistant Secretary of the Army (Acquisition, Logistics and Technology) (ASA (ALT)).* The ASA (ALT) is the Army Acquisition Executive and leads the execution of the Army's acquisition function and the acquisition management system; supervises the life cycle management and sustainment of Army weapon systems and equipment from research and development through test and evaluation, acquisition, logistics,

fielding, and disposition; appoints, manages, and evaluates program executive officers and manages the Army Acquisition Corps and Army Acquisition Workforce. As the Army Acquisition Executive, the ASA (ALT) requires:

(1) Army acquisition programs and procedures comply with NEPA requirements as set forth in this part, and Department of Defense Directive 5000.01, Department of Defense Instruction 5000.02, Operation of the Defense Acquisition System (*http://www.dtic.mil/whs/directives/*), and implementing Army publications to include Army Regulation (AR) 70–1, Army Acquisition Policy, AR 73–1, Test and Evaluation Policy, and the discretionary guidance contained within Department of the Army Pamphlet 70–3, Army Acquisition Procedures (*http://www.apd.army.mil/*), as well as the Defense Acquisition Guidebook.

(2) Environment, safety, and occupational health (ESOH) planning in a Systems Engineering Plan (SEP); documentation of the results of the planning in a Programmatic ESOH Evaluation (PESHE) as an addendum to the SEP (the PESHE is for planning purposes and does not constitute or substitute for NEPA compliance).

(3) Integration of environmental considerations early in the acquisition process as part of the capability requirements document development and as part of the Analysis of Alternatives.

(4) Acquisition Program Executive Officers (PEOs) and Acquisition Program/Project/Product Managers (who acts as the Materiel Developer (MATDEV)) (PMs) prepare and maintain a NEPA Compliance Schedule covering all known or projected system-related activities, events, or proposed actions that may trigger a requirement for NEPA documentation.

(5) Acquisition PEOs and PMs function as the proponent for their respective acquisition actions and ensure the appropriate NEPA documentation is prepared prior to acquisition activities, events, or proposed actions. As part of the materiel fielding package PEOs and PMs, in coordination with fielding locations, will prepare a comprehensive evaluation of environmental information and potential environmental issues obtained during the system specific acquisition process. The materiel fielding package containing the comprehensive evaluation of environmental information and potential site specific environmental issues will be provided to each fielding location.

(6) Acquisition PEOs and Acquisition Program/Project/Product Managers comply with the procedures in this part and:

(i) Coordinate NEPA documentation for acquisition with the appropriate stakeholders.

(ii) Make NEPA documents for acquisition available to the approving official prior to implementation of proposed actions.

(iii) Serve as the approving official where appropriate and sign or appoint a designee to sign NEPA documents for acquisition actions.

(iv) Maintain the NEPA administrative record for their acquisition and ensure they are placed in the Army NEPA repository in a timely manner.

(v) Provide installations with NEPA documents and associated analyses prepared during the acquisition process. The Installation Commander is responsible for ensuring that NEPA documentation has been completed prior to fielding new materiel at their installation.

(7) Middle-Tier Acquisitions (MTA), the MTA Decision Authority, and PEOs and PMs designated as an MTA Decision Authority comply with the requirements of NEPA by implementing this part in manner consistent with MTA actions to rapidly prototype and field high priority military capabilities.

(c) *The Deputy Chief of Staff (DCS), G–9.* DCS, G–9 is the Army Staff (ARSTAF) proponent for Army military construction, master planning, real property management, and base realignment and closure. DCS, G–9 assists and supports the ASA (IE&E) in all aspects of Army NEPA requirements and collaborates across the ARSTAF to ensure actions are fully coordinated. The DCS, G–9 will:

(1) Designate a DCS, G–9 environmental officer responsible for NEPA program management.

(2) Advise Army agencies in the preparation of NEPA analyses.

(3) Review and coordinate NEPA analyses and documents for Army actions, and NEPA analyses and documents submitted by other DoD components and other Federal agencies for actions of interest to or effecting the Army.

(4) Monitor proposed Army policy and program documents that have environmental implications to determine compliance with NEPA requirements and ensure integration of environmental considerations into decision-making processes.

(5) Prepare Army NEPA guidance for implementing this part, NEPA program metrics, and oversee NEPA initiatives executed by the Army Commands, Service Component Commands, and Direct Reporting Units.

(6) Monitor proponent implementation and execution of NEPA requirements, E.O. 12114 and 32 CFR part 187 requirements, and develop and execute guidance, programs, and initiatives to address problem areas.

(7) Apply this part when planning and executing overseas actions, where appropriate in light of applicable statutes and Status of Forces Agreements (SOFAs).

(8) Provide guidance and ensure commanders implement the requirements of E.O. 12114 and this part.

(9) Support DASA (ESOH) in all aspects of Army NEPA requirements.

(10) Advise headquarters organizations on process to secure funding for NEPA requirements.

(11) Maintain manuals and guidance for optimizing NEPA analyses in accordance with § 651.4(e) for major Army programs and make this guidance accessible to Army personnel and, as appropriate, the public.

(12) Maintain a record of command and installation NEPA points of contact (POCs) in the Army.

(13) Review NEPA training at all levels of the Army, including curricula at Army, DoD, other service, and other agency and institutions. Review of DoD, other service, and other NEPA training is limited to training affecting the Army.

(14) Designate and maintain an electronic Army-wide NEPA repository for all Army EAs and EISs, FONSIs and RODs.

(15) Advise Army agencies regarding participation as a NEPA cooperating agency.

(d) *Deputy Chief of Staff G–3/5/7.* The Deputy Chief of Staff (DCS), G–3/5/7 is responsible for stationing the force. Any proposed stationing action which meet criteria set forth in AR 5–10 requires DCS G–3/5/7 coordination and Headquarters, Department of the Army (HQDA) senior leadership approval. All proposed actions impacting training mission will be coordinated with the DCS, G–3/5/7. The DCS G–3/5/7:

(1) Serves as or designates G–3/5/7 proponents and G–3/5/7 approving officials for Army actions under G–3/5/7 responsibility.

(2) Identifies the requirement to conduct NEPA early in the stationing planning process.

(3) Integrates NEPA, and NEPA optimizing measures into the strategic stationing decision framework.

(4) Ensures the appropriate NEPA analysis, document, and review process

occurs to inform senior leaders prior to final stationing decisions.

(e) *The Assistant Secretary of the Army for Financial Management and Comptroller (ASA (FMC)).* The ASA (FMC) ensures Army NEPA compliance requirements are supported in annual authorization requests.

(f) *The Army General Counsel.* The Army General Counsel (GC) provides legal advice and review to the SA and ASA (IE&E) on all environmental matters, to include interpretation and compliance with NEPA and Federal implementing regulations, the requirements of E.O. 12114, and other applicable legal authority. Determines the final Army position on legal questions and issues related to NEPA. Serves as the point of contact between the Army and OSD Office of General Counsel and General Counsels of other services and Federal agencies with regard to Army NEPA compliance.

(g) *The Judge Advocate General (TJAG).* TJAG provides legal advice to the ARSTAF and assistance in NEPA interpretation, Federal implementing regulations, the requirements of E.O. 12114, and other applicable legal authority; determine the legal sufficiency for Army EISs, EAs of national concern or interest, and other NEPA documentation as appropriate; and interface with the Army GC and the Department of Justice on NEPA-related litigation.

(h) *The Army Surgeon General.* The Surgeon General provides technical expertise and guidance to proponents in the Army, as requested, to assess public health, industrial hygiene, and other human health aspects of proposed programs and projects.

(i) *The Chief, Public Affairs.* The Chief, Public Affairs:

(1) Provides communication plan development guidance to enable appropriate public involvement on Army actions. Provides public affairs guidance on conducting public meetings for NEPA processes and on issuing public announcements such as NOIs, scoping, and NOAs.

(2) Reviews and coordinates planned public announcements on actions of national concern or interest, and actions that will undergo an EIS process, with appropriate ARSTAF elements, ASA (IE&E) and the Office of the Assistant Secretary of Defense for Public Affairs (OASD (PA)).

(3) Assists in the issuance of appropriate press releases to coincide with the publication of notices in the FR.

(4) Provides assistance, as requested, to Army Public Affairs Officers (PAOs) regarding the development and release of public involvement materials.

(j) *The Chief of Legislative Liaison.* The Chief of Legislative Liaison notifies Members of Congress of pending actions including those that will be published in the FR. The Chief will:

(1) Provide guidance on issuing Congressional notifications for NEPA notifications that will be published in the FR.

(2) Review proposed Congressional notifications on actions.

(3) Issue Congressional notifications prior to the publication of NEPA notifications in the FR.

(k) *Commanders of Army Commands, the Director of the ARNG, Chief, U.S. Army Reserve and Commanding General of U.S. Army Reserve Command, Army Service Component Commands, and Direct Reporting Units (Commands).* These Commands will:

(1) Apply policies and procedures of this part to programs and actions within their staff responsibility, except for state-funded operations of the ARNG.

(2) Assume proponency for their proposed actions.

(3) Assign a command environmental officer responsible for NEPA program management, and report the individual by name to DCS, G–9.

(4) For programs and actions within their staff responsibility that require a NEPA notice to be published in the FR, staff the FR publication package for review at HQDA; see § 651.25.

(5) Establish procedures for identification of the appropriate proponent and delineate responsibilities for the NEPA review process within their command. Develop and implement Command-wide NEPA guidance, as needed, in coordination with the DCS, G–9.

(6) Assist in the review and staffing of NEPA documentation prepared by or affecting subordinate elements.

(7) Maintain the capability (personnel and other resources) to comply with the requirements of this part and include provisions for NEPA requirements through the Program Planning and Budget Execution System (PPBES) process.

(8) ARNG installations consist of the 54 States and Territories and are commanded by a state government official, The Adjutant General (TAG).

(i) TAGs have authority over ARNG personnel and resources within the States and Territories they command. As a state government official, TAGs cannot function as the proponent or Army approving official. TAGs will review and validate NEPA documents prepared for projects within their command, and will forward those NEPA documents to the Director, ARNG.

(ii) The Director, ARNG or designee serves as the proponent and approving official for ARNG actions. The Director, ARNG or designee signs RODs for ARNG EISs, and FONSIs for ARNG EAs.

(iii) ARNG Records of Environmental Consideration (RECs) are signed at the installation level by ARNG environmental officers that serve in Federal positions in title 32 of the CFR. In the event that the ARNG environmental officer is not a federal civilian employee, or a Federal Technician in Active Guard and Reserve Duty (AGR) status, the ARNG RECs are signed by a Federal Technician, AGR, or Federal civilian employee in the ARNG environmental officer's chain of command.

(l) *The Commander, U.S. Army Training and Doctrine Command (TRADOC).* In addition to responsibilities as a proponent, as applicable, the Commander, TRADOC will:

(1) Ensure that NEPA requirements are understood and incorporated in the Officer Foundation Standards (OFS).

(2) Integrate environmental considerations into doctrine, organization, training, materiel, leadership and education, personnel, facilities, and policy (DOTMLPF–P) processes.

(3) Include environmental officer representation on all Integrated Concept Teams (ICTs) involved in requirements determinations.

(4) Ensure that TRADOC Capability Managers retain and transfer environmental analyses or data to the MATDEV upon approval of the materiel Capabilities Requirements Documents.

(5) Ensure that environmental considerations are incorporated into the Capabilities Requirements Documents.

(m) *Installation Commanders.* For the purposes of this part, Installation Commander refers to all Army Commanders and senior civilian managers of land holding organizations who serve as the senior executive for installation activities and are responsible for day-to-day operation and management of installations. Commanders who execute land holding functions may be referred to by different titles for different Army organizations. For an Installation Management Command installation, these responsibilities fall upon the Garrison Commander (the Senior Commander's senior executive for installation activities), or the Garrison Manager. For other Army commands, this function may be served by an Installation Commander; for the Reserves,

Commanders of U.S. Army Reserve Readiness Divisions and Mission Support Commands (MSCs); for ARNG see § 651.5(l) for commander responsibilities. Commanders of arsenals or depots may have these same terms in their title (''Depot Commander''), and are also included in this section, as are commanders of Government-owned, Contractor-Operated (GOCO) facilities. This section is intended to refer to all commanders and senior civilian managers of land holding organizations, regardless of title. The description ''land holding'' is intended to encompass all resources and areas, such as surface and subsurface waters and airspace within the command and/or control of the land holding commander. Hereinafter, the term ''Installation Commander'' has the meaning described in this section. Installation Commanders will:

(1) Establish an installation NEPA compliance program and evaluate its performance.

(2) Serve as, or designate a proponent and approving official for installation sponsored actions requiring NEPA compliance.

(3) Ensure NEPA requirements associated with fielding new materiel at their installation have been met.

(4) Plan, program, and budget for installation NEPA requirements, and initiate the NEPA review of installation proposed actions early in the planning process.

(5) Ensure that proposed actions subject to NEPA are coordinated by appropriate organizations.

(6) Ensure installation staff elements, tenants, and others incorporate NEPA requirements early in the planning of proposed actions.

(7) Maintain an administrative record of all installation NEPA documents and associated information, and ensure NEPA documents are deposited in the Army NEPA Repository.

(8) Ensure NEPA awareness and/or training is provided for professional staff, installation-level proponents, and document reviewers (for example, master planning, range operations, acquisition support staff, etc.).

(9) In coordination with the proponent, ensure mitigation measures specified in NEPA documents are carried out, and that a mitigation and monitoring plan is developed and implemented as needed.

(10) Consult on a government-to-government basis with federally-recognized Indian Tribes.

(11) Implement NEPA optimizing measures as appropriate.

(12) Review, validate, concur, or co-sign and approve (as appropriate) NEPA documentation for proposed actions prepared by other Army or DoD organizations that will take place in the area over which the Installation Commander has authority. The Installation Commander may authorize a designee to concur or co-sign on their behalf.

(13) Designate an Installation environmental officer responsible for NEPA program management who will:

(i) Assist proponents in integrating the NEPA process into their activities and programs.

(ii) Advise the commander on NEPA matters and enable early coordination with the proponent for proposed actions requiring NEPA documentation.

(iii) Prepare and coordinate NEPA documents as directed by the Installation Commander.

(iv) Serve as the proponent, and/or as the approving official if designated, for installation sponsored actions.

(v) Advise his/her organization on the selection, preparation, and completion of NEPA analyses and documentation, as well as the possible extent of required mitigation (see Subpart F), for those proposed actions for which the organization is the proponent and for those NEPA analyses of others that will impact or involve the environmental resources or mission activities for which the organization has oversight.

(vi) Develop and publish local NEPA guidance and procedures.

(vii) Identify additional environmental information needed to support informed Army decision-making.

(viii) Assist proponents to identify issues, impacts, and possible alternatives and/or mitigation measures relevant to specific proposed actions.

(ix) Ensure mitigation measures are implemented, and mitigation monitoring occurs to ensure that mitigation measures are accomplished.

(x) Assist in completion of agency, stakeholder, and public coordination. Request PAO review and assistance with all public communications and events.

Subpart B—Army National Environmental Policy Act Implementation

§ 651.6 Army NEPA review.

(a) Army actions that may involve some level of NEPA compliance generally include, but are not necessarily limited to:

(1) Policies, regulations, plans, and procedures that affect the use or management of the environment.

(2) Research, Development, Test, and Evaluation (RDT&E) activities; acquisition program actions; and real property and facility management actions.

(3) Projects involving facility construction, renovation, or demolition.

(4) Military operations and activities including training, flight operations, overall operation of installations, and test and evaluation programs.

(5) Actions that require licenses for operations or special material use, including a Nuclear Regulatory Commission (NRC) license, an Army radiation authorization, and Federal Aviation Administration (FAA) air space requests (new, renewal, or amendment).

(6) Materiel acquisition, development, testing, fielding, operation and support, disposal, and/or modification.

(7) Transfer and use of weapons systems or other personal property to the ARNG or Army Reserve.

(8) Research and development including areas such as genetic engineering, laser testing, and electromagnetic pulse generation.

(9) The planned use of land acquired through leases, easements, permits, licenses, out-grants, or other entitlement for use, to include donation, exchange, barter, or Memorandum of Understanding (MOU). Examples include grazing leases, grants of easement for highway right-of-way, and requests by the public to use land for special events such as sporting events, air shows, or carnivals.

(10) Federal contracts, grants, cooperative agreements, subsidies, loans, or other forms of funding such as Government-Owned, Contractor-Operated (GOCO) industrial plants or housing and construction via third-party contracting.

(11) Request for approval to use, store, or dispose of non-DoD radiation sources, hazardous or toxic material, or hazardous or toxic wastes on Army land, when permitted by law.

(12) Stationing actions that result in increases, reductions, or realignments of military and civilian personnel.

(b) *Special circumstances.* The following are special circumstances addressing exemptions and emergency actions.

(1) *Exemption by law.* NEPA itself does not contain a statutory exemption. NEPA exemptions in other statutes must apply to DoD and/or the Army and must prohibit, exempt, or make impossible full compliance with the NEPA procedures. While some aspects of Army decision-making may be exempted from NEPA, other aspects of an action may still be subject to NEPA review. Army proponents who believe a proposed Army action qualifies for an

exemption from NEPA will, at the earliest practicable time, notify their chain of command and DASA (ESOH). DASA (ESOH) will coordinate with the appropriate OSD office, and will request a binding legal opinion regarding the applicability of the exemption from Army OGC. Congressional direction to the Army to take an action does not constitute an exemption from NEPA.

(2) *Emergencies.* (i) The Army will not delay an emergency action necessary for national defense, security, or preservation of human life or property to comply with this part. The Army's on-site commander dealing with the emergency will consider the probable environmental consequences of proposed actions, and will minimize environmental damage to the maximum degree practicable, consistent with protecting human life, property, and national security.

(ii) Where emergency circumstances make it necessary for a responsible Army official to take an action with significant environmental impact without observing the provisions of this part, the Army official will, at the earliest practicable time, notify their chain of command and DASA (ESOH). The responsible Army official will consult with CEQ as soon as reasonably possible about alternative arrangements. This section applies only to actions necessary to control the immediate effects of the emergency.

(iii) Where the significance of the impacts are unknown but are anticipated to be less than significant, and emergency circumstances make it necessary to take an action without observing the provisions of this part, the responsible Army official will, at the earliest practicable time, notify their chain of command and the DASA (ESOH). If the action is ongoing, an appropriate NEPA review will be prepared as soon as practicable.

(iv) After-action reports may be required at the discretion of the DASA (ESOH).

(v) State call-ups of ARNG during a natural disaster or other state emergency are excluded from the notification requirements of this section.

(c) *Levels of Army NEPA review.* The following are the levels of NEPA review that a proposed Army action may be subject to:

(1) *CX.* This level of NEPA review addresses actions that normally do not require an EA or an EIS. A CX is applicable where the Army has determined that certain actions do not individually or cumulatively have a significant effect on the human environment. Requirements for application of a CX are further described in this part. The Army uses a Record of Environmental Consideration (REC) to document the application of certain CXs. Army CXs and RECs are addressed in subpart C of this part.

(2) *EA.* Proposed Army actions not covered by paragraphs (b) and (c)(1) of this section must be analyzed to determine if they could cause significant impacts to the environment. The EA is the basis for determining that impacts would not be significant, are mitigated to less than significant, or that an EIS is required. The EA requires analysis of the magnitude of impacts and evaluation of their significance. The EA findings are documented in either a FONSI or an NOI (to prepare an EIS). This process requires public review of the signed EA and draft FONSI. The format and requirements for the EA are addressed in subpart D of this part.

(3) *EIS.* When an action clearly has significant impacts or when an EA cannot be concluded by a FONSI, an EIS must be prepared. An EIS is initiated by the NOI published in the FR. An EIS examines the environmental effects of the proposed action and reasonable alternatives as well as potential measures to mitigate adverse effects. This process requires formal interaction with the public, to include a scoping process, opportunities for public review of the Draft EIS, and the incorporation of public comments. The format and requirements for the EIS are addressed in subpart E of this part.

(4) *Programmatic EA or EIS.* Army agencies may analyze proposed actions at a programmatic level for programs and actions that are similar in nature or broad in scope and/or that involve decisions related to multiple locations to eliminate repetitive discussions of the same issues and focus on the key points at each appropriate level of project review. When a programmatic EA or EIS has been prepared, any subsequent EIS, EA, or REC on an action included within the entire program or policy (particularly a site-specific action) can ''tier'' off the original analyses, eliminating duplication. The subsequent documents need only summarize issues discussed in the broader statement and concentrate on the issues specific to the subsequent, site-specific action.

§ 651.7 NEPA principles and practices.

(a) *Synchronizing environmental reviews.* (1) Proponents will ensure that permitting, compliance, consultation, and coordination required by other applicable independent environmental statutes and regulations is completed prior to execution of the decision document (FONSI or ROD). The proponent will incorporate the information and requirements resulting from these independent compliance actions into the NEPA document to identify and assess potential environmental impacts and mitigation measures.

(2) NEPA compliance does not replace the procedural or substantive compliance requirements of other independent environmental statutes and regulations. The NEPA analysis summarizes and consolidates the information resulting from compliance with other independent environmental statutes and regulations into a single NEPA document. This ensures the approving official has a comprehensive view of the environmental issues and understands the full scope of potential environmental consequences.

(3) Decision documents will be forwarded to the planners, designers, and/or implementers to ensure the actions and mitigation measures occur as specified in the decision document and are incorporated as needed during project execution.

(b) *Analyzing connected actions.* (1) The Army will analyze impacts of connected actions within the same NEPA review. Connected actions are actions that are closely related, and include: Actions that automatically trigger other actions that may require a higher level of analysis; those that cannot or will not proceed unless another action is taken previously or simultaneously; and those that are interdependent parts of a larger action and depend on the larger action for their justification.

(2) *Segmentation* is the impermissible separation of connected actions into different NEPA analyses for the purposes of, or having the result of, avoiding the appearance of significance of the total action. Segmentation includes defining an action too narrowly to avoid a higher level of analysis. The use of a programmatic NEPA document and subsequent tiering of NEPA analyses is permissible and does not constitute improper segmentation.

(3) The rapidly and continuously evolving nature of the national defense mission, and the sheer size, nation-wide geographic distribution, and inherently hierarchical organization of the Army, often require that higher-headquarter decisions are made without a complete analysis of the multitude of connected actions, alternatives, and impacts at the site-specific, installation level. Such actions are best analyzed using a programmatic tiered NEPA approach, with the local-level analyses focused on alternatives for the best implementation of the higher-level decision.

(c) *Cumulative impacts.* NEPA documents must assess cumulative impacts.

(d) *Preparing the administrative record.* The proponent is responsible for maintaining the complete administrative record for the proposed action, and for providing copies of the record to the relevant environmental officer responsible for NEPA program management if requested. The administrative record includes all documents and information used to make the decision. All documentation and supporting administrative records will be retained by the installation staff responsible for NEPA program management, at the installation where the proposed action takes place. The administrative record will be retained for a minimum of six years after signature of the decision document or the completion of the action, any required mitigation is complete, or the information is no longer valid, whichever is later. For programmatic NEPA analyses, the proponent will keep NEPA documentation and supporting administrative records. The proponent will ensure that EAs/FONSIs and final EISs/RODs are uploaded into the Army NEPA repository as designated by DCS, G–9.

(e) *Preparing a Supplemental EA or Supplemental EIS.* When significant new or previously unknown circumstances or information relevant to the environmental effects or impacts of an action are revealed, the proponent will determine if the completed NEPA documentation is adequate. If the completed NEPA documentation is adequate, or if a CX is applicable to the changes or to the new circumstances or information, a REC may be prepared. If conditions warrant a Supplement EA or a Supplemental EIS, these documents are prepared and processed in the same way as the original EA or EIS. No new scoping is required for a Supplemental EIS filed within one year of the filing of the original ROD.

(f) *Addressing response actions.* Response actions implemented in accordance with the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) or the Resource Conservation and Recovery Act (RCRA) do not require separate NEPA review. Where appropriate, CERCLA and RCRA analysis and documentation should incorporate the values of NEPA.

(g) *Joint basing applicability.* This part applies to joint bases for which the Army is the supporting component. This part applies to supported military components on joint bases where the Army is the supporting component. Supported Army proponents on a joint base where another military service is the supporting component will follow the supporting military component's NEPA regulations. Under joint base agreements, the supporting service component provides installation management services to the supported service component including management functions associated with NEPA documentation financed by supported components.

(h) *Army as NEPA lead agency.* In some cases, other Federal agencies, and local, state, regional, or tribal governments or agencies will have sufficient jurisdiction by law or special expertise with respect to a proposed Army action that the NEPA process would benefit from the participation of the organization. When appropriate, the proponent for an action should determine whether these entities have an interest in becoming a cooperating agency. If cooperating agency status is established, a memorandum of agreement (MOA) or MOU is required to document specific expectations, roles, and responsibilities, including analyses to be performed, time schedules, availability of pre-decisional information, and other issues. Cooperating agencies use their own funds, and the designation of cooperating agency status neither enlarges nor diminishes the decision-making status of any Federal entity leading or cooperating in the action.

(i) *Army as NEPA cooperating agency.* In cases where other agencies take actions that can impact the Army mission, the Army may have some special or unique expertise or jurisdiction by law. In those circumstances, the Army may be a NEPA cooperating agency and provide information or technical expertise to a lead agency, approve portions of a proposed action under Army control, ensure the Army has an opportunity to be involved in an action of another Federal agency that will affect the Army, and provide review and approval of the portions of NEPA documents that affect the Army.

(j) *Other reports.* Army proponents may publish fact sheets and/or supplemental information documents on complex or long-term NEPA reviews to keep the public informed on the status of the proposed action.

(k) *Greenhouse gas (GHG) and climate change.* When defining the scope of NEPA analysis, the proponent determines whether and to what extent GHG emissions and climate change effects warrant analysis. When the proponent determines that reasonably foreseeable GHG emissions are substantial enough to warrant quantification, the proponent should:

(1) Quantify those GHG emissions where information and quantification tools are available, and where quantification would be practicable and not overly speculative.

(2) Where quantification would not be practicable or would be overly speculative, the proponent should include a qualitative analysis.

(3) Emissions should be reasonably foreseeable, there must be a sufficiently close causal relationship.

(4) Proponents are not required to quantify effects where information necessary for quantification is unavailable, not of high quality, or the complexity of identifying emissions would make quantification overly speculative.

(5) A direct and indirect effects analysis of GHG emissions is sufficient and a separate cumulative impact analysis for GHG emissions is not required.

(6) Proponents are not required to develop cost benefit analyses, including Social Cost of Carbon (SCC). SCC analyses were not intended for socio-economic analysis under NEPA or decision-making on individual actions, including project-level decisions.

(l) *Information inclusion.* Proponents should identify and eliminate from further consideration any insignificant issues and information that is not relevant or important to determining the environmental effects of a proposed action. This also includes issues and information which have been covered in a previous environmental review.

(m) *NEPA time limits.* Proponents should strive to achieve completion of:

(1) EAs within one year. One year is measured from the date of the proponent's decision to prepare an EA to the publication of a final EA.

(2) EISs within two years. Two years is measured from the date of the issuance of the NOI to the date a ROD is signed.

§ 651.8 Security review and clearance policy for NEPA documents.

The proponent will ensure NEPA documents intended for public release undergo operational security review and are cleared for public release. Security review and clearance protects classified information, controlled unclassified information, unclassified information that may individually or in aggregate lead to the compromise of classified information, militarily critical information and other information that if disclosed is deemed an operational security risk.

(a) Classified proposals, and proposed actions involving classification of

information, militarily critical and other information whose disclosure is deemed a risk to national defense operational security does not relieve the proponent of the NEPA compliance requirement to assess and document the effects of their proposed action on the environment.

(b) Information may be considered militarily critical if it addresses the following subjects or affects the operations security thereof:

(1) New weapons or weapons systems, or significant modifications or improvements to existing weapons or weapons systems, equipment, or techniques.

(2) Military operations and significant exercises of national or international significance.

(3) Command, control, communications, computers, intelligence, surveillance, and reconnaissance; information operations and cyberspace; weapons of mass destruction; improvised explosive devices; and computer security.

(4) Military activities or application in space; nuclear weapons, including nuclear weapons effects research; defense from chemical and biological warfare and threats; initial fixed weapons basing; and arms control treaty implementation.

(5) Any other contemporary topic that is so designated by the appropriate authority.

(c) Proponents will follow all applicable DoD and Army information security regulations (including AR 380–5 Department of the Army Information Security Program) for proposed actions and NEPA analyses involving classified information, or military critical and other information deemed a risk to operational security. EAs and EISs which address classified proposals, contain classified information, militarily critical or other information deemed an operational security risk will be safeguarded, and may be restricted from public dissemination.

(d) When classified information, militarily critical or other information deemed an operational security risk can be reasonably separated from other information, an unclassified and publically releasable NEPA document will be prepared and processed in accordance with this part. Classified information, militarily critical and other information deemed an operational security risk will be safeguarded, restricted from public dissemination, and provided to reviewers and approving officials in accordance with AR 380–5. Critical program information will be kept separated and provided to reviewers and decision-makers in accordance with the appropriate distribution statement.

(e) When classified information, militarily critical and other information deemed an operational security risk is an integral part of the analysis of a proposal such that a meaningful NEPA document cannot be produced for public dissemination, the proponent will: Ensure that the appropriate NEPA analysis is prepared by individuals with appropriate expertise and clearance levels, consider environmental effects in accordance with § 651.1(b), safeguard and restrict the resulting NEPA document from public dissemination, and ensure that the approving official is fully informed of the environmental consequences of the proposed action prior to making a decision regarding the action. The proponent will retain the NEPA document and associated NEPA analyses as part of the administrative record for the proposed action in accordance with applicable Army information security regulations.

Subpart C—Categorical Exclusions and Records of Environmental Consideration

§ 651.9 Categorical exclusions and screening criteria general information.

(a) CXs are categories of actions with no individual or cumulative significant effect on the human or natural environment, and for which neither an EA nor an EIS is required. The use of a CX is intended to reduce paperwork and eliminate delays in the initiation and completion of proposed actions that have no significant impact. Proponents must apply the Army CX screening criteria to determine if a CX is applicable to their proposed action. The Army CX screening criteria are at § 651.11 and the Army CXs are at § 651.12.

(b) Specific screening criteria must be applied to determine if a CX is appropriate and applicable. The screening criteria must be applied to ensure that no extraordinary circumstances or effects on environmentally sensitive resources exist, or to ensure that any effects on environmentally sensitive resources have been addressed through a prior NEPA document or by compliance with other environmental statutes and regulations.

(c) If no CX is appropriate, the potential environmental impacts of the proposed action must be analyzed in an EA/FONSI or an EIS/ROD before it may proceed. Where documentation is needed to clarify that the proposed action is adequately covered by a prior completed NEPA document, a REC is prepared to that effect (§ 651.10).

§ 651.10 Record of environmental consideration.

(a) A REC is a signed statement that briefly describes a proposed action, and documents that the action has received NEPA review. A REC has no prescribed format, as long as it contains all relevant information required to support its conclusions.

(b) RECs are used to:

(1) Document how an action qualifies for a CX when a REC is required for the CX and that it is not a major Federal action or has no potential for significant effects on the environment;

(2) Document where other environmental statutory or regulatory compliance requirements (other than NEPA) have been used to address potential impacts to environmentally sensitive resources;

(3) Describe how a prior completed NEPA document applies to the current proposed action such that the proposed action has already been adequately analyzed in a completed NEPA document; and

(4) Identify new or additional information and document a determination that amendment or supplementation of a previously completed EA or EIS is not needed, even in light of the new or additional information. In such circumstances, an additional information document may be prepared and attached to the REC.

(c) *REC content.* (1) RECs must document the basis for the determination that a CX is applicable, including the conclusions reached during application of the screening criteria. The REC must expressly state that screening criteria were applied.

(1) RECs may include by reference relevant and readily available documents, and new or additional information.

(2) When used to document that a proposed action is adequately covered within a previously completed EA or EIS, the REC should state the applicable EA or EIS title, date, date of FONSI or ROD, and the location of record copies.

(3) While a REC may document compliance with the requirements of NEPA, it does not fulfill the requirements of other environmental statutes and regulations. The REC should reference compliance with other environmental statutes and regulations. Appropriate interagency correspondence can be referenced in and/or attached to the REC to document compliance with other environmental statutes and regulations.

(4) RECs must address all connected actions associated with the proposed action.

(d) *REC coordination and signature.* RECs will be coordinated with appropriate Army offices as determined by the proponent. RECs require one signature, and are signed by the approving official, or their designee. RECs can only be signed by Army military personnel or a Federal civil service employee. RECs must be dated and include the estimated date or timeframe of the proposed action. RECs must be signed prior to the start of the proposed action. A REC need not be published or made available to the public for comment, but must be kept by the proponent with the project file for the proposed action and, subject to operations security review, may be made available to the public on request.

(e) Once a REC is signed, the NEPA process is concluded, and the proposed action may proceed.

(f) More than one CX may apply to a proposed action. Not all applicable CXs may require a REC; however, a REC should discuss all connected actions, including those that are covered by an applicable CX that does not require a REC, to clarify that the actions were analyzed and not segmented.

§ 651.11 Army CX screening criteria.

The Army Screening Criteria are as follows:

(a) The proposed action has not been segmented (see § 651.7(b)(2)).

(b) Determine if the proposed action involves extraordinary circumstances that would preclude the use of a CX. Extraordinary circumstances that preclude the use of a CX are:

(1) Unique characteristics of the affected site or region in which the proposed action is located indicate a reasonable likelihood of significant effects (direct, indirect, or cumulative) on public health, safety, or the environment.

(2) Possible effects on the environment are highly uncertain or the proposed action involves unique or unknown risks.

(3) Scope or size of the proposed action is substantially greater than what is typical or what is described in otherwise applicable CXs.

(4) Implementation of the proposed action would require a substantive revision to a management plan and an EA or EIS for the management plan is required prior to the plan revision being finalized or approved.

(5) Reasonable likelihood that the proposed action would result in discharges or emissions of pollutants above a de-minimis level and/or reportable quantities, and the discharge or emission is not otherwise alleviated through another environmental process (*e.g.,* discharge or emission permit).

(6) Reasonable likelihood of violating an applicable Federal, state, or local law or requirement imposed for the protection of the environment.

(7) Effects on the quality of the environment likely to be highly controversial.

(8) Would establish a precedent (or make decisions in principle) for future or subsequent actions that are reasonably likely to have a future significant effect.

(9) Introduction/employment of materials or technology for which potential impacts on the environment are unproven.

(c) A CX may not be used if a proposed action would adversely affect an environmentally sensitive resource unless the adverse effect is addressed through another environmental compliance process (for example, Endangered Species Act (ESA), Native American Graves Protection and Repatriation Act (NAGPRA), Integrated Natural Resources Management Plans (INRMPs) adhering to the Sikes Act, Migratory Bird Treaty Act (MBTA), Bald and Golden Eagle Protection Act (BGEPA), Coastal Zone Management Act (CZMA), National Historic Preservation Act (NHPA), Clean Water Act (CWA), etc.). A REC is required to document the use of another environmental compliance process to address potential impacts to environmentally sensitive resources. The term ''environmentally sensitive resources'' is defined in appendix B, Section II, of this part.

(d) The use of a CX does not relieve the proponent from compliance and consultation requirements under other statutes, regulations, and permits.

§ 651.12 Army CXs.

(a) *Army CXs.* Army CXs are grouped under common types of activities, see paragraphs (b) through (i) of this section.

(1) CXs that require a REC are so identified. If a CX does not require a REC, no documentation is necessary. The screening criteria must be analyzed to provide sufficient detail to demonstrate that no extraordinary circumstances exist that would preclude the use of a CX.

(2) Proposed actions may not be segmented in order to meet the requirements of a CX.

(3) The list of CXs is subject to continual review and modification. Requests for additions or changes to the CXs (along with justification) should be staffed, through channels, to the ODASA (ESOH). Subordinate Army headquarters may not modify the CX list through supplements to this part.

(4) More than one CX may be cited for a given proposed action.

(b) *Administrative measures.* (1) Routine law and order activities performed by civilian and military police, physical plant protection and security personnel, and civilian natural resources and environmental law officers. This includes defense support to civil authorities and search and rescue operations.

(2) Emergency or disaster assistance provided to Federal, state, or local entities (REC required).

(3) Preparation, revision, and promulgation of regulations, policies, directives, procedures, manuals, and guidance documents that implement HQDA or other Federal agency regulations, policy, procedures, manuals, and guidance documents that have been the subject of previous NEPA review or do not have substantial impacts on the environment.

(4) Proposed administrative activities and operations to be conducted in an existing structure that are within the scope and compatibility of the present functional use of the structure. This includes all routine administrative functions of any kind; examples include, but are not limited, to military and civilian personnel recruitment, hiring, paying, supervision, and management; budgets, appropriations, and contracts planning, administration, and management; documents and records preparation, management, and distribution; investigations, inspections, analyses, and studies planning, execution, and documentation; educational and public outreach material development and distribution; and communications, briefs, and staffing actions.

(5) Routine management of buildings, facilities, utilities, training areas, and ranges in order to support routine use and enable timely maintenance and repair. This CX includes all management activities to enable and maintain the full functionality of the site.

(6) Routine morale, welfare, and recreation activities not involving off-road recreational vehicles.

(7) Deployment of military forces on a temporary duty or training basis where existing facilities are used for their intended purposes consistent with the scope and size of existing mission.

(8) Routine travel and movement of personnel, vehicles, watercraft, aircraft, equipment, and other materiel and commercial goods.

(9) Approval of asbestos or lead-based paint management plans drafted in accordance with applicable laws and regulations (REC required).

(10) Special events and routine community relations events, whether on or off the installation. These include educational, technical, advisory, and consultation activities where the Army engages with communities, government, private organizations and individuals, federally-recognized Indian tribes, and the general public. Such events include for example, ceremonies, funerals (to include state funerals), open houses, town halls, air shows, athletic events, flyovers, Earth Day events, and concerts. (REC required for air shows and flyovers).

(11) Temporary closure or temporary restriction of access to roads, trails, recreational areas, and/or any lands within the boundaries of a military installation or within DoD real estate lease agreement land holdings in order to protect human or animal life, other natural or cultural resources, or for military training or security/law enforcement purposes (REC required).

(12) Reductions and realignments of civilian and/or military personnel that fall below the thresholds for actions reportable to Congress, as prescribed by statute (for example, 10 U.S.C. 2687(a)(2) and 10 U.S.C. 993). This includes reorganizations and reassignments with no changes in force structure, unit redesignations, and routine administrative reorganizations and consolidations. (REC required when the net change in military and civilian authorizations at a military installation meets the threshold for forwarding a stationing package to the DCS, G–3/5/7).

(13) Relocation of personnel into existing federally-owned (or state-owned in the case of ARNG) or commercially-leased space. (REC required when the net change in military and civilian authorizations at a military installation meets the threshold for forwarding a stationing package to the DCS, G–3/5/7).

(14) An Army action occurring on another military service's property where the action qualifies for a CX of that military service, or for actions on property designated as a Joint Base or Joint Region that qualifies for a CX of any of the military services included as part of the Joint Base or Joint Region. When the Army proponent chooses to use another military service's CX to cover a proposed action, the proponent must have written confirmation that the other service does not object to using their CX to cover the Army action. The Army proponent will include that written confirmation in the administrative record for the proposed action. The Army official making the CX determination must ensure the application of the CX is appropriate and that the Army proposed action was a type contemplated when the CX was established by the other service, and that no extraordinary circumstances exist. (REC required).

(15) An Army action occurring on another Federal agency's property, or on property where another Federal agency is operating, that qualifies for a CX of the other Federal agency. If the Army chooses to use the other Federal agency's CX to cover the proposed Army action, the Army proponent must have written confirmation that the other agency does not object to using their CX to cover the Army action. The Army proponent will include that verification in the administrative record for the proposed action. The Army proponent must determine that the Army action fits within the other Federal agency's CX, is of a similar type and scope as the action categorically excluded by the other Federal agency, and no extraordinary circumstances exist. (REC required).

(c) *Construction and demolition.* (1) Construction of new, alteration of existing (to include replacement or upgrades), and additions to existing buildings, facilities, structures (to include towers that do not present a collision hazard to military aircraft), launch pads, utility systems, and communication systems on previously disturbed land and/or on undisturbed land, provided there are no more than 5 cumulative acres of surface disturbance to undisturbed land. (REC required). This does not include construction of facilities intended primarily for the transportation, distribution, storage, treatment, and disposal of solid waste, medical waste, and hazardous waste. The terms ''previously disturbed land'' and ''undisturbed land'' are defined in appendix B, Section II, of this part.

(2) Construction of new and expansion of existing parking lots and hardening of tank trails and turn pads on previously disturbed land and/or on undisturbed land, provided there are no more than 5 cumulative acres of surface disturbance to undisturbed land. If a parking lot design will replicate the pre-development hydrology, limitation may be extended to 10 acres (REC required). The terms ''previously disturbed land'' and ''undisturbed land'' are defined in appendix B, Section II, of this part.

(3) Placement and replacement of targetry and other stationary equipment on existing ranges provided there are no more than 5 cumulative acres of surface disturbance to undisturbed land (REC required). The term ''undisturbed land'' is defined in appendix B, Section II, of this part.

(4) Installation of fencing, utility systems, and communication systems that use existing right-of-way, and installation of airfield communication and safety equipment (REC required).

(5) Construction, placement, installation, or relocation of machinery and equipment (for example, analytical laboratory apparatus, electronic hardware, maintenance equipment, and health and safety equipment) from another site or structure to the new or altered building/facility/site, assuming the uses of the relocated items will be similar to their former uses (REC required).

(6) Demolition of buildings, structures, or other improvements and disposal of debris therefrom, or removal of a part thereof for disposal, in accordance with applicable requirements, to include requirements associated with removal of asbestos, polychlorinated biphenyls (PCBs), lead-based paint, and other special hazards. For historic districts, sites, buildings, structures, or objects eligible for or included in the National Register of Historic Places, all requirements of the NHPA must be met (REC required).

(7) Road or trail construction on existing rights-of-ways or on previously disturbed areas to dimensions that meet design standards that permit safe vehicle operation (REC required).

(8) Construction, in accordance with applicable permits, of new or improved low water crossing and fording areas on existing trails or roads used for training purposes, and storm water conveyances for storm water management, safety, and other purposes. Construction or improvements must permit the flow of water across the crossing/fording. Total ground area disturbed per low water crossing area must not exceed 5 acres. (REC required).

(9) Minor renovations and additions, in accordance with applicable permits, to waterfront facilities, including mooring piles, fixed floating piers, existing piers, unburied power cables, and maintenance and replacement of existing oil booms. (REC required).

(10) Actions in unsewered areas on lands within the boundaries of a military installation or within DoD real estate lease agreement land holdings involving the replacement of existing small (total capacity less than approximately 250,000 gallons per day) on-site wastewater and sewage systems, providing the new on-site systems do not relocate existing discharge (REC required).

(11) Construction or installation, to include modification, of fencing, gates, grates, walls, small enclosures, stakes, signage, cattle guards, and other small appurtenances or devices (for example, raptor electrocution prevention devices) attached to the land for the purposes of security or to otherwise protect human life, animal life, or other resources.

(12) Construction and modernization of common small arms ranges on previous or existing range sites in Army training and testing areas requiring total disturbance of approximately 40 acres or less, without change to noise contours that would potentially increase noise impacts to sensitive receptors and without change to existing Surface Danger Zones (SDZs). This includes the construction of a Range Operations Control Area, which contains common range support facilities and parking. This CX also includes the demolition of any old structures on the previously disturbed sites. Small arms ranges typically include weapons that fire ammunition that is .50 caliber or less and hand or launched grenades (REC required).

(13) Reconstruction, repair, restoration, retrofitting, or replacement of any facility, structure, road, or trail (including fencing, gates, parking lots, erosion control structures, storm water control structures, roads, trails, revegetation, removal of debris, or any other infrastructure improvement), that was in use and operation, or was under construction, and was damaged or destroyed due to a natural event, including but not limited to wildfires, floods, earthquakes, landslides, weather events; or an accident, vandalism, or an act of terrorism; and which will substantially conform to the preexisting design, function, and location as the original (REC required; will include consideration of anticipated temporary construction impacts).

(d) *Cultural and natural resources.* (1) Regeneration of an area to native tree species and other native vegetation species including: Site preparation; post-fire rehabilitation activities (such as tree planting, fence replacement, or habitat restoration); timber stand and/or wildlife habitat improvement activities that do not include the use of herbicides and do not require more than 1 mile of road construction; and restoration of wetlands, streams, riparian areas, and other water bodies. This does not include forestry operations (REC required).

(2) Implementation of hunting and fishing policies or regulations that are consistent with state and local regulations and Tribal Treaty rights.

(3) Scientific studies, surveys, data collection, monitoring, and information gathering activities that are minimally intrusive to the environment. Examples include, but are not limited to topographic surveys; bird counts; wetland mapping; use of remote sensing technologies; geophysical investigations using sonar; inventories, evaluation, and mitigation for historic properties in accordance with NHPA; other cultural and natural resource surveys, inventories, monitoring, and investigations; and geotechnical testing to support pre-construction investigations and facility design when the geotechnical testing technology used is minimally intrusive to the environment (REC required).

(4) Maintenance, repair, and replacement in kind of archaeological, historical, and endangered/threatened species avoidance markers, fencing, and signs; and maintenance, repair, and replacement in kind of existing fencing to provide improved wildlife ingress and egress.

(5) Update and implementation of Integrated Natural Resources Management Plans (INRMPs) and Integrated Cultural Resources Management Plans (ICRMPs), where plan update and implementation activities are similar in type, scope, and intensity to those currently allowed and result in no new adverse effects on the environment (REC required).

(6) Actions to find, contain, and eradicate localized populations of invasive species using control mechanisms listed in the installation Integrated Pest Management Plan (IPMP), provided the invasive species control mechanism affects an area 250 cumulative acres or less in size (REC required).

(7) Forestry and associated operations focused on the harvest of live trees not to exceed 70 acres. Salvage of dead or dying trees (and adjacent live trees) not to exceed 250 acres to control disease or the spread of insect infestation. Associated operations include no more than 0.5 mile of temporary road construction, and seeding or reforestation of timber areas (REC required).

(8) Prescribed burning not to exceed 4,500 acres per prescribed burn project, and mechanical vegetation removal not to exceed 1,000 acres per vegetation removal project, for the purposes of: Reducing the risks and severity of wildland fires and fires resulting from Army mission activities; and enhancing the biodiversity, stability, and productivity of the natural environment (REC required).

(e) *Procurement and product modifications.* (1) Routine procurement of goods and other services (complying with applicable procedures for procurement of sustainable goods and services) to support operations and infrastructure, and routine utility services and contracts.

(2) Procurement, installation or replacement, or operation of utility and communication systems, mobile antennas, data processing equipment and similar electronic equipment, that use existing right-of-way, easement, distribution systems, and/or facilities (REC required).

(3) Conversion of commercial activities under the provisions of AR 5–20, Competitive Sourcing Program (for example, conversion of commercial RDT&E activities for military equipment). This includes only those actions that do not change the actions or the missions of the organization or alter the existing land use patterns.

(4) Modification, product improvement, or configuration engineering design change to materiel, structure, item, equipment, or system that does not change the original impact of the materiel, structure, item, equipment, or system on the environment (REC required).

(5) Procurement, testing, use, and/or conversion of a commercially available product or non-developmental item (defined in Appendix B, Section II of this part; for example, forklift, chain saw, security monitoring equipment, software, automobile, commercially-available heavy equipment, etc.) that does not result in any unusual disposal requirements.

(6) Acquisition or contracting for spares and spare parts, consistent with the approved Technical Data Package (TDP).

(7) Modification and adaptation of commercially available products and non-developmental items for military application (for example, sportsman's products and wear such as holsters, shotguns, side arms, protective shields, clothing, backpacks, etc.), as long as modifications do not alter the normal impact to the environment from similar military equipment (REC required).

(8) Adaptation of non-lethal munitions and restraints from law enforcement suppliers and industry (for example, rubber bullets, stun grenades, and smoke bombs) for military police and crowd control activities where there is no change from the original product design and there are no unusual disposal requirements; the development and use by the military of non-lethal munitions and restraints that are similar to those used by local police forces and

in which there are no unusual disposal requirements (REC required).

(f) *Real estate transactions.* (1) Grants, acquisitions, or terminations of leases, licenses, easements, permits for use of real property or facilities, and land withdrawal continuances or extensions that merely establish time periods in which there is no significant change in land or facility use (REC required).

(2) Disposal of excess easement areas to the underlying fee owner (REC required).

(3) Transfer of real property administrative control within the Army, to another military department, or to other Federal agency, including the return of public domain lands to the Department of Interior, and reporting of property as excess and surplus to the General Services Administration (GSA) for disposal (REC required).

(4) Transfer of active installation utilities to a commercial or governmental utility provider, except for systems on property that has been declared excess and proposed for disposal (REC required).

(5) Acquisition of real property (including facilities) where the land use will not change substantially, or where the land acquired will not exceed 40 acres and the use will be similar to Army activities on adjacent land (REC required).

(6) Disposal of real property (including facilities) by the Army where the reasonably foreseeable use will not change significantly (REC required).

(7) Agreements entered into with an eligible entity or entities under the Army Compatible Use Buffer (ACUB) program, in accordance with 10 U.S.C. 2684 or under other applicable authorities, that address the use or development of real property in the vicinity of, or ecologically related to, a military installation or military airspace for purposes of limiting development of the property that would be incompatible with the mission of the military installation and/or for preserving habitat and cultural resources on the property that may eliminate or relieve current or anticipated restrictions on military testing, training or operations and for which there is no significant change of land use (REC required).

(g) *Maintenance, repair, and infrastructure operations.* (1) Routine repair and maintenance of buildings, facilities, launch pads, structures, utility/communication systems, airfields, grounds, parking areas, targetry and other stationary equipment on existing ranges, and fencing; includes associated components and equipment. Examples include, but are not limited to custodial services performed on existing facilities, removal and disposal of asbestos-containing material (for example, roof material and floor tile) or lead-based paint; in accordance with applicable regulations; removal of dead, diseased, or damaged trees; and repair of roofs, doors, windows, or fixtures (REC required for removal and disposal of asbestos-containing material and lead-based paint. REC required for work on structures eligible for or listed in the National Register of Historic Places where impacts to such environmentally sensitive resources have been resolved in accordance with NHPA Section 106 regulatory procedures).

(2) Routine repairs and maintenance of existing roads, trails, and firebreaks. Examples include, but are not limited to, grading and clearing the roadside of brush with or without the use of herbicides; resurfacing a road to its original conditions; pruning vegetation; removal of dead, diseased, or damaged trees; replacing or cleaning culverts; and conducting minor soil stabilization activities.

(3) Routine installation, repair, and maintenance of equipment and vehicles (for example wheeled vehicles, tractors, lawn equipment, airfield equipment [such as runway visual range equipment and visual approach slope indicators], and military vehicles, equipment, and systems) that is substantially the same as that routinely performed by private sector owners and operators of similar equipment and vehicles. This does not include depot maintenance of unique military equipment.

(4) Repair and maintenance (including replacement and upgrade of parts), and decontamination operations for military equipment conducted at existing enclosed facilities, to include contractor-operated/owned enclosed facilities, consistent with previously established safety levels and in compliance with applicable Federal, state, and local requirements (REC required if proposed action entails a new/modified repair/maintenance operation affecting equipment containing munitions, explosives, or hazardous material, and the operation was not implemented at the enclosed facility during the preceding 5 years; REC required if the proposed action necessitates a new permit or change in an existing permit).

(5) Land repair and maintenance projects for the purpose of mitigating the effects of military training exercises. Examples include, but are not limited to: Soil stabilization through revegetation; installing and maintaining erosion control measures; gulley and ravine stabilization; control of invasive vegetation; maintenance of existing structures such as culverts, terraces, and sediment control structures; and maintenance of improved surfaces that are part of the training landscape (REC required).

(6) Routine maintenance of streams and ditches or other rainwater conveyance structures and erosion control and storm water control structures (REC required).

(7) Development, adoption, update, and implementation of an installation pesticide, fungicide, herbicide, insecticide, and rodenticide-use program and plan (IPMP). The IPMP will provide for application of substances approved for use by the appropriate regulating agency when the application of such substances is implemented in accordance with the manufacturer's label directions, the IPMP, and INRMP as applicable. (REC required). This categorical exclusion does not apply to implementation of aerial spraying.

(8) Closure, decommissioning, mothballing, disconnection, and similar discontinued use of facilities, equipment, vehicles, aircraft, watercraft, and utility and communication systems, whether temporary or permanent (REC required).

(h) *Waste, hazardous materials, hazardous waste, and excess material and equipment.* (1) Use of gauging devices, analytical instruments, and other devices containing sealed radiological sources; use of industrial radiography; use of radioactive material in medical and veterinary practices; possession of radioactive material incident to performing services such as installation, maintenance, leak tests, and calibration; use of uranium as shielding material in containers or devices; and radioactive tracers (REC required).

(2) Immediate responses in accordance with emergency response plans (for example, Spill Prevention, Control, and Countermeasure Plan (SPCCP)/Installation Spill Contingency Plan (ISCP), and Chemical Accident and Incident Response Plan) for release or discharge of oil, hazardous materials or hazardous substances; and emergency actions taken by Explosive Ordnance Demolition (EOD) detachment or Technical Escort Unit.

(3) Sampling, surveying, well drilling and installation, analytical testing, site preparation, and intrusive testing to determine if hazardous wastes, contaminants, pollutants, or special hazards are present (REC required). No REC required for CERCLA responses or RCRA corrective actions.

(4) Routine management to include the use of hazardous material or waste inventory management systems, transportation, distribution, use, storage, treatment, disposal, recycling, and other waste management activities for solid waste, hazardous waste, medical waste, radiological waste, and special hazards.

(5) Reutilization, marketing, distribution, donation, and resale of items, personal property, equipment, and materiel, to include normal transfer of items to the Defense Logistics Agency; items, personal property, equipment, and materiel that have been contaminated with hazardous materials or wastes but will be adequately cleaned and will conform to the applicable regulatory agency's requirements.

(i) *Training; research, development, engineering, testing, evaluation, and demonstration; manufacturing operations, and human systems integration.* (1) Training entirely of an administrative or classroom nature.

(2)(i) Military training, materiel testing, and materiel fielding activities conducted in or on existing military structures, ranges, maneuver areas, and training areas that are:

(A) Compatible with the current use of existing military structures, ranges, maneuver areas, and training areas;

(B) Similar in type, intensity, and setting to ongoing military activities; and

(C) Are conducted in accordance with applicable plans and standard operating procedures protective of the environment.

(ii) This categorical exclusion includes: Use of existing SDZs and impact areas; emergency response training; use of missile, rocket and artillery-type projectiles; survivability and vulnerability testing; safety and engineering drills; training exercise modification on a Military Operations in Urban Terrain site or in a shoot house; simulated war games (in existing structures); and on-post tactical and logistical exercises involving brigade size units or smaller (REC required).

(3) Intermittent on-post training activities (or off-post training covered by an ARNG land use agreement) that involve no live fire or vehicles off established roads or trails. Uses include, but are not limited to, land navigation, physical training, FAA approved aerial overflights, and small unit level training.

(4) Flying activities, to include manned and unmanned aerial vehicle (UAV) flights, and other airspace use activities (for example, missile and projectile flights) in compliance with FAA regulations and in accordance with normal flight patterns and elevations for that facility/installation.

(5) Infrequent and temporary increases in air operations that do not exceed 50 percent of the typical installation aircraft operations rate or 50 additional operations per day. Repetitive use of this CX requires further analysis to determine there are no cumulative impacts. (REC required).

(6) Operation of small arms ranges on Army lands of approximately 40 acres or less in size, without change to noise contours that would potentially increase noise impacts to sensitive receptors and/or without change to existing SDZs, if operation includes appropriate monitoring for potential off-range impacts (for example, under the Operational Range Assessment Program or similar procedures). Small arms ranges typically include weapons that fire conventional ammunition that is .50 caliber or less and hand or launched grenades. Includes operation of existing recreational small arms ranges on installations. (REC required).

(7) Routine operation and use of radar, sonar, laser, telemetry, and other systems that make use of the electromagnetic spectrum for detection, tracking, navigation, range-finding, targeting, communications, or other military purposes, within the boundaries of a military installation, boundaries of a DoD real estate lease agreement land holding, and/or existing airspace currently used for military training. Operation must conform to current American National Standards Institute/Institute of Electrical and Electronics Engineers guidelines for maximum permissible exposure to electromagnetic fields (REC required).

(8) Research (basic and applied), testing, other RDT&E production/repair operations, and manufacturing operations conducted at existing enclosed facilities to include contractor-operated/owned laboratories and other enclosed facilities, consistent with previously established safety levels (REC required if the proposed action involves the use of munitions and explosives of concern or hazardous material and the constituent was not used at the enclosed facility during the preceding 5 years, or if the proposed action is expected to release radiation).

(9) New activities conducted at established laboratories or manufacturing and maintenance facilities (including contractor-operated laboratories and facilities) of a similar type, nature, and scope as the prior or existing activities on the facility.

(10) Testing, evaluation, and demonstration of Soldier equipment, to include the operator, maintainer, and supporter, and support facilities, that provide for protection of the Soldier and the delivery of required ammunition, cargo, unit equipment, and shelters. Soldier support activities include the transportability testing of mobile facilities that include evaluation of weight, center of gravity, tilt table, and lane change, initial inspection, safety, weight, rail impact, mobility testing, drop test, and final inspection. Testing also includes evaluation of the Lightweight Chemical-Biological Protection, including collective protection and detection equipment, to determine the durability of the Soldier-worn materials and to gain wearability data, including mock training exercises (REC required).

(11) Testing, evaluation, and demonstration of small-scale Army equipment with similar constituents and use as commercially available equipment (for example, backpacks, batteries, radios, flashlights, helmets, clothing, shoes, Global Positioning Systems, containers, test kits, respirators, netting, tents, stretchers, splints, and medical equipment).

(12)(i) Flight testing, evaluation, and demonstration of surface-to-surface, air-to-surface, surface-to-air, and air-to-air rockets, missiles, and medium and large caliber ammunition or artillery-type projectiles where:

(A) The projectile launch, flight, landing, and vehicle/payload recovery occurs solely within the boundaries of a military installation or within DoD real estate lease agreement land holdings;

(B) The entire flight from launch to landing occurs over an established range designated for testing of such projectiles;

(C) Landing and recovery, when feasible, of boosters, (surface) projectiles, payload, aerial targets and/or related debris occurs within a designated impact area (such as a warhead impact target area); and

(D) Recovery operations will be coordinated with explosive ordnance disposal (EOD) personnel to ensure test debris is rendered harmless to human health and safety prior to recovery.

(ii) This CX does not apply to the testing, evaluation, or demonstration of projectiles with payloads designed to release radiological, nuclear, and high-yield explosives or other types of payloads that could cause significant threat to human health and/or the environment if released (REC required).

(13) Testing, evaluation, and demonstration of man portable, individual, and crew-served weapons systems used principally against personnel and lightly armored targets, to

include both ballistic and non-ballistic systems and associated ordnance, munitions, aiming, powering, storage, training, specialized maintenance equipment, logistic support, and other ancillary items where:

(i) The small arms firing occur solely within the boundaries of a military installation;

(ii) The entire firing occurs over an established range designated for testing of small arms; and

(iii) Landing and recovery, when feasible, of munitions and/or debris occurs within a designated impact area (REC required).

(14) Testing, evaluation, and demonstration of mortars on military installations, including:

(i) General support, weapon system testing, production qualifications testing, mortar detection and data acquisition, proof assembly testing, acceptance testing, classification testing, and mortar technology demonstrations;

(ii) General support for mortars testing requiring small arms firing, grenade launcher firing, and rocket propelled grenades firing when launch, flight, and impact occur on designated ranges; or

(iii) Final classification testing, including static functioning of test items in a boxed and stacked configuration when launch, flight, and/or impact/detonation occur on designated ranges (REC required).

(15) Automotive testing involving testing, evaluation, and demonstration of automotive performance, transportability, reliability, human factors engineering and all applicable human systems integration domains, rail impact, lift and tie-down, tilt table, braking, steering and handling, side slopes, longitudinal slopes, gradeability, acceleration, and standard obstacles. Testing also includes:

(i) Testing mobile equipment which includes weight and center of gravity, tilt table, and lane change;

(ii) Automotive performance tests accomplished in environmental chambers or in existing outdoor testing area, including blowing rain and sand tests and transportability tests (lift provision compression test, helicopter flight, and rail impact);

(iii) Specific automotive testing measuring for weight, center of gravity, and moment of inertia, and tire, track, and suspension dynamic and static properties;

(iv) Testing of automotive trailers for resistance to towing; and

(v) Performance vehicles tested for speed and acceleration, gradeability and side slopes, standard obstacles, transportability, fuel consumption, full load cooling, environmental performance, ride quality, winching, braking, steering and handling, towing compatibility, human factors, and material handling cranes (REC required).

(16) Testing, evaluation, and demonstration of robotic vehicles, to include Unmanned Ground Vehicle (UGV). Testing includes scenarios that:

(i) Test UGVs and Soldiers individually;

(ii) Test the interface between UGVs and Soldiers in mounted and dismounted maneuvers on existing test grids and training ranges, including navigation and identification of obstacles, targets, and hazards;

(iii) Test vehicles on existing test courses and existing improved surfaces; and

(iv) Test vehicles operating in test chambers while subjected to environmental conditions (REC required).

(17) Testing, evaluation, and demonstration of UAV and associated technologies. Testing includes scenarios in which:

(i) The UAV is launched, operated, landed, and recovered solely within land boundaries of a military installation or within DoD real estate lease agreement land holdings;

(ii) The entire flight from launch to landing occurs over an established range designed for testing of such systems;

(iii) The entire flight from launch to landing occurs within DoD controlled airspace; and

(iv) Landing and recovery of UAVs, and recovery, when feasible, of associated test materials including munitions occurs within a designated test range or impact area (REC required).

Subpart D—Environmental Assessments

§ 651.13 Introduction.

(a) An EA is intended to facilitate agency planning and informed decision-making. The analysis should describe the potential extent of impacts of a proposed action and its alternatives to determine whether those impacts are significant. The EA is the basis for determining that impacts would not be significant or that EIS is not necessary.

(b) The length of an EA should be adequate to meet the requirements of this part, depending upon site-specific circumstances and conditions.

(c) See § 651.8 for security review and clearance procedures for NEPA documents.

§ 651.14 Actions normally requiring an EA.

The following Army actions may require an EA, unless they qualify for the use of a CX or are already addressed in an applicable NEPA document. This list is not binding nor is it all inclusive.

(a) Military construction, including contracts for off-post construction.

(b) Land use changes.

(c) Actions involving environmentally sensitive resources.

(d) Proposed actions which support system acquisition throughout the system's lifecycle such as testing, fielding, and other program events.

(e) Implementation of INRMPs, ICRMPs, Installation Master Plans, and similar management plans when there may be impacts on the environment.

(f) Military training and testing activities on land, air, or water.

(g) An action with significant local or regional effects on energy or water availability.

(h) Increases in production of hazardous or toxic materials.

(i) Changes to noise patterns that would affect sensitive receptors.

(j) Changes to established airspace use or restrictions.

(k) Actions with significant local or regional socioeconomic effects.

(l) Acquisition or construction of (or space for) a facility that will use hazardous materials, drugs, or biological or radioactive materials. New use of hazardous materials, drugs, or biological or radioactive materials in a facility currently not using this material.

(m) Changes in Army-wide doctrine or policy when there may be an impact on the environment.

§ 651.15 Contents of the EA.

EAs will include:

(a) *Signature page to document approval of the EA.* The signed signature page accompanies the EA when made available with the Draft FONSI for public comment.

(b) *Purpose.* Purpose of and need for the proposed action.

(c) *Description.* Description of the proposed action.

(d) *Alternatives considered.* The EA should briefly identify and describe the alternatives carried forward for analysis, including the ''No Action'' alternative and all other appropriate and reasonable alternatives that can accomplish the purpose and need for the proposed action. The discussion of alternatives should discuss why any alternatives were eliminated from full consideration.

(e) *Affected environment.* The EA must address or adopt by reference the general conditions and nature of the affected environment and establish the environmental setting against which environmental effects are evaluated. This should include any relevant general baseline conditions for those resources analyzed.

(f) *Environmental consequences.* The EA must address the effects (direct, indirect, and cumulative) of the proposed action and its alternatives on the environment. Discussion and comparison of impacts must provide sufficient analysis to reach a conclusion regarding the intensity of the impacts and whether any are significant. The EA will set out the threshold or criteria for each resource for a determination that a significant impact would occur. The EA analysis procedures must be sufficiently rigorous to identify and analyze impacts that could be individually or cumulatively significant. The EA must identify when information is incomplete or unavailable, and will address the missing information in substantially the same way as prescribed for EISs (see § 651.21).

(g) *Mitigation.* The EA must identify what practical mitigation measures are available to reduce, avoid, minimize, rectify, compensate or eliminate identified adverse effects (see subpart F of this part). If applicable, the EA must clearly identify any mitigation measures that would be required to reduce an impact to less than significant. Proponents are encouraged to identify existing procedures or requirements that will be implemented as part of the proposed action and serve to mitigate adverse effects. When mitigation is a component or factor of the proposed action (*e.g.,* mitigation by design), it should be so identified in the EA.

(h) *Conclusion.* The EA will provide a clear statement regarding whether or not the described impacts of the proposed action and alternatives are significant and whether or not any of the conclusions of less than significant are dependent upon mitigation measures being implemented. The EA will explain the next steps in the decision-making process, specifically identifying whether the outcome of the EA will be a FONSI or an NOI to prepare an EIS.

(i) *List of analysts/preparers and agencies and persons consulted.* Copies of correspondence with agencies and persons contacted during the preparation of the EA will be available in the administrative record and may be included in the EA as appendices. When operational security concerns require, the information specified in this paragraph may be omitted.

(j) *References.* References and appendices (as appropriate).

(k) *Public and agency involvement.* The EA will include a summary of the past public and agency involvement in the NEPA process for the proposed action and a summary of instructions for commenting on the EA and draft FONSI. The instructions for commenting will include the public comment time period, due date for comments, and contact information for inquiries and comment submissions. The content of the appropriate public notice for the EA, as well as the body of the EA itself, will state where the EA and draft FONSI will be available to be accessed during the public comment period. If the EA included a Cooperating Agency, the agency will be identified.

§ 651.16 Contents of the FONSI.

(a) The FONSI briefly states why a proposed action will not significantly affect the environment and that an EIS will not be prepared. The FONSI includes summaries of information taken into account by the approving official. The FONSI should adopt the EA's discussion by reference.

(b) The draft FONSI will accompany the signed EA when made available for public comment. The draft FONSI must contain the following:

(1) The name of the proposed action and a reference to the EA for which the FONSI is issued. The FONSI should specifically state that it adopts the EA by reference.

(2) A brief description of the proposed action and alternatives analyzed in the EA.

(3) A summary and short discussion of the anticipated environmental effects of the proposed action, alternatives, and the no action alternative, and a determination of whether any of the impacts are significant.

(4) Identification of any mitigation measures that are necessary to reduce impacts to less than significant. The FONSI shall state the means of and authority for any mitigation that the proponent has adopted, any applicable monitoring or enforcement provisions, and any enforceable mitigation requirements or commitments that will be undertaken to avoid significant impacts.

(5) When mitigation is a component or factor of the proposed action (*e.g.,* mitigation by design), it should be so identified in the FONSI.

(6) A brief discussion of public involvement and agency coordination/consultation.

(7) A declaration that the determination made in the draft FONSI is a preliminary determination, and that no final determination will be made until all comments submitted by the end of the public comment period have been considered.

(8) The approving official's signature block (unsigned).

(c) The final FONSI will be prepared following the public comment period. The final FONSI must contain the following:

(1) All items specified in paragraphs (b)(1) through (6) of this section, and the approving official's signature and date of signature.

(2) A statement that a FONSI is still appropriate following review of public comments and (if applicable) that the analysis of any new information that has come to the attention of the approving official since completion of the EA indicates no supplementation of the EA is necessary. If this statement cannot be made, the proponent must either supplement the EA and republish it or publish an NOI and proceed with an EIS. The proponent can also decline to pursue the proposed action.

(3) The proponent may proceed with the proposed action once the FONSI is signed.

§ 651.17 EA review process.

(a) An EA may result either in a FONSI, an NOI to prepare an EIS, or a determination not to pursue the proposed action.

(b) At any time during the EA process, when it is determined that the proposed action may have significant impacts that cannot be mitigated to level below significance, an NOI to prepare an EIS may be initiated. In this case, an EA in preparation need not be completed. The proponent should notify the approving official of any such determination as soon as possible. See § 651.22(c) for guidance on preparing the NOI.

(c) The EA and draft FONSI will be made available to the public for 30 days.

(1) The 30-day period begins on the date that a public notice is published indicating the EA and draft FONSI are available for review. For actions of local or regional interest, the public notice regarding the availability of the EA and draft FONSI will be published in the appropriate local or regional media.

(2) The public notice must specify the deadline date for receipt of comments and describe the steps required to obtain the EA and draft FONSI. This can include a POC, address, and phone number; a location; a reference to a website; or some equivalent mechanism.

(3) In cases where a 30-day review period creates an unacceptable risk to national security concerns, the review period may be shortened by the proponent. In no circumstances should the public comment period for an EA/draft FONSI be less than 15 days.

(d) If the proposed action is nationwide in scope and of national concern, the availability of the EA and draft FONSI may be published in the FR, subject to DASA ESOH approval.

The FR publication package must be submitted in accordance with § 651.25.

(e) Distribution of the EA and draft FONSI should include any agencies, organizations, and individuals that have expressed interest in the project, those who may be affected, and others deemed appropriate.

(f) The proponent is responsible for the distribution of the EA and draft FONSI package and consideration of review comments received. Public and inter-agency meetings may be held if the proponent determines that such meetings are needed and appropriate.

Subpart E—Environmental Impact Statements

§ 651.18 Introduction.

(a) An EIS is a tool to facilitate a full, open, and balanced discussion of significant environmental impacts that may result from a proposed action and alternatives, allowing public review and comment on the proposal and providing a basis for informed decision-making. See § 651.6(b) for more information on levels of NEPA review.

(b) An EIS may be required when the proponent reasonably believes that the proposed action has:

(1) Potential for significant impact on the human environment, either on its own or when its impacts are combined with those of other actions.

(2) Potential for significant threat or hazard to public health or safety.

(3) Potential for controversy regarding the factual evidence pertaining to the effects of the proposed action on the environment.

(c) Proponents will apply NEPA optimizing measures to EIS actions § 651.4(e).

(d) Proponents see § 651.8 for security review and clearance procedures for NEPA documents.

§ 651.19 Actions normally requiring an EIS.

The following actions normally require an EIS. The threshold for significance is a matter of context and intensity and will vary between installations. This list is not binding nor is it all inclusive.

(a) Substantial expansion of military facilities and infrastructure.

(b) Construction that has the potential for a significant effect on ''environmentally sensitive'' resources as described in § 651.11(c).

(c) The disposal of nuclear materials, munitions, explosives, industrial and military chemicals, and other hazardous or toxic substances that have the potential to cause significant environmental impacts.

(d) Major land acquisitions, leasing, or other actions that may lead to significant changes in land use.

(e) Stationing of a brigade or larger unit, except where the only significant impacts are socioeconomic.

(f) Major training exercises or testing activities with potential for new and adverse environmental impacts.

(g) Changes in the mission, unit structure, or facilities with potential for significant environmental impacts.

(h) Initial public land withdrawals of over 5,000 acres.

§ 651.20 Contents of the EIS.

(a) *Cover sheet.* The cover sheet will include:

(1) A list of responsible agencies including the lead agency and any cooperating agency, if applicable.

(2) The title of the proposed action and, if appropriate, the titles of related cooperating agency actions, together with state and installation, municipality, or other local designation where the action is located.

(3) A designation of the statement as a draft, final, or draft or final supplement.

(4) Date completed.

(b) *Administrative information.* (1) The address for submission of comments and inquiries, the telephone number for inquiries, and, as appropriate, the name and title of the approving official.

(2) A one-paragraph abstract of the statement that describes the purpose and need for the proposed action, alternatives, the significant environmental consequences of the proposed action and alternatives, and mitigation measures.

(3) In the case of a Draft Environmental Impact Statement (DEIS), the date by which comments must be received, computed in accordance with the minimum public comment period prescribed herein, will be included in the instructions for commenting.

(c) *Summary.* The purpose of the summary is to provide a brief overview of the purpose and need for the action, alternatives considered, environmental impacts, areas of controversy, mitigation measures, and issues yet to be resolved. The summary will also contain a synopsis of state and Federal consultations and permit requirements and their status.

(d) *Table of contents.* The table of contents should include a sequential list of the EIS's organizational structure (*e.g.,* chapter and/or section numbers and headings), figures, tables, and appendices; and the associated starting page number of each item listed. The electronic version of the Draft and Final EIS filed with EPA and made available to the public will meet related requirements noted in EPA's EIS filing protocols regarding enabling a reader to find specific document sections (*e.g.,* bookmarking feature) rapidly.

(e) *Purpose of and need for the proposed action.* This section should clearly state the nature of the problem or need to which the proponent is responding.

(f) *Description of the proposed action and any alternatives carried forward for analysis, including the no action alternative.* This section will include:

(1) A discussion on how the proposed action and the range of alternatives would solve the problem or fulfill the need.

(2) The relevant background information on the proposed action; its operational, social, economic, and environmental objectives, and its benefits. If a cost-benefit analysis has been prepared for the proposed action, it may be included here, or attached as an appendix and referenced here.

(3) All reasonable alternatives, including the no action alternative. The Army will identify the preferred alternative or alternatives, if one or more exists, in the DEIS and identify such alternative in the FEIS unless another law prohibits the expression of such a preference. List any alternatives that were eliminated from detailed study, and include a brief discussion of the reasons for which each alternative was eliminated.

(4) A description of environmental management practices and measures that are currently in effect and are therefore considered part of the proposed action and alternatives, and will serve to minimize, mitigate, or eliminate adverse effects.

(5) A list of anticipated state and Federal permits and other legal requirements.

(g) *Affected environment (baseline conditions) that may be impacted.* This section will contain information about existing conditions in the affected areas in sufficient detail to understand the potential effects of the alternatives under consideration. Affected elements could include, for example, biophysical characteristics (ecology and water quality); land use and land use plans; architectural, historical, and cultural amenities; utilities and services; and transportation. This section will not be encyclopedic. It will be written clearly and the degree of detail for points covered will be related to the magnitude of expected impacts. Information on baseline conditions may be adopted by reference where appropriate.

(h) *Environmental consequences and mitigation measures.* This section forms the scientific and analytic basis for the comparison of impacts. The environmental impacts of the alternatives should be presented in comparative form, thus sharply defining the issues and providing a clear basis for choice among the options that are provided to the approving official and the public. For each resource area, the threshold for significance should be set out. The information should be summarized in a brief, concise manner including graphics, and tabular or matrix formats. The following areas will be covered:

(1) Direct effects (short-term and long-term) and their significance.

(2) Indirect effects (short-term and long-term) and their significance.

(3) Possible conflicts between the proposed action and existing land use plans, policies, and controls.

(4) Energy requirements and conservation potential of various alternatives and mitigation measures.

(5) Irreversible and irretrievable commitments of resources associated with the proposed action.

(6) Relationship between short-term use of the environment and maintenance and enhancement of long-term productivity.

(7) Urban quality, historic and cultural resources, and design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures.

(8) Cumulative effects of the proposed action in light of other past, present, and reasonably foreseeable actions.

(9) Means to mitigate adverse environmental effects (see subpart F of this part).

(10) The extent to which adverse effects would remain after application of identified mitigation measures.

(11) The analysis will address impacts to all resources, including impacts which are less than significant. Discussion and comparison of impacts should provide sufficient analysis to reach a conclusion regarding the significance of the impacts, and not merely be a quantification of facts. Mitigation measures whose implementation forms the basis of any ''less than significant'' conclusion should be so identified.

(12) The analysis will address circumstances where mitigation of adverse environmental effects is not technically, financially, or otherwise feasible. The analysis will explain why mitigation of adverse environmental effects is not feasible and the loss of environmentally sensitive resource(s) without mitigation measures is acceptable relative to the importance of the proposed action to national policy and national defense.

(i) *Conclusions.* The EIS will clearly state the conclusions of the environmental consequences analysis, to include a summary of mitigation measures.

(1) The EIS will provide a comparative presentation of the environmental consequences of all alternatives analyzed.

(2) To simplify consideration of complex relationships, the summary of proposed mitigation measures shall include a table format presentation or refer to a distinct and unambiguous mitigation and monitoring plan that is part of the EIS.

(3) To simplify consideration of mitigation measures and to improve tracking, the summary of proposed mitigation measures will include a table format presentation.

(j) *Public and agency involvement.* A summary of public and agency involvement in the EIS process, both past and future, as appropriate, will be provided in the Draft and Final EIS. Past involvement would address, for example, public scoping. Future involvement documented in the Draft EIS would succinctly address, for example, public meetings and the opportunity to submit written comments.

(k) *Other environmental statutes.* The Draft and Final EIS will summarize the requirements for and status of compliance under other environmental statutes that would have to be completed prior to implementing the proposed action or alternatives. This summary should be presented in the discussion for each resource area. The Final EIS should document (in an appendix) the results of required compliance under other statutes.

(l) The Final EIS will document (in an appendix) public and agency comments received as part of the Draft EIS public comment period. Comments will be clearly credited to the appropriate entity (*e.g.,* commenting organization or individual with personal information such as physical address, email address, and phone number removed). The Final EIS will document the Army's response to the issues raised. Where possible, similar comments will be grouped for a common response.

(m) *Signature page.* The Draft and Final EIS will be signed by the approving official.

(n) *List of preparers.* The EIS will list the names of its preparers, including those people who were primarily responsible for preparing (research, data collection, and writing) the EIS or significant background or support papers, and basic components of the statement. When possible, the individuals who are responsible for a particular analysis, as well as an analysis of background papers, will be identified. If some or all of the preparers are contractors' employees, they must be identified as such.

(o) *Distribution list.* For the DEIS, a list will be prepared indicating from whom review and comment is requested. The list will include public agencies, private parties or organizations, federally-recognized Indian Tribes, Native Alaskans, and Native Hawaiians.

(p) *References.* References and appendices (as appropriate).

§ 651.21 Incomplete or unavailable information.

When the proposed action will have significant adverse effects on the human environment, and there is incomplete or unavailable information, the EIS will make clear that the information is lacking, and will address the issue as follows:

(a) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the Army will include the information in the EIS.

(b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known (for example, the means for obtaining it are beyond the state of the art), the EIS will include:

(1) A statement that such information is incomplete or unavailable.

(2) A statement of the relevance of the incomplete or unavailable information to evaluating the reasonably foreseeable significant adverse impacts on the human environment.

(3) A summary of existing credible scientific evidence that is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment.

(4) An evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community.

§ 651.22 EIS process.

(a) *Purpose and need.* The first step in preparing an EIS is to articulate the purpose and need for the proposed action.

(b) *Public participation plan.* A public participation plan that provides for periodic interaction with the

community should be developed. The proponent is responsible for ensuring information is provided to members of the public regarding where they can obtain information about the ongoing action.

(c) *NOI.* The NOI initiates the formal scoping process and its preparation is the responsibility of the proponent.

(1) Prior to preparing an EIS, an NOI will be published in the FR in accordance with § 651.25 and, as appropriate, in media outlets with general circulation in the areas potentially affected by the proposed action. After the NOI is published in the FR, copies of the notice may also be distributed to agencies, organizations, and individuals, as the proponent deems appropriate.

(2) The NOI will clearly state the purpose and need, describe the proposed action and alternatives, and state why the action may have unknown and/or significant environmental impacts.

(d) *Lead and cooperating agency determination.* As soon as possible after the decision is made to prepare an EIS, the proponent will ensure contact is made with appropriate Federal, tribal, state, and local agencies to identify lead or cooperating agency responsibilities concerning EIS preparation.

(e) *Scoping.* The proponent will begin the scoping process. Portions of the scoping process may take place prior to publication of the NOI.

(1) As part of the scoping process, determine whether to hold public meetings.

(2) Scoping determines the scope of issues to address in the EIS and identifies the significant issues related to the proposed action. During the scoping process, participants identify the range of actions, alternatives, and impacts to consider in the EIS.

(3) The extent of the scoping process, including public involvement, will depend on several factors. These factors include, but are not limited to:

(i) The size and type of the proposed action.

(ii) Whether the proposed action is of regional or national interest.

(iii) Degree of possible environmental controversy.

(iv) Geographic range of the affected environmental parameters.

(v) Extent of prior environmental compliance reviews.

(vi) Involvement of any substantive time limits.

(vii) Requirements of other laws for environmental review.

(viii) Anticipated cumulative impacts.

(f) *NOA publication.* Upon completion of the DEIS, a NOA will be published in the FR in accordance with § 651.25.

(1) Following approval of the publication package, the proponent will provide the DEIS to EPA for filing and notice in the FR in accordance with EPA procedures.

(i) The EPA publishes a weekly notice of EISs filed with EPA during the preceding week. The EPA's notice provides the date by which the comment period ends for each Draft EIS listed. Unless requested otherwise by the Army, and based upon compelling reasons of national policy after consultation with EPA, the comment period end date is calculated based upon the date EPA's notice is published.

(ii) EPA reviews the DEIS and provides an assessment.

(2) Publication of the Army's approved NOA in the FR will occur at the same time as the FR publication of EPA's weekly notice.

(3) The DEIS is distributed simultaneously with publication of the NOA in the FR.

(g) *Public review and participation.* (1) The following time periods, calculated from the publication date of the FR notice, will generally be observed:

(i) Not less than 45 days for public comment on DEISs.

(ii) Not less than 15 days for public availability of DEISs prior to any public meeting on the DEIS.

(iii) See § 651.22(k) for time period limitations regarding a decision on the proposed action.

(2) The proponent may also set time limits for other procedures or decisions related to DEISs and FEISs.

(h) *Public meetings or hearings on the DEIS.* If appropriate, hold public meetings or hearings on the DEIS. Media releases to publicize the meetings or hearings should be issued at least 15 days prior to the meeting. If the public is invited to provide verbal comments on the DEIS at the meeting or hearing, the comments will be recorded verbatim. If public involvement requirements associated with laws and regulations other than NEPA are integrated with a public meeting or hearing on the DEIS (*e.g.,* 36 CFR 800.2(d)(1) through (3) for public involvement under the NHPA), the media release should identify these additional elements.

(i) *The FEIS.* (1) Following the public comment period, the proponent is responsible for preparation of the FEIS.

(i) If the changes to the DEIS are exclusively clarifications or minor factual corrections, a document consisting of only the DEIS comments, responses to the comments, and errata sheets may be prepared and circulated. If such an abbreviated FEIS is anticipated, the DEIS should contain a statement advising reviewers to keep the document so they will have a complete set of final documents. The final EIS to be filed with EPA will consist of a complete document containing a new cover sheet, the errata sheets, comments and responses, and the text of the DEIS.

(ii) If substantial modifications are warranted, the proponent will ensure a complete FEIS is prepared. The FEIS distribution must include any person, organization, or agency that submitted substantive comments on the DEIS. The Army will identify the preferred alternative or alternatives in the FEIS unless another law prohibits the expression of such a preference.

(2) Coordination, approval, filing, and public notice of an FEIS are the same as for a draft DEIS.

(j) *Changes during preparation.* If there are substantial changes in the proposed action, or significant new information relevant to environmental concerns during the proposed action's planning process, the proponent will prepare revisions or a supplement to the NEPA document or prepare new documentation or supplemental information as necessary.

(k) *Decision.* No decision will be made on a proposed action until 30 days after EPA has published its notice of receipt of the FEIS in the FR, or 90 days after the EPA notice of receipt of the DEIS, whichever is later. The ROD documents that the decision has been made and the basis for that decision.

§ 651.23 Record of Decision.

The proponent will prepare the ROD. The ROD will be signed by the approving official and will:

(a) Clearly state the decision by describing it in sufficient detail to address the significant issues and ensure necessary long-term monitoring and execution.

(b) Identify all alternatives considered by the Army in reaching its decision. Discuss preferences among alternatives based on relevant factors including environmental, economic, and technical considerations and agency statutory missions. Identify the environmentally preferred alternative.

(c) Identify and discuss all such factors, including any essential considerations of national policy and national defense that were balanced by the Army in making its decision. Because economic and technical analyses are balanced with environmental factors, the selected alternative will not necessarily be the environmentally preferred alternative.

(d) Discuss how the considerations of § 651.23(c), above, entered into the decision.

(e) State whether all practicable means to avoid or minimize environmental harm from the selected alternative have been adopted, and if not, why they were not.

(f) Clearly and expressly identify or adopt by reference those mitigation measures that were incorporated into the decision which require specific funding (*i.e.,* funding that will be required in addition to the applicable Army organizations' internal operating budget and will be dedicated to the specified mitigation measure) and those for which specific monitoring is appropriate (*e.g.,* results in a specific deliverable such as a survey or report, requires reporting to a regulatory agency, etc.).

(g) Adopt mitigation measures to reduce adverse environmental effects (see subpart F of this part). Mitigation measures may include actions that require programming and funding, and measures that are already in effect and do not require additional funding (*e.g.,* standard operating procedures, best management practices, etc.).

(h) Include a statement that the Antideficiency Act (31 U.S.C. 1341) prevents Federal agencies, including the Army, from incurring obligations that are not yet funded by Congress, and that while the Army's intent is to pursue funding for all mitigation measures identified in the ROD, the Army is limited by future Congressionally-approved budgets.

§ 651.24 Implementation of Decision.

(a) Implementation of the decision may begin immediately after signature on the ROD. The proponent will prepare and coordinate a NOA for publication in the FR in accordance with § 651.25.

(b) The proponent is responsible for implementing mitigation measures and other conditions that have been identified in the EIS and included in the ROD. The proponent, in coordination with the Installation Commander as appropriate will:

(1) Include appropriate conditions in grants, permits, or other approvals.

(2) Ensure that funding is secured for selected mitigation measures.

(3) Upon request, inform cooperating or commenting agencies on the progress in carrying out adopted mitigation measures and make the results of relevant monitoring available.

§ 651.25 Federal Register publication of Army actions.

The proponent is responsible for preparation of the FR publication package for their actions. FR publication packages are required for EIS NOIs, EIS NOAs, RODs, and notices of withdrawal of an EIS NOI. By exception, NOA FR publication packages are also prepared for EAs/draft FONSIs that are nationwide in scope and of national concern. FR publication packages must be coordinated and contain the documentation as required in this section.

(a) The FR publication package must include: The FR NOI, NOA, or ROD as appropriate; either Information for Members of Congressional Delegations (if the action is affecting one or several installations and states) or Information for Members of Congress (if the action is nation-wide, affecting many installations and states to a point that requires informing *all* Members of Congress); Questions and Answers; Press Release; and the proponent's record of coordination.

(b) The FR publication package must be coordinated by the proponent as follows:

(1) The proponent will coordinate the FR publication package through their chain of command to DCS, G–9 and OTJAG for review. The proponent will address all comments and questions from DCS, G–9 and OTJAG. The DCS, G–9 will forward the FR publication package to ODASA (ESOH) with all revisions incorporated.

(2) ODASA (ESOH) will coordinate the FR package with OCLL, OCPA, OGC, and the SA (as appropriate).

(3) Information for Members of Congressional Delegations is prepared for actions of interest to a specific Delegation(s). By exception, when the action has nation-wide implications to the point where it is appropriate to provide information on the action to every Member of Congress an Information for Members of Congress is prepared by the proponent.

(4) ODASA (ESOH) provides the approved FR package to the Army Federal Register Liaison Officer for publication in the FR. The Army Federal Register Liaison Officer will provide the anticipated date the FR notice will be published.

(c) ODASA (ESOH) will notify DCS, G–9, the proponent, and OCLL of the anticipated FR publication date. OCLL will notify the relevant Members of Congress of the action prior to publication in the FR.

(1) If the action is a NOA for a Draft or Final EIS, the proponent or their designee is responsible for uploading of the required documents to EPA's EIS website (*https://www.epa.gov/nepa*). Uploading the EIS to EPA's EIS website shall not precede Secretariat approval of the FR package.

(2) Publication or release of local notices by Army proponents shall not precede the FR notice, and will be identical to the notice published in the FR.

(3) It is the proponent's responsibility to allow sufficient time to coordinate publication of their notice in the FR in order to avoid conflicts with execution of the proposed action.

Subpart F—Mitigation and Monitoring

§ 651.26 Mitigation.

(a) Throughout the NEPA process, the proponent must consider mitigation measures to avoid, minimize, or compensate for adverse environmental effects:

(b) Identification of Mitigations. Potential mitigation measures must be identified for all adverse effects, not just those that are significant. Some adverse effects are so minute as to be barely noticeable; for these de minimis effects, it is possible that no mitigation is required. When mitigation is a component or factor of the proposed action (*e.g.,* mitigation by design), it should be identified in the EA or EIS.

(c) Determining Appropriate Mitigation Measures. The identification and evaluation of appropriate mitigation measures must involve the use of experts familiar with the predicted environmental impacts, in addition to collaboration with affected resource agencies.

(d) Practicability of Mitigation Measures. Only those practicable mitigation measures that can reasonably be accomplished as part of a proposed action and alternatives will be identified. A number of factors determine what is practicable, including military mission, manpower restrictions, financial feasibility, technical feasibility, institutional barriers, and public acceptance. In certain circumstances, mitigation of adverse environmental effects may not be practicable and the decision to proceed with an action may result in an acceptable loss of environmentally sensitive resources.

(e) Adoption and Implementation of Mitigation. Implementation of mitigation measures is the responsibility of the proponent. The proponent will make available to the public, upon request, the status and results of mitigation measures associated with the proposed action.

(f) Any mitigation measures selected will be clearly outlined in the FONSI or ROD. All practicable means to avoid or minimize environmental effects

resulting from the selected alternative should be adopted, or an explanation given as to why they were not. Mitigation measures that were considered in the EA or EIS but rejected in the FONSI or ROD must be discussed, providing the reason for rejection.

(g) An EA may result in a FONSI based upon the analysis and selection of mitigation measures that reduce adverse environmental effects to the point that they are no longer significant. If mitigation measures are used in such a manner, the FONSI must identify them, and they become legally binding and must be accomplished as the selected alternative is implemented.

(h) Mitigation measures will be planned, programmed, and budgeted by the proponent or, if appropriate, through the appropriate installation or mission program, in accordance with applicable Army policy and regulation. Implementation of the selected action should be conditioned on funding of mitigation, subject to the Antideficiency Act (31 U.S.C. 1341).

§ 651.27 Mitigation Monitoring and Enforcement.

(a) Monitoring and enforcement ensure that mitigations are effective and are performed as described in NEPA documents. If mitigation measures are extensive, the Installation Commander will prepare, resource, and implement a Mitigation Monitoring and Enforcement Plan (MMEP). If prepared, a MMEP may be filed with the proponent's file copy of the EA or EIS, and may be summarized and adopted in the FONSI or ROD.

(b) A MMEP should address the following:

(1) Effectiveness Monitoring. Plans should identify what mitigation measures must be monitored and how the effectiveness of the mitigation measures are evaluated. Effectiveness will be determined based on specific criteria that may include but are not limited to:

(i) Effectiveness metrics developed for mitigation results that are quantitative, measurable, and replicable.

(ii) A baseline assessment that identifies the state of environmentally sensitive resources prior to disturbance by the action.

(iii) A control that isolates the effects of the mitigation measures from effects originating outside the action.

(iv) Ability to implement any necessary corrective actions to mitigation measures.

(2) Enforcement Monitoring.

(i) Contractor performance. The proponent must ensure that mitigation measures performed under contract are subject to timely inspection and all contract provisions are met and enforced.

(ii) NEPA Lead agency performance. When there is a Lead and a Cooperating agency involved in a proposed action (see 32 CFR 651.7(h) and (i)), the Lead agency must ensure that needed tasks are performed. Actions enabling enforcement include providing appropriate funding in the project budget, and arranging for necessary manpower allocation.

(iii) NEPA Cooperating agency performance. When a cooperating agency performs a mitigation required by NEPA, the lead agency as proponent must ensure that the cooperating agency fully understands its role in funding and executing the mitigation. The proponent's mitigation monitoring and enforcement plan should include monitoring cooperating agency mitigation actions.

(3) Potential change in environmental conditions. The MMEP should identify the possibility of a change in environmental conditions or project activities identified in the EA or EIS that may require adjustment in mitigation measures. Adjustments to mitigation measures may be needed when the original conclusions of the extent of environmental effects are found to be inaccurate and original mitigation measures are too limited or too extensive, or when previously undetected environmentally sensitive resources are found to be present during implementation of the action.

(4) Observation Frequency. Identify requirements for the frequency of observation especially where the effectiveness of a mitigation measure is uncertain, or environmental controversy remains associated with the selected action or mitigation measures.

Subpart G—Environmental Effects of Major Army Actions Abroad

§ 651.28 Overview.

This section provides an overview of requirements for addressing the environmental effects of Army actions abroad.

(a) NEPA applies to Army actions within the United States (as defined in § 651.1(c)). NEPA does not apply to Army actions abroad (outside of the United States). E.O. 12114, Environmental Effects Abroad of Major Federal Actions, addresses requirements for environmental effects of Army actions abroad.

(b) E.O. 12114 and 32 CFR part 187, Environmental Effects Abroad of Major DoD Actions, provide responsibilities relating to analysis of the environmental effects of Army actions abroad and in the global commons. Responsible Army components will document the review of potential environmental effects of their actions abroad and in the global commons. Environmental review will be consistent with diplomatic factors (including applicable SOFAs), stationing agreements and final governing standards, national security considerations, site-specific ARs, and ability to access information.

(c) The analysis and documentation of potential environmental effects of Army actions abroad and in the global commons should, to the maximum extent possible, be incorporated into existing decision-making processes, planning for military exercises, training plans, and military operations. The requirement for documentation is subject to exemptions listed in paragraph 2–5 of E.O. 12114.

§ 651.29 Use of Categorical Exclusions.

CXs in § 651.12 of this part are not applicable to environmental considerations in locations abroad where NEPA is not applicable. They may be used, however, to assist in gauging the level of analysis that may be needed under this Subpart.

Appendix A to Part 651—References

Military publications and forms are accessible from a variety of sources through the use of electronic media or paper products. In most cases, electronic publications and forms that are associated with military organizations can be accessed at various address or websites on the internet. Since electronic addresses can frequently change, or similar web links can also be modified at several locations on the internet, it's advisable to access those sites using a search engine that is most accommodative, yet beneficial to the user. Additionally, in an effort to facilitate the public right to information, certain publications can also be purchased through the National Technical Information Service (NTIS). Persons interested in obtaining certain types of publications can write to the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

Section I—Required Publications

AR 360–1
The Army Public Affairs Program.

Section II—Related Publications

A related publication is merely a source of additional information. The user does not have to read it to understand this part.

Antideficiency Act.
Public Law 97–258, 96 Stat. 923; *as amended* (31 U.S.C. 1341)

AR 5–10
Stationing.

AR 70–1
Army Acquisition Policy.

AR 200–1

Environmental Protection and Enhancement
AR 380–5
Department of the Army Information Security Program
Defense Acquisition Guidebook
https://www.dau.mil/tools/dag
DA PAM 70–3
Army Acquisition Procedures
Department of Defense Directive 5000.01
The Defense Acquisition System
Department of Defense Instruction 5000.02
Operation of the Defense Acquisition System
Executive Order 12114
Environmental Effects Abroad of Major Federal Actions, 3 CFR, 1979 comp., p. 356
Executive Order 13007
Indian Sacred Sites, 3 CFR, 1996 Comp., p. 196
Clean Air Act
Public Law 88–206; *as amended* (42 U.S.C. 7401, *et seq.*)
Clean Water Act of 1977
Public Law 95–217, 91 Stat. 1566 and Public Law 96–148, Sec. 1(a)–(c), 93 Stat. 1088 (33 U.S.C. 1251 *et seq.*)
Comprehensive Environmental Response, Compensation, and Liability Act of 1980
As amended (CERCLA, Superfund) (42 U.S.C. 9601 *et seq.*)
Endangered Species Act of 1973
Public Law 93–205, 87 Stat. 884 (16 U.S.C. 1531 *et seq.*)
Fish and Wildlife Coordination Act
Public Law 85–624, Sec. 2, 72 Stat. 563 and Public Law 89–72, Sec. 6(b), 79 Stat. 216. (16 U.S.C. 661 *et seq.*)
Migratory Bird Treaty Act of 1918
(16 U.S.C. 703–712; Ch. 128; July 3, 1918; 40 Stat. 755)
National Environmental Policy Act of 1969
Public Law 91–190, 83 Stat. 852 (42 U.S.C. 4321 *et seq.*)
National Historic Preservation Act
Public Law 89–665, 80 Stat. 915 (54 U.S.C. 300101 *et seq.*)
Native American Graves Protection and Repatriation Act
Public Law 101–601, 104 Stat. 3048 (25 U.S.C. 3001 *et seq.*)
Pollution Prevention Act of 1990
Public Law 101–508, Title VI, Subtitle G, 104 Stat. 13880–321 (42 U.S.C. 13101 *et seq.*)
Resource Conservation and Recovery Act of 1976
Public Law 94–580, 90 Stat. 2795 (42 U.S.C. 6901 *et seq.*)
Rivers and Harbors Appropriation Act of 1899
33 U.S.C. 407
Sikes Act
Public Law 86–797, 74 Stat. 1052 (16 U.S.C. 670a *et seq.*)

Note. The following CFRs may be found in your legal office or law library. Copies may be purchased from the Superintendent of Documents, Government Printing Office, Washington, DC 20401.

36 CFR part 800
Advisory Council on Historic Preservation
40 CFR parts 1500 through 1508
Council on Environmental Quality

Section III—Prescribed Forms

This section contains no entries.

Section IV—Referenced Forms

This section contains no entries.

Appendix B to Part 651—Glossary

Abbreviations

AAE Army Acquisition Executive
ACAT Acquisition Category
ACOM Army Command
AGR Active Guard and Reserve Duty
APHC U.S. Army Public Health Center
AQCR Air Quality Control Region
AR Army Regulation
ARNG Army National Guard
ARSTAF Army Staff
ASA (AL&T) Assistant Secretary of the Army (Acquisition, Logistics, and Technology)
ASA (FMC) Assistant Secretary of the Army (Financial Management and Comptroller)
ASA (IE&E) Assistant Secretary of the Army (Installations, Energy and Environment)
BGEPA Bald and Golden Eagle Protection Act
CARD Cost Analysis Requirements Description
CBTDEV Combat Developer
CEQ Council on Environmental Quality
CERCLA Comprehensive Environmental Response, Compensation, and Liability Act
CFR Code of Federal Regulations
CONUS Continental United States
CX Categorical Exclusion
DA Department of the Army
DASA (ESOH) Deputy Assistant Secretary of the Army (Environment, Safety, and Occupational Health)
DCS Deputy Chief of Staff
DEIS Draft Environmental Impact Statement
DoD Department of Defense
DOPAA Description of Proposed Action and Alternatives
DOTMLPF–P Doctrine, organization, training, materiel, leadership and education, personnel, facilities, and policy
DRU Direct Reporting Unit
DTIC Defense Technical Information Center
EA Environmental Assessment
EIS Environmental Impact Statement
EJ Environmental Justice
E.O. Executive Order
EOD Explosive Ordnance Demolition
EPA Environmental Protection Agency
ESA Endangered Species Act
ESOH Environment, Safety, and Occupational Health
FAA Federal Aviation Administration
FEIS Final Environmental Impact Statement
FONSI Finding of No Significant Impact
FR Federal Register
GC General Counsel
GOCO Government-Owned, Contractor-Operated
GSA General Services Administration
HQDA Headquarters, Department of the Army
ICRMP Integrated Cultural Resources Management Plan
ICT Integrated Concept Team
INRMP Integrated Natural Resources Management Plan
IPMP Integrated Pest Management Plan
ISCP Installation Spill Contingency Plan
ITAM Integrated Training Area Management
MATDEV Materiel Developer
MBTA Migratory Bird Treaty Act
MILCON Military Construction
MMEP Mitigation Monitoring and Enforcement Plan
MOA Memorandum of Agreement
MOU Memorandum of Understanding
MSC Mission Support Commands
NAGPRA Native American Graves Protection and Repatriation Act
NEPA National Environmental Policy Act
NGB National Guard Bureau
NHPA National Historic Preservation Act
NOA Notice of Availability
NOI Notice of Intent
NRC Nuclear Regulatory Commission
NTIS National Technical Information Service
OASD (PA) Office of the Assistant Secretary of Defense (Public Affairs)
OCLL Office of the Chief of Legislative Liaison
OCPA Office of the Chief of Public Affairs
OFS Officer Foundation Standards
OGC Office of General Counsel
OPSEC Operations Security
OSD Office of the Secretary of Defense
PAO Public Affairs Officer
PCB Polychlorinated Biphenyls
PESHE Programmatic Environment Safety and Occupational Health Evaluation
PEO Program Executive Officer
PM Program/Project/Product Managers
POC Point of Contact
POL Petroleum, Oils, and Lubricants
PPBES Program Planning and Budget Execution System
RCRA Resource Conservation and Recovery Act
RDT&E Research, Development, Test, and Evaluation
REC Record of Environmental Consideration
ROD Record of Decision
SA Secretary of the Army
SARA Superfund Amendments and Reauthorization Act
SDZ Surface Danger Zone
SEP Systems Engineering Plan
SOFA Status of Forces Agreement
SPCCP Spill Prevention, Control, and Countermeasure Plan
TAG The Adjutant General
TDP Technical Data Package
TJAG The Judge Advocate General
TRADOC U.S. Army Training and Doctrine Command
UAV Unmanned Aerial Vehicle
UGV Unmanned Ground Vehicle
USACE U.S. Army Corps of Engineers
USAEC U.S. Army Environmental Command
U.S.C. United States Code.

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. 2019–26336 Filed 12–19–19; 8:45 am]

BILLING CODE 5001–03–P

FEDERAL REGISTER

Vol. 84 Friday,

No. 245 December 20, 2019

Part IV

Department of the Treasury

Internal Revenue Service

26 CFR Part 1

Certain Employee Remuneration in Excess of $1,000,000 Under Internal Revenue Code Section 162(m); Proposed Rule

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–122180–18]

RIN 1545–BO95

Certain Employee Remuneration in Excess of $1,000,000 Under Internal Revenue Code Section 162(m)

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document sets forth proposed regulations under section 162(m) of the Internal Revenue Code (Code), which limits the deduction for certain employee remuneration in excess of $1,000,000 for federal income tax purposes. These proposed regulations implement the amendments made to section 162(m) by the Tax Cuts and Jobs Act. These proposed regulations would affect publicly held corporations. This document also provides a notice of a public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by February 18, 2020. Outlines of topics to be discussed at the public hearing scheduled for March 9, 2020, at 10 a.m. must be received by February 18, 2020.

ADDRESSES: Submit electronic submissions via the Federal eRulemaking Portal at *www.regulations.gov* (indicate IRS and REG–122180–18) by following the online instructions for submitting comments. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The Department of the Treasury (Treasury Department) and the IRS will publish for public availability any comment received to its public docket, whether submitted electronically or in hard copy. Send hard copy submissions to: CC:PA:LPD:PR (REG–122180–18), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–122180–18), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW, Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Concerning these proposed regulations, Ilya Enkishev at (202) 317–5600; concerning submissions of comments, the hearing, and/or being placed on the building access list to attend the hearing, Regina Johnson at (202) 317–6901 (not toll-free numbers) or *fdms.database@irscounsel.treas.gov.*

SUPPLEMENTARY INFORMATION:

Background

This document sets forth proposed amendments to the Income Tax Regulations (26 CFR part 1) under section 162(m). Section 162(m)(1) disallows the deduction by any publicly held corporation for applicable employee remuneration paid with respect to any covered employee to the extent that such remuneration for the taxable year exceeds $1,000,000. Section 162(m) was added to the Code by section 3211(a) of the Omnibus Budget Reconciliation Act of 1993, Public Law 103–66. Proposed regulations under section 162(m) were published in the **Federal Register** on December 20, 1993 (58 FR 66310) (1993 proposed regulations). On December 2, 1994, the Treasury Department and the IRS issued amendments to the proposed regulations (59 FR 61884) (1994 proposed regulations). On December 20, 1995, the Treasury Department and the IRS issued final regulations under section 162(m) (TD 8650) (60 FR 65534) (final regulations).

Section 162(m) was amended by section 13601 of the Tax Cuts and Jobs Act (TCJA) (Pub. L. 115–97, 131 Stat. 2054, 2155 (2017)). Section 13601 of TCJA amended the definitions of covered employee, publicly held corporation, and applicable employee remuneration in section 162(m). Section 13601 also provided a transition rule applicable to certain outstanding compensatory arrangements (commonly referred to as the grandfather rule).

On August 21, 2018, the Treasury Department and the IRS released Notice 2018–68 (2018–36 I.R.B. 418), which provides guidance on certain issues under section 162(m). Specifically, the notice provides guidance on the amended rules for identifying covered employees. Furthermore, the notice provides guidance on the operation of the grandfather rule, including when a contract will be considered materially modified so that it is no longer grandfathered. Notice 2018–68 requested comments on the following issues:

- The application of the definition of publicly held corporation to foreign private issuers, including the reference to issuers that are required to file reports under section 15(d) of the Securities Exchange Act of 1934,
- the application of the definition of covered employee to an employee who was a covered employee of a predecessor of the publicly held corporation,
- the application of section 162(m) to corporations immediately after they become publicly held either, through an initial public offering or a similar business transaction, and
- the application of the Securities and Exchange Commission (SEC) executive compensation disclosure rules for determining the three most highly compensated executive officers for a taxable year that does not end on the same date as the last completed fiscal year.

In drafting these proposed regulations, the Treasury Department and the IRS have considered all comments received on the notice. See § 601.601(d)(2)(ii)(b). Commenters noted that the many examples in Notice 2018–68 were helpful in illustrating the guidance in the notice. In light of these comments, the Treasury Department and the IRS have included numerous examples in these proposed regulations to illustrate the proposed rules.

Explanation of Provisions

I. Overview

Section 13601 of TCJA significantly amended section 162(m). This document adds a section to the Income Tax Regulations (26 CFR part 1) to reflect these amendments. The amended section 162(m) applies to taxable years beginning after December 31, 2017, except to the extent the grandfather rule applies. Because the final regulations continue to apply to deductions related to amounts of remuneration that are grandfathered, the final regulations are retained as a separate section in the Income Tax Regulations under section 162(m).

II. Publicly Held Corporation

A. In General

Section 162(m)(2) defines the term ''publicly held corporation.'' Before the amendments made by section 13601(c) of TCJA, section 162(m)(2) defined publicly held corporation as any corporation issuing any class of common equity securities required to be registered under section 12 of the Securities Exchange Act of 1934 (Exchange Act). In defining a publicly held corporation, § 1.162–27(c)(1) adds that whether a corporation is publicly held is determined based solely on whether, as of the last day of its taxable year, the corporation is subject to the reporting obligations of section 12 of the Exchange Act.

Section 13601(c) of TCJA amended the definition of publicly held corporation in section 162(m)(2) to

provide that the term means any corporation which is an issuer (as defined in section 3 of the Exchange Act) the securities of which are required to be registered under section 12 of the Exchange Act, or that is required to file reports under section 15(d) of the Exchange Act. Thus, section 13601(c) of TCJA expanded the definition of publicly held corporation in two ways to include: (1) A corporation with any class of securities (rather than only a class of common equity securities) that is required to be registered under section 12 of the Exchange Act, and (2) a corporation that is required to file reports under section 15(d) of the Exchange Act.

The proposed regulations similarly define a publicly held corporation as any corporation that issues securities required to be registered under section 12 of the Exchange Act or that is required to file reports under section 15(d) of the Exchange Act. Unlike the final regulations, the proposed regulations do not focus on whether the corporation is subject to the reporting obligations of section 12 of the Exchange Act. Rather, tracking the statutory text as amended, the proposed regulations focus on whether a corporation's securities are required to be registered under section 12, or whether a corporation is required to file reports under section 15(d).

Consistent with the statutory expansion of section 162(m), Congress provided in the legislative history to TCJA that the definition of a publicly held corporation ''may include certain additional corporations that are not publicly traded, such as large private C or S corporations.'' H. Rep. 115–466, at 490 (2017) (Conf. Rep.). See also Staff of the Joint Committee on Taxation, General Explanation of Public Law 115–97 (Blue Book), at 261 (December 20, 2018). As a result, these proposed regulations make clear that an S corporation (as defined in section 1361(a)(1)) would qualify as a publicly held corporation if it (1) issues securities required to be registered under section 12(b) of the Exchange Act, or (2) is required to file reports under section 15(d) of the Exchange Act (for example, because the S corporation has issued publicly traded debt). See Proposed § 1.162–33(c)(1)(i). Accordingly, the proposed regulations also provide that an S corporation parent of a qualified subchapter S subsidiary (as defined in section 1361(b)(3)(B)) (QSub) that issues securities required to be so registered, or is required to file such reports, likewise would qualify as a publicly held corporation. See part II.G of this Explanation of Provisions section. See also Proposed § 1.162–33(c)(1)(iv).

For ease of administration, the proposed regulations follow the approach in the final regulations and use the last day of a corporation's taxable year to determine whether it is publicly held. Accordingly, the proposed regulations provide that a corporation is publicly held if, as of the last day of its taxable year, its securities are required to be registered under section 12 of the Exchange Act or it is required to file reports under section 15(d) of the Exchange Act.

A corporation is required to register its securities under section 12 of the Exchange Act in two circumstances. First, section 12(b) of the Exchange Act requires a corporation to register its securities in order to list them for trading on a national securities exchange (15 U.S.C. 78l(b)). Second, section 12(g) of the Exchange Act requires an issuer with total assets exceeding $10 million to register a class of equity securities that is held of record by either 2,000 or more persons, or 500 or more persons who are not accredited investors (as that term is defined by the SEC) (15 U.S.C. 78l(g)).[1]

A corporation is required to file reports under section 15(d) of the Exchange Act when it offers securities for sale in a transaction subject to the registration requirements of the Securities Act of 1933 (Securities Act) and its registration statement is declared effective by the SEC. A corporation's section 15(d) filing obligation is automatically suspended when certain statutory requirements are met, and a corporation that meets other requirements established by rule may file a form with the SEC to suspend its section 15(d) filing obligation.[2] A commenter suggested that a corporation should not be considered publicly held if its obligation to file reports under section 15(d) of the Exchange Act is suspended. The proposed regulations adopt this suggestion.

In defining the term publicly held corporation under pre-amended section 162(m)(2), the final regulations included examples illustrating whether a corporation, as of the last day of its taxable year, is subject to the reporting obligations of section 12 of the Exchange Act. Similarly, these proposed regulations include examples illustrating when a corporation, as of the last day of its taxable year, is either required to file reports under section 15(d) of the Exchange Act or required to register its securities under section 12 of the Exchange Act. Even though the examples in these proposed regulations illustrate the application of the Securities Act and the Exchange Act and the rules thereunder (17 CFR part 240) for purposes of section 162(m), the examples are not intended to provide any guidance on how an issuer should apply the requirements of the Securities Act, the Exchange Act, and the rules thereunder (17 CFR part 240). Questions regarding those requirements should be directed to the SEC.

B. Subsidiaries That File Reports Under Section 15(d) of the Exchange Act

Pursuant to the definition of publicly held corporation in the proposed regulations, a corporation is publicly held if, as of the last day of its taxable year, it is required to file reports under section 15(d) of the Exchange Act. A commenter suggested that if a wholly-owned subsidiary corporation of a publicly held corporation subject to section 162(m) is required to file reports under section 15(d) of the Exchange Act, then it should not be considered a publicly held corporation separately subject to section 162(m) because its parent corporation is already subject to section 162(m). According to the commenter, to consider the subsidiary a publicly held corporation would result in two sets of covered employees—one for the parent corporation and one for the subsidiary corporation. The commenter was concerned that there would be too many covered employees for the group of corporations. The proposed regulations do not adopt this suggestion because not treating the subsidiary corporation as a separate publicly held corporation is inconsistent with the text of amended section 162(m)(2), which defines a publicly held corporation as a corporation that is required to file reports under section 15(d) of the Exchange Act. This conclusion is consistent with the affiliated group rule in the final regulations (which is retained in these proposed regulations and discussed in section II.E of this preamble) providing that a publicly held subsidiary is separately subject to section 162(m) and, therefore, has its own set of covered employees.

[1] In the case of an issuer that is a bank, savings and loan holding company, or bank holding company, section 12(g) of the Exchange Act requires registration if the issuer has assets exceeding $10 million and a class of equity securities held of record by 2,000 or more persons. See Exchange Act Rule 12g–1 (17 CFR 240.12g–1) regarding the requirements of section 12(g) generally, and Exchange Act Rule 12g5–1 (17 CFR 240.12g5–1) for determining record ownership of securities for purposes of Exchange Act sections 12(g) and 15(d).

[2] See Exchange Act Section 15(d) (15 U.S.C. 78o(d)), and Exchange Act Rules 15d–6 (17 CFR 240.15d–6) and 12h–3 (17 CFR 240.12h–3).

C. Foreign Private Issuers

Foreign issuers [3] may access the U.S. capital markets to raise capital or establish a trading presence for their securities. There are specific rules under the Federal securities laws that apply if a foreign issuer meets the regulatory definition of ''foreign private issuer'' (FPI). ''Foreign private issuer'' is defined in 21 CFR 240.3b–4(c). A foreign private issuer is any foreign issuer other than a foreign government, except for an issuer that has (1) more than 50% of its outstanding voting securities held of record by U.S. residents and (2) any of the following: (i) A majority of its officers and directors are citizens or residents of the United States, (ii) more than 50% of its assets are located in the United States, or (iii) its business is principally administered in the United States.

A FPI may access the U.S. capital markets or establish a trading presence in the U.S. by offering or listing its securities, often in the form of American Depositary Receipts (ADRs). An ADR is a negotiable certificate that evidences ownership of a specified number (or fraction) of the FPI's securities held by a depositary (typically, a U.S. bank). Depending on the FPI's level of participation in the U.S. capital market or trading presence, the FPI may be required to register its deposited securities (underlying the ADRs) under section 12 of the Exchange Act.

Commenters recommended that the proposed regulations provide that section 162(m) does not apply to FPIs. Before TCJA, the IRS ruled in several private letter rulings that section 162(m) does not apply to FPIs because FPIs are not required to file a summary compensation table pursuant to the reporting obligations under the Exchange Act.[4] The rationale of the rulings is that section 162(m) does not apply to FPIs because they do not have covered employees as a result of not being required to file a summary compensation table with the SEC. Commenters suggested that section 162(m) should continue to be inapplicable to FPIs because they are not required to disclose compensation of their officers on an individual basis under the Exchange Act, unless that disclosure is required by their home country. The commenters asserted that determining compensation on an individual basis (in order to determine the three most highly compensated executive officers) would require the FPIs to expend significant time and money in adopting the necessary internal legal and compliance procedures to comply with the Exchange Act requirements that are otherwise inapplicable to them.

The proposed regulations do not adopt the recommendation to exclude FPIs from the application of section 162(m). Pursuant to the definition of publicly held corporation in amended section 162(m)(2), a FPI is a publicly held corporation if it is required either to register its securities under section 12 of the Exchange Act or to file reports under section 15(d) of the Exchange Act. The legislative history to TCJA indicates that Congress intended for section 162(m) to apply to FPIs.[5] Furthermore, the rationale of the private letter rulings, which conclude that section 162(m) does not apply to FPIs because they are not required to file a summary compensation table, is inconsistent with the definition of covered employee in amended section 162(m)(3). As discussed in section III of this preamble, under the definition of covered employee as amended by TCJA, a publicly held corporation has covered employees regardless of whether it is required to file a summary compensation table, and regardless of whether the employees appear on a summary compensation table that is filed. Accordingly, the proposed regulations do not adopt the suggestion to exclude FPIs from the application of section 162(m). The proposed regulations include examples illustrating when a FPI is a publicly held corporation. Because the calculation of compensation to determine the three highest compensated executive officers for a taxable year is made in accordance with the SEC executive compensation disclosure rules under the Exchange Act, the Treasury Department and the IRS request comments on whether a safe harbor for that determination is appropriate for FPIs that are not required to disclose compensation of their officers on an individual basis in their home countries and, if so, how that safe harbor should be designed.

D. Publicly Traded Partnerships

Partnerships may issue equity interests that are required to be registered under section 12 of the Exchange Act because they are traded on an established securities market. These partnerships are known as publicly traded partnerships (PTPs). Under section 7704(a), a PTP generally is treated as a corporation for purposes of the Code, unless its gross income meets the requirement of section 7704(c)(2). Stakeholders have asked whether a PTP that is treated as a corporation under that provision would be considered a publicly held corporation. As described in the preamble to the 1993 proposed regulations, stakeholders previously raised this issue:

> Questions have arisen as to the application of section 162(m) to certain master limited partnerships whose equity interests are required to be registered under the Exchange Act and that, beginning in 1997, may be treated as corporations for Federal income tax purposes. Whether these partnerships would be publicly held corporations within the meaning of section 162(m) and, if so, the manner in which they would satisfy the exception for performance-based compensation is currently under study and is not addressed in these proposed regulations. If necessary, guidance as to the application of section 162(m) to these entities will be provided in the future.

(58 FR 66310, 66311). The Treasury Department and the IRS have concluded that, for purposes of section 162(m), a PTP that is treated as a corporation under section 7704 (or otherwise) is a publicly held corporation if, as of the last day of its taxable year, its securities are required to be registered under section 12 of the Exchange Act or it is required to file reports under section 15(d) of the Exchange Act. A PTP that is not treated as a corporation for Federal tax purposes (for example, because it satisfies the gross income requirement under section 7704(c)(2) and is not otherwise treated as a corporation for Federal tax purposes) is not a publicly held corporation for purposes of section 162(m).

E. Affiliated Groups

In defining the term ''publicly held corporation,'' § 1.162–27(c)(1)(ii) provides that a publicly held corporation includes an affiliated group of corporations, as defined in section 1504 (determined without regard to section 1504(b)). The proposed regulations retain this rule with a modification described below. Because an affiliated group may include more

[3] The term ''foreign issuer'' means any issuer which is a foreign government, a national of any foreign country or a corporation or other organization incorporated or organized under the laws of any foreign country. 21 CFR 240.3b–4(b).

[4] A private letter ruling may be relied upon only by the taxpayer to whom the ruling was issued, and does not constitute generally applicable guidance. See section 11.02 of Revenue Procedure 2019–1, 2019–01 I.R.B. 157.

[5] The legislative history to TCJA provides that the amendment to the definition of publicly held corporation under section 162(m) ''extends the applicability of section 162(m) to include . . . all foreign companies publicly traded through ADRs.'' House Conf. Rpt. 115–466, 489 (2017). The Blue Book similarly states that ''the provision extends the applicability of section 162(m) to include all foreign companies publicly traded through ADRs.'' Blue Book at page 261.

than one publicly held corporation, § 1.162–27(c)(1)(ii) provides that an affiliated group of corporations does not include any subsidiary that is itself a publicly held corporation. In that case, pursuant to the final regulations, the publicly held subsidiary and its subsidiaries (if any) are separately subject to section 162(m). Therefore, the parent corporation that is a publicly held corporation and the publicly held subsidiary each has its own set of covered employees. However, the final regulations do not specifically address the situation in which a parent corporation is privately held and the subsidiary is publicly held. Because the amended definition of publicly held corporation includes a corporation that is required to file reports under section 15(d) of the Exchange Act, this type of affiliated group may be more common post-TCJA. Accordingly, unlike the final regulations, which provide that a publicly held subsidiary is excluded from an affiliated group, with the result that a privately held parent is not part of an affiliated group with its publicly held subsidiary, these proposed regulations provide that an affiliated group includes a parent corporation that is privately held and its subsidiary that is publicly held. Furthermore, because an affiliated group of corporations is determined without regard to section 1504(b), an affiliated group may also include a domestic parent corporation that is publicly held and its foreign subsidiary that is not publicly held.

A covered employee of a publicly held corporation may also perform services for another member of the affiliated group. In these situations, § 1.162–27(c)(1)(ii) provides that

> [i]f a covered employee is paid compensation in a taxable year by more than one member of an affiliated group, compensation paid by each member of the affiliated group is aggregated with compensation paid to the covered employee by all other members of the group. Any amount disallowed as a deduction by this section must be prorated among the payor corporations in proportion to the amount of compensation paid to the covered employee by each such corporation in the taxable year.

The proposed regulations retain this rule and include additional rules addressing the proration of the deduction disallowance in situations in which a covered employee is paid compensation in a taxable year by more than one publicly held corporation in an affiliated group. Under these rules, the amount disallowed as a deduction is determined separately with respect to each publicly held payor corporation of which the individual is a covered employee. Accordingly, in determining the deduction disallowance with respect to compensation paid to a covered employee by one publicly held payor corporation of an affiliated group, compensation paid to the covered employee by another publicly held payor corporation of the affiliated group (of which the individual is also a covered employee) is not aggregated for purposes of the deduction disallowance proration.

F. Disregarded Entities

Generally under § 301.7701–2(c)(2)(i), a business entity that has a single owner and is not a corporation under § 301.7701–2(b) is disregarded as an entity separate from its owner for Federal tax purposes (disregarded entity). All of the activities of a disregarded entity are therefore treated in the same manner as a sole proprietorship or as a branch or division of its owner under § 301.7701–2. Section 301.7701–2(c)(2)(iv) provides that § 301.7701–2(c)(2)(i) does not apply to taxes imposed under Subtitle C—Employment Taxes and Collection of Income Tax (Chapters 21, 22, 23, 23A, 24, and 25 of the Code). Because section 162(m) is in Subtitle A, the general rule in § 301.7701–2(c)(2)(i) applies for purposes of section 162(m).

Nonetheless, a disregarded entity that is owned by a privately held corporation may be an issuer of securities that are required to be registered under section 12(b) of the Exchange Act or may be required to file reports under section 15(d) of the Exchange Act. The Treasury Department and the IRS have concluded that, for purposes of section 162(m), a corporation that is the owner of a disregarded entity is treated as issuing any securities issued by its disregarded entity. Accordingly, if a disregarded entity that is owned by a privately held corporation is an issuer of securities that are required to be registered under section 12(b) of the Exchange Act or is required to file reports under section 15(d) of the Exchange Act, these proposed regulations treat the privately held corporation as a publicly held corporation for purposes of section 162(m).

The Treasury Department and the IRS are aware that a corporation could form a partnership with a minority partner in an attempt to circumvent the proposed rules treating a corporation that wholly-owns a disregarded entity that issues certain securities as a publicly held corporation for purposes of section 162(m). In these circumstances, the corporation may be treated as a publicly held corporation by reason of the application of § 1.701–2 or other federal income tax principles. The Treasury Department and the IRS also note that, in addition to the above-described fact pattern involving disregarded entities, § 1.701–2 and other federal income tax principles may apply to any transaction in which a corporation forms a partnership in an attempt to circumvent the proposed rules.

G. Qualified Subchapter S Subsidiaries

Section 1361(b)(3)(B) defines a QSub as any domestic corporation that is not an ineligible corporation (as defined in section 1361(b)(2)) if an S corporation owns 100 percent of the stock of such corporation and the S corporation elects to treat the corporation as a QSub. Under section 1361(b)(3)(A), unless otherwise provided by regulations, a QSub is not treated as a separate corporation, and therefore all of its assets, liabilities, and items of income, deduction, and credit are treated as assets, liabilities, and such items (as the case may be) of its parent S corporation.

Like a disregarded entity, a QSub may issue securities required to be registered under section 12(b) of the Exchange Act, or be required to file reports under section 15(d) of the Exchange Act. The Treasury Department and the IRS have concluded that, for purposes of section 162(m), an S corporation that is the owner of a QSub is treated as issuing any securities that are issued by its QSub. Accordingly, if a QSub is an issuer of securities that are required to be registered under section 12(b) of the Exchange Act, or is required to file reports under section 15(d) of the Exchange Act, these proposed regulations treat the QSub's S corporation parent as a publicly held corporation for purposes of section 162(m). See Proposed § 1.162–33(c)(1)(iv).

III. Covered Employee

A. In General

Section 162(m)(3) defines the term ''covered employee.'' Before TCJA, section 162(m)(3) defined a covered employee as any employee of the taxpayer if (a) as of the close of the taxable year, such employee is the chief executive officer of the taxpayer or is an individual acting in such capacity, or (b) the total compensation of such employee for the taxable year is required to be reported to shareholders under the Exchange Act by reason of such employee being among the four highest compensated officers for the taxable year (other than the chief executive officer).

Section 13601(b) of TCJA amended the definition of covered employee in section 162(m)(3) to provide that a

covered employee means any employee of the taxpayer if (a) the employee is the principal executive officer (PEO) or principal financial officer (PFO) of the taxpayer at any time during the taxable year, or was an individual acting in such a capacity, (b) the total compensation of the employee for the taxable year is required to be reported to shareholders under the Exchange Act by reason of such employee being among the three highest compensated officers for the taxable year (other than the PEO and PFO), or (c) the individual was a covered employee of the taxpayer (or any predecessor) for any preceding taxable year beginning after December 31, 2016. Section 13601(c) of TCJA also added flush language to provide that a covered employee includes any employee whose total compensation for the taxable year places the individual among the three highest compensated officers for the taxable year (other than any individual who is the PEO or PFO of the taxpayer at any time during the taxable year, or was an individual acting in such a capacity) even if the compensation of the officer is not required to be reported to shareholders under the Exchange Act.

The SEC executive compensation disclosure rules generally require disclosure of compensation of the three most highly compensated executive officers if they were employed at the end of the taxable year and up to two executive officers whose compensation would have been disclosed but for the fact that they were not employed at the end of the taxable year. See Item 402 of Regulation S–K, 17 CFR 229.402(a)(3). After TCJA amended the definition of covered employee, stakeholders submitted comments indicating that they would benefit from initial guidance on whether amended section 162(m)(3)(B) and the flush language to section 162(m)(3) require an employee to be employed at the end of the taxable year to qualify as a covered employee. Notice 2018–68 provided that a covered employee for any taxable year means any employee who is among the three highest compensated executive officers for the taxable year, regardless of whether the executive officer is serving at the end of the publicly held corporation's taxable year, and regardless of whether the executive officer's compensation is subject to disclosure for the last completed fiscal year under the applicable SEC rules. To reach this conclusion, consistent with Notice 2018–68, the proposed regulations rely on the flush language to section 162(m)(3), the legislative history,[6] and the SEC executive compensation disclosure rules that do not necessarily require an executive officer to be employed at the end of the fiscal year for his or her compensation to be disclosed for the year. Based on these considerations, the proposed regulations adopt the position set forth in Notice 2018–68.[7]

B. Taxable Years Not Ending on Same Date as Fiscal Years

The SEC executive compensation disclosure rules are based on a corporation's fiscal year. Usually, a corporation's fiscal and taxable years end on the same date; however, this is not always the case (for example, due to a short taxable year as a result of a corporate transaction that does not result in a short fiscal year). In these cases, the publicly held corporation will have three most highly compensated executive officers under section 162(m)(3)(B) for the short taxable year (instead of the fiscal year). In Notice 2018–68, the Treasury Department and IRS requested comments on the application of the SEC executive compensation disclosure rules to determine the three most highly compensated executive officers for a taxable year that does not end on the same date as the fiscal year for purposes of section 162(m)(3)(B). The notice provided that until additional guidance is issued, taxpayers should base their determination of the three most highly compensated executive officers for purposes of section 162(m)(3)(B) upon a reasonable good faith interpretation of the statute.

A commenter suggested that the determination of the three highest compensated executive officers should be based on the total amount of otherwise deductible remuneration. The proposed regulations do not adopt this approach. In defining covered employee, section 162(m)(3)(B) provides that the three most highly compensated executive officers are officers whose compensation is required to be (or would be required to be) reported to shareholders under the Exchange Act. Therefore, under the statutory text, the determination of the three most highly compensated executive officers is made pursuant to the rules under the Exchange Act. Accordingly, the proposed regulations provide that the amount of compensation used to identify the three most highly compensated executive officers is determined pursuant to the executive compensation disclosure rules under the Exchange Act using the taxable year as the fiscal year for purposes of making the determination. Thus, for example, if a publicly held corporation uses a calendar year fiscal year for SEC reporting purposes, but has a taxable year beginning July 1, 2019, and ending June 30, 2020, then the three most highly compensated executive officers are determined for the taxable year ending June 30, 2020, by applying the executive compensation disclosure rules under the Exchange Act as if the fiscal year ran from July 1, 2019 to June 30, 2020. The same rule applies to short taxable years. Assume in the previous example that, due to a corporate transaction, the corporation's taxable year ran from July 1, 2019, to March 31, 2020. In that situation, the three most highly compensated executive officers would be determined for the taxable year ending March 31, 2020 by applying the disclosure rules as if the fiscal year began July 1, 2019, and ended March 31, 2020. For a discussion of the proposed special applicability dates related to the determination of the three most highly compensated executive officers for a corporation whose fiscal year and taxable year do not end on the same date, see section VIII.B of this preamble.

C. Covered Employees Limited to Executive Officers

The SEC executive compensation disclosure rules require disclosure of compensation for certain executive officers. The term executive officer is defined in 17 CFR 240.3b–7 as follows:

> The term executive officer, when used with reference to a registrant, means its president, any vice president of the registrant in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy making function or any other person who performs similar policy making functions for the registrant. Executive officers of subsidiaries may be deemed executive officers of the registrant if they perform such policy making functions for the registrant.

Under the amended definition of covered employee, a PEO and PFO are covered employees by virtue of having those positions or acting in those capacities. The three highest compensated officers (other than the PEO or PFO) are covered employees by reason of their compensation. With respect to the three highest compensated officers for a taxable year, a commenter asked whether only an executive officer (as defined in 17 CFR 240.3b–7) may qualify as a covered employee. Because the SEC executive compensation disclosure rules that

[6] See House Conf. Rpt. 115–466, 489 (2017).

[7] Furthermore, in explaining the amended definition of covered employee, the Blue Book concurred with the guidance provided in Notice 2018–68. Blue Book at page 260.

require disclosure of the three highest compensated executive officers apply only to executive officers, only an executive officer may qualify as a covered employee under section 162(m)(3)(B).

A publicly held corporation may own an interest in a partnership as discussed in section IV.B. of this preamble. Consistent with the definition of the term executive officer in 17 CFR 240.3b–7, an officer of a partnership is deemed to be an executive officer of a publicly held corporation that owns an interest in such partnership if the officer performs a policy making function for the publicly held corporation. As a deemed executive officer of the publicly held corporation, the officer of the partnership may be a covered employee under section 162(m)(3)(B) if the officer is one of the three highest compensated executive officers of the publicly held corporation.

D. Covered Employees After Separation From Service

Consistent with section 162(m)(3)(C), as amended by TCJA, Notice 2018–68 provides that a covered employee identified for taxable years beginning after December 31, 2016, will continue to be a covered employee for all subsequent taxable years. Accordingly, if an individual is a covered employee for a taxable year, the individual remains a covered employee for all subsequent taxable years, even after the individual has separated from service. For example, if a publicly held corporation makes nonqualified deferred compensation (NQDC) payments to a former PEO after separation from service, then the deduction for the payments generally would be subject to section 162(m). Notice 2018–68 based this conclusion on the statutory text in section 162(m)(3)(C) and the legislative history, which provides that

> if an individual is a covered employee with respect to a corporation for a taxable year beginning after December 31, 2016, the individual remains a covered employee for all future years. Thus, an individual remains a covered employee with respect to compensation otherwise deductible for subsequent years, including for years during which the individual is no longer employed by the corporation and years after the individual has died.

(House Conf. Rpt. 115–466, 489 (2017)). The Blue Book reiterated the legislative history in explaining the amended definition of covered employee.[8]

One commenter suggested that a covered employee ceases to be a covered employee for taxable years following the taxable year in which the individual separates from service because the statutory text uses the term ''employee'' instead of ''individual'' in defining covered employee. In other words, the commenter asserted that the term ''employee'' in the statute should be interpreted as referring to a ''current employee'' instead of a ''current or former employee.'' The commenter suggested that because this is the plain reading of the statute, the legislative history should be ignored. The proposed regulations do not adopt this suggestion. The statute gives no indication that the term ''employee'' is limited to a current employee, and a reference in the Code to an ''employee'' has frequently been interpreted in regulations as a reference to a current or a former employee.[9] Given the ambiguity in the meaning of ''employee'' and the legislative intent in this context to include a former employee, as evidenced by the legislative history and the Blue Book explanation of the term covered employee, the proposed regulations define employee to include a former employee.

E. Predecessor Corporation

Section 162(m)(3)(C) provides that the term ''covered employee'' means any employee who was a covered employee of the taxpayer for any preceding taxable year beginning after December 31, 2016. The term ''covered employee'' also means any employee who was a covered employee of any predecessor of the taxpayer for any preceding taxable year beginning after December 31, 2016. For clarity, these proposed regulations use the term ''predecessor of a publicly held corporation'' instead of ''predecessor.'' An individual who is a covered employee for one taxable year (including a taxable year of a predecessor of a publicly held corporation) remains a covered employee for subsequent taxable years.

In certain circumstances, the term ''predecessor of a publicly held corporation'' includes the publicly held corporation itself if it was a publicly held corporation for a prior taxable year. Specifically, the proposed regulations provide that a predecessor of a publicly held corporation includes a publicly held corporation that, after becoming privately held, again becomes a publicly held corporation for a taxable year ending before the 36-month anniversary of the due date for the corporation's U.S. Federal income tax return (excluding any extensions) for the last taxable year for which the corporation was previously publicly held. For a discussion of the proposed special applicability date related to the definition of predecessor of a publicly held corporation as applied to a privately held corporation that was previously a publicly held corporation and again becomes a publicly held corporation, see section VIII.B of this preamble.

The proposed regulations also provide that the term ''predecessor of a publicly held corporation'' includes a publicly held corporation that is acquired (target corporation), or the assets of which are acquired, by another publicly held corporation (acquiror corporation) in certain transactions. Accordingly, the covered employees of the target corporation in those transactions are also covered employees of the acquiror corporation.

The proposed regulations define the term ''predecessor of a publicly held corporation'' by reference to the type of corporate acquisition in which a publicly held corporation is acquired. The proposed regulations describe corporate acquisitions in four categories: (1) Corporate reorganizations, (2) corporate divisions, (3) stock acquisitions, and (4) asset acquisitions. Certain transactions may fall within more than one category, but this redundancy is intended to provide certainty as to the application of these rules if a taxpayer is unsure which category covers the acquisition in question.

With respect to corporate reorganizations, the proposed regulations provide that a predecessor of a publicly held corporation includes a publicly held corporation that is acquired or that is the transferor corporation in a corporate reorganization described in section 368(a)(1). For example, if a publicly held target corporation merges into a publicly held acquiror corporation, then any covered employee of the target corporation would become a covered employee of the acquiror corporation.

With respect to corporate divisions, the proposed regulations provide that a predecessor of a publicly held corporation includes a publicly held distributing corporation that distributes or exchanges the stock of one or more

[8] The Blue Book states that, ''[i]n addition, if an individual is a covered employee with respect to a corporation for a taxable year beginning after December 31, 2016, the individual remains a covered employee for all future years. Thus, an individual remains a covered employee with respect to compensation otherwise deductible for subsequent years, including for years during which the individual is no longer employed by the corporation and years after the individual has died.'' Blue Book at page 260.

[9] For example, under § 1.105–11(c)(3)(iii), the nondiscrimination rules of section 105(h)(3) apply to former employees even though the Code uses only the term ''employees.''

controlled corporations in a transaction described in section 355(a)(1) (a 355(a)(1) transaction) if the controlled corporation is a publicly held corporation. This rule applies to the distributing corporation only with respect to covered employees of the distributing corporation who are hired by the controlled corporation (or by a corporation affiliated with the controlled corporation that received stock of the controlled corporation as a shareholder of the distributing corporation in the 355(a)(1) transaction) within the period beginning 12 months before and ending 12 months after the distribution. For example, if a publicly held distributing corporation exchanges with its shareholders the stock of a controlled corporation for stock of the distributing corporation in a 355(a)(1) transaction, and the controlled corporation is a publicly held corporation after the exchange, then any covered employee of the distributing corporation would become a covered employee of the controlled corporation if hired by the controlled corporation within the period beginning 12 months before and ending 12 months after the exchange. Furthermore, a covered employee of the distributing corporation who becomes a covered employee of the controlled corporation will remain a covered employee of the distributing corporation for all subsequent taxable years because, as discussed in section III.D of this preamble, if an individual is a covered employee for a taxable year, the individual remains a covered employee for all subsequent taxable years.

With respect to stock acquisitions, a predecessor of a publicly held corporation includes a publicly held corporation that becomes a member of an affiliated group (as defined in proposed § 1.162–33(c)(1)(ii)). For example, if an affiliated group that is considered a publicly held corporation pursuant to proposed § 1.162–33(c)(1)(ii) in the proposed regulations acquires a publicly held target corporation that becomes a member of the affiliated group, then the target corporation would be considered a predecessor of the affiliated group. Therefore, any covered employee of the target corporation would become a covered employee of the affiliated group.

With respect to asset acquisitions, if an acquiror corporation or one or more members of an affiliated group (acquiror group) acquires at least 80% of the operating assets (determined by fair market value on the date of acquisition) of a publicly held target corporation, then the target corporation is a predecessor of the acquiror corporation or group. For example, if an acquiror corporation acquires 80% or more of the operating assets of a publicly held target corporation, then any covered employees of the target corporation that become employees of the acquiror corporation would become covered employees of the acquiror corporation. For acquisitions of assets that occur over time, the proposed regulations provide that generally only acquisitions that occur within a 12-month period are taken into account to determine whether at least 80% of the target corporation's operating assets were acquired.

Similarly, this asset acquisition rule provides that the target is a predecessor of a publicly held corporation only with respect to a covered employee of the target corporation who is hired by the acquiror (or a corporation affiliated with the acquiror) within the period beginning 12 months before and ending 12 months after the date on which all events necessary for the acquisition have occurred.

These proposed regulations provide that the rules for determining predecessors are applied cumulatively, with the result that a predecessor of a corporation includes each predecessor of the corporation and the predecessor or predecessors of any prior predecessor or predecessors.

Also, in a similar manner to the rule for a publicly held corporation that becomes privately held, and subsequently becomes publicly held, these proposed regulations provide that a target corporation may be a predecessor corporation in certain circumstances. For example, the proposed regulations provide that if a target corporation was a publicly held corporation, subsequently becomes privately held, is then acquired by an acquiror that is not a publicly held corporation, and the acquiror becomes a publicly held corporation for a taxable year ending before the 36-month anniversary of the due date for the target corporation's U.S. Federal income tax return (excluding any extensions) for the last taxable year for which the target corporation was publicly held, then the target corporation is a predecessor of the publicly held corporation. The proposed regulations also provide a similar rule for asset acquisitions.

These proposed regulations further clarify that, in the case of an election to treat as an asset purchase either the sale, exchange, or distribution of stock pursuant to regulations under section 336(e) or the purchase of stock pursuant to regulations under section 338, the corporation is treated as the same corporation before and after the transaction for which the election is made. Similar exceptions are made to the general treatment of an election under section 336(e) and section 338 that would treat the post-election corporation as a new corporation for purposes of other rules regarding various compensation tax provisions (see § 1.338–1(b)(2)(i)). These exceptions align with the other predecessor rules in these proposed regulations by treating a substantial continuation of the earlier business in the post-election corporation as continuing the pre-election corporation, so that the covered employees continue to be covered employees.

F. Disregarded Entities

Under section 162(m)(3), only employees of the taxpayer may be covered employees. When a corporation owns an entity that is disregarded as an entity separate from its owner under § 301.7701–2(c)(2)(i), the corporation that is a publicly held corporation (and not its wholly-owned entity) is the taxpayer for purposes of section 162(m)(3). In that case, the covered employees of the publicly held corporation are identified pursuant to the rules discussed in sections III.A through III.E of this preamble. Accordingly, a PEO, PFO, or executive officer of a disregarded entity wholly-owned by a corporation is generally not treated as a PEO, PFO, or executive officer of the corporate owner (the publicly held corporation). However, consistent with the definition of the term executive officer in 17 CFR 240.3b–7 that treats executive officers of subsidiaries as executive officers of the registrant if the executive officers perform policy making functions for the registrant, an executive officer of a disregarded entity is treated as an executive officer of its corporate owner for the taxable year if the executive officer performs policy making functions for the corporate owner during the taxable year. These proposed regulations include examples illustrating how to determine whether employees of a disregarded entity are treated as covered employees of its publicly held corporate owner for purposes of section 162(m).

The Treasury Department and the IRS are aware that, in an attempt to circumvent the proposed rules treating a corporation that wholly-owns a disregarded entity that issues certain securities as a publicly held corporation for purposes of section 162(m), a corporation could form a partnership with a minority partner and the partnership could then employ an individual who otherwise would have

been a covered employee of the corporation. In these circumstances, § 1.701–2 and other federal income tax principles may apply to a transaction in which a corporation forms a partnership in an attempt to circumvent the proposed rules.

G. Qualified Subchapter S Subsidiaries

Like the case when a corporation owns a disregarded entity, when an S corporation that is a publicly held corporation owns a QSub, the S corporation, and not its QSub, is the taxpayer for purposes of section 162(m)(3). Therefore, pursuant to the rules discussed in sections III.A through III.E of this preamble, a PEO, PFO, or executive officer of such QSub generally is not treated as a PEO, PFO, or executive officer of the S corporation owner (that is, the publicly held corporation). Under these proposed regulations, an executive officer of a QSub is treated as an executive officer of its S corporation owner for the taxable year if the executive officer performs policy making functions for the S corporation owner during the taxable year. See Proposed § 1.162–33(c)(2)(iv). This treatment is consistent with the definition of the term executive officer in 17 CFR 240.3b-7, which treats executive officers of subsidiaries as executive officers of the registrant if the executive officers perform policy making functions for the registrant.

IV. Applicable Employee Remuneration

A. In General

Section 162(m)(4) defines the term ''applicable employee remuneration'' with respect to any covered employee for any taxable year as the aggregate amount allowable as a deduction for such taxable year (determined without regard to section 162(m)) for remuneration for services performed by such employee (whether or not during the taxable year). Before TCJA, applicable employee remuneration did not include remuneration payable on a commission basis (as defined in section 162(m)(4)(B)) or performance-based compensation (as defined in section 162(m)(4)(C)). Section 13601(a) of TCJA amended the definition of applicable employee remuneration to eliminate these exclusions, while section 13601(d) of TCJA added a special rule for remuneration paid to beneficiaries. This special rule, set forth in section 162(m)(4)(F), provides that remuneration shall not fail to be applicable employee remuneration merely because it is includible in the income of, or paid to, a person other than the covered employee, including after the death of the covered employee.

For simplicity, when incorporating the amendments TCJA made to the definition of applicable employee remuneration, these proposed regulations use the term ''compensation'' instead of ''applicable employee remuneration.'' Consistent with the amendments made by TCJA, these proposed regulations provide that compensation means the aggregate amount allowable as a deduction under chapter 1 of the Code for the taxable year (determined without regard to section 162(m)) for remuneration for services performed by a covered employee, whether or not the services were performed during the taxable year. The proposed regulations also clarify that compensation includes an amount that is includible in the income of, or paid to, a person other than the covered employee, including after the death of the covered employee.

B. Compensation Paid by a Partnership to a Covered Employee

These proposed regulations address the issue of compensation paid by a partnership (as defined for Federal tax purposes) to a covered employee of a publicly held corporation; this issue has been subject to a no-rule position for private letter rulings since 2010. Between 2006 and 2008, the IRS issued four private letter rulings addressing specific situations in which a publicly held corporation was a partner in a partnership. As part of the analysis, the private letter rulings stated that if a publicly held corporation is a partner in a partnership, then section 162(m) does not apply to the corporation's distributive share of the partnership's deduction for compensation paid by the partnership for services performed for it by a covered employee of the corporation. Therefore, the private letter rulings ruled on the facts presented that section 162(m) did not limit the otherwise deductible compensation expense of the publicly held corporation for compensation the partnership paid the covered employee. Upon further consideration, and recognizing the potential for abuse, the IRS stopped issuing private letter rulings involving section 162(m) and partnerships.[10] Stakeholders have asked the Treasury Department and the IRS to address this issue in these proposed regulations.

In relevant part, section 162(m)(1) provides that ''[i]n the case of any publicly held corporation, no deduction shall be allowed under this chapter for applicable employee remuneration with respect to any covered employee.'' This language does not limit the application of section 162(m) to deductions for compensation paid by the publicly held corporation; it also covers the deduction for compensation paid to the corporation's covered employees by another party to the extent the corporation is allocated a share of the otherwise deductible item. For instance, if a publicly held corporate partner is allocated a distributive share of the partnership's deduction for compensation paid by the partnership, the allocated distributive share of the deduction is subject to section 162(m) even though the corporation did not directly pay the compensation to the covered employee. Thus, the publicly held corporation must take into account its distributive share of the partnership's deduction for compensation expense paid to the publicly held corporation's covered employee and aggregate that distributive share and the corporation's otherwise allowable deduction for compensation paid directly to that employee in determining the amount allowable to the corporation as a deduction for compensation under section 162(m). See § 1.702–1(a)(8)(ii) and (iii).

The Treasury Department and the IRS are aware that this issue has not been addressed in generally applicable guidance and understand taxpayers may have taken positions contrary to those set forth in these proposed regulations. Accordingly, the proposed regulations provide transition relief for current compensation arrangements, but also prohibit the formation or expansion of these types of structures for the purpose of avoiding the application of section 162(m) prior to the issuance of final regulations. Specifically, in order to ensure that compensation agreements are not formed or otherwise structured to circumvent this rule after publication of these proposed regulations and prior to the publication of the final regulations, the proposed regulations propose that the rule with respect to compensation paid by a partnership will apply to any deduction for compensation that is otherwise

[10] Initially, the IRS announced the no-rule position in 2010 in section 5.06 of Revenue Procedure 2010–3, 2010–1 I.R.B. 110, which provided that ''[w]hether the deduction limit under § 162(m) applies to compensation attributable to services performed for a related partnership'' was an area under study in which rulings or determination letters will not be issued until the IRS resolves the issue through publication of a revenue ruling, revenue procedure, regulations, or otherwise. Most recently, section 4.01(13) of Revenue Procedure 2019–3, 2019–01 I.R.B. 130, provides that this issue is an area in which rulings or determination letters will not ordinarily be issued.

allowable for a taxable year ending on or after December 20, 2019 but will not apply to compensation paid pursuant to a written binding contract in effect on December 20, 2019 that is not materially modified after that date. The Treasury Department and the IRS request comments on whether similar rules should apply to trusts.

C. Compensation for Services in a Capacity Other Than an Executive Officer

A commenter suggested that, if a covered employee separates from service as an executive officer and subsequently performs services as a director of the publicly held corporation, then the compensation paid to the individual as a director should not be considered applicable employee remuneration for purposes of section 162(m)(4). These proposed regulations do not adopt this suggestion.

Since the enactment of section 162(m) in 1993, director fees were considered applicable employee remuneration for purposes of section 162(m)(4). In describing compensation for which the deduction is limited by section 162(m), the legislative history to the enactment of section 162(m) states:

> Unless specifically excluded, the deduction limitation applies to all remuneration for services, including cash and the cash value of all remuneration (including benefits) paid in a medium other than cash. If an individual is a covered employee for a taxable year, the deduction limitation applies to all compensation not explicitly excluded from the deduction limitation, regardless of whether the compensation is for services as a covered employee and regardless of when the compensation was earned.

House Conf. Rpt. 103–213, 585 (1993). Thus, in enacting section 162(m), Congress did not exclude compensation for services not performed as a covered employee from the deduction limitation. As stated in the preamble to the 1993 proposed regulations, ''[t]he deduction limit of section 162(m) applies to any compensation that could otherwise be deducted in a taxable year, except for enumerated types of payments set forth in section 162(m)(4)'' (58 FR 66310, 66310). Compensation earned by a covered employee through a non-employee position, such as director fees, was never one of the ''enumerated types of payments set forth in section 162(m)(4)'' and so this compensation does not fall within the exception and has always been considered applicable employee remuneration for which the deduction is limited by section 162(m).[11] The amendments to section 162(m)(4) made by TCJA did not change this aspect of the definition of applicable employee remuneration; accordingly, the proposed regulations do not adopt the commenter's suggestion.

Pursuant to the amended definition of covered employee in section 162(m)(3)(C), a covered employee includes any individual who was a covered employee of the publicly held corporation (or any predecessor) for any taxable year beginning after December 31, 2016. Therefore, a covered employee remains a covered employee after separation from service. If, after separation from service as an employee, a covered employee returns to provide services to the publicly held corporation in any capacity, including as a common law employee, a director, or an independent contractor, then any deduction for compensation paid to the covered employee is subject to section 162(m).

V. Privately Held Corporations That Become Publicly Held

Section 162(m) applies to the deduction for compensation paid to a covered employee that is otherwise deductible for a taxable year of a publicly held corporation. These proposed regulations provide that, in the case of a corporation that is a privately held corporation that becomes a publicly held corporation, section 162(m) applies to the deduction for any compensation that is otherwise deductible for the taxable year ending on or after the date that the corporation becomes a publicly held corporation. Furthermore, the proposed regulations provide that a corporation is considered to become publicly held on the date that its registration statement becomes effective either under the Securities Act or the Exchange Act.

Commenters suggested that these proposed regulations retain the transition relief provided in the final regulations for privately held corporations that become publicly held. Commenters reasoned that corporations that become publicly held corporations need time to adjust compensation arrangements to take into account section 162(m). The proposed regulations do not adopt this suggestion.

As background, in enacting section 162(m) in 1993, Congress excepted performance-based compensation from the definition of applicable employee remuneration and, thus, the section 162(m) deduction limitation. Before TCJA, section 162(m)(4)(C) defined performance-based compensation as ''any remuneration payable solely on account of the attainment of one or more performance goals, but only if—

(i) the performance goals are determined by a compensation committee of the board of directors of the taxpayer which is comprised solely of 2 or more outside directors,

(ii) the material terms under which the remuneration is to be paid, including the performance goals, are disclosed to shareholders and approved by a majority of the vote in a separate shareholder vote before the payment of such compensation, and

(iii) before any payment of such remuneration, the compensation committee referred to in clause (i) certifies that the performance goals and any other material terms were in fact satisfied.

These requirements are also set forth in §§ 1.162–27(e)(2) through (e)(5). In enacting section 162(m), Congress recognized that privately held corporations may have difficulty adopting compensation arrangements that satisfy the requirements for performance-based compensation. Specifically, Congress was concerned about the shareholder approval requirement. Congress also recognized that, when a corporation becomes a publicly held corporation in connection with an initial public offering (IPO), prospective shareholders who read the corporation's prospectus are aware of the compensation arrangements adopted prior to the IPO. Accordingly, Congress thought that shareholders who read the prospectus and purchase the corporation's shares are, in effect, approving the corporation's compensation arrangements. The 1993 legislative history provides as follows:

> [I]n the case of a privately held company that becomes publicly held, the prospectus is subject to the rules similar to those applicable to publicly held companies. Thus, if there has been disclosure that would satisfy the rules described above, persons who buy stock in the publicly held company will be aware of existing compensation arrangements. No further shareholder approval is required of compensation arrangements existing prior to the time the company became public unless there is a material modification of such arrangements.

[11] Furthermore, as explained in section II.E of this preamble, the final regulations provide that all compensation paid to a covered employee by more than one member of an affiliated group is aggregated for purposes of prorating the amount disallowed as a deduction by section 162(m). For purposes of aggregating the total compensation paid by the affiliated group, the final regulations do not exclude compensation paid for services performed by a covered employee in a capacity other than an employee (for example, as an independent contractor).

House Conf. Rpt. 103–213, 588 (1993). Based on the legislative history, the final regulations provided transition relief for corporations that become publicly held. Section 1.162–27(f)(1) provides that in the case of a corporation that was not a publicly held corporation and then becomes a publicly held corporation, section 162(m) ''does not apply to any remuneration paid pursuant to a compensation plan or agreement that existed during the period in which the corporation was not publicly held.'' If a corporation becomes publicly held in connection with an IPO, then the relief provided in § 1.162–27(f)(1) applies only to the extent that the prospectus accompanying the IPO disclosed information concerning the existing compensation plans or agreements and satisfied all applicable securities laws.

Section 13601(a) of TCJA amended the definition of applicable employee remuneration in section 162(m)(4) to eliminate the exception for performance-based compensation, which among other things, made shareholder approval of compensation arrangements irrelevant with respect to entitlement to the deduction. Accordingly, these proposed regulations do not retain the transition relief provided in the final regulations.

For a discussion of rules applicable to privately held corporations that previously were publicly held corporations, see section III.E. of this preamble.

VI. Grandfather Rules

A. In General

Section 13601(e) of TCJA generally provides that TCJA amendments to section 162(m) apply to taxable years beginning after December 31, 2017. However, it further provides that those amendments do not apply to remuneration that is provided pursuant to a written binding contract that was in effect on November 2, 2017, and that was not modified in any material respect on or after such date.

As discussed in Notice 2018–68, the text of section 13601(e) of the TJCA is almost identical to the text of pre-TCJA section 162(m)(4)(D), which provided a grandfather rule in connection with the enactment of section 162(m) in 1993. Under that grandfather rule, section 162(m) did not apply to remuneration payable under a written binding contract that was in effect on February 17, 1993, and that was not modified thereafter in any material respect before such remuneration was paid. Section 1.162–27(h) provides guidance on the definitions of written binding contract and material modification for purposes of applying the original grandfather rule, and Notice 2018–68 adopted those definitions for purposes of the grandfather rule in connection with section 13601(e) of TCJA. The proposed regulations likewise adopt those definitions. Notice 2018–68 also provided examples illustrating the use of these definitions, and many of those examples are incorporated in these proposed regulations. However, to increase clarity, the proposed regulations replace some examples from Notice 2018–68 with other examples. This replacement with new examples does not reflect a substantive change from the definitions of written binding contract and material modification provided in Notice 2018–68.

Notice 2018–68 clarified that remuneration is payable under a written binding contract that was in effect on November 2, 2017, only to the extent that the corporation is obligated under applicable law (for example, state contract law) to pay the remuneration under the contract if the employee performs services or satisfies the applicable vesting conditions. Accordingly, the TJCA amendments to section 162(m) apply to any amount of remuneration that exceeds the amount of remuneration that applicable law obligates the corporation to pay under a written binding contract that was in effect on November 2, 2017, if the employee performs services or satisfies the applicable vesting conditions.

As an alternative to the grandfather rules in Notice 2018–68, some commenters suggested that these proposed regulations adopt a safe harbor regarding the determination of whether a contract qualifies as a written binding contract so that compensation paid pursuant to the contract would be grandfathered. Under the suggested safe harbor, any arrangement in effect on or before November 2, 2017, would be treated as a written binding contract if an amount related to the compensation payable under the contract was accrued (or could have been accrued) as a cost under Generally Accepted Accounting Principles (GAAP), regardless of whether the corporation is obligated to pay the remuneration under applicable law.

Although the Treasury Department and the IRS understand that the application of the written binding contract standard may be burdensome in certain cases and welcome the potential for simplification, the suggested safe harbor raises several issues. First, as expressed in the comment, the accrual of a cost is often based on predictions of whether the amount will be paid, which may not necessarily reflect whether the amount must be paid in all cases. This raises issues of whether costs identified correlate with the statutory standard of being paid under a legally binding contract if, in fact, the employer was not necessarily bound to pay the amounts of compensation but rather was likely to pay them. Second, the suggested safe harbor is an accounting standard based on financial statements audited by accountants. This raises issues of tax administration, including the potential for the IRS to audit for section 162(m) purposes a corporation's ''audited'' financial statements, and challenges IRS examiners would have in applying GAAP principles. For these reasons, the proposed regulations do not adopt this suggested safe harbor. However, the Treasury Department and the IRS welcome further comments on whether the suggested safe harbor standard would be administrable, including how it would be implemented with respect to differing positions on corporate tax returns (such as use of the standard in Notice 2018–68 and these proposed regulations) that have already been filed.

B. Compensation Subject to Discretion

Under the definition of written binding contract in Notice 2018–68 and these proposed regulations, applicable law (such as state contract law) determines the amount of compensation that a corporation is obligated to pay pursuant to a written binding contract in effect on November 2, 2017. Some commenters suggested that negative discretion be completely disregarded in determining the amount of compensation that a corporation is obligated to pay pursuant to a written binding contract. The proposed regulations do not adopt this approach, because it is contrary to the statutory text and the legislative history. See House Conf. Rpt. 115–466, 490 (2017). The Treasury Department and the IRS are aware, however, that compensation arrangements may purport to provide the corporation with a wider scope of negative discretion than applicable law permits the corporation to exercise. In that case, the negative discretion is taken into account only to the extent the corporation may exercise the negative discretion under applicable law.

One commenter asked whether an amount of compensation is grandfathered if it is paid pursuant to a written binding contract under which the corporation is obligated to recover an amount of compensation from the employee if a vesting condition is later determined not to have been satisfied.

For example, a vesting condition may be based on the achievement of results reported in the financial statements. In this example, if a corporation pays a bonus based on the financial statements but the financial statements are subsequently restated and demonstrate that the vesting condition was not, in fact, satisfied, then the corporation is required to recover a portion of the bonus from the employee. If, under applicable law, the employee retains the remaining portion of the bonus then, pursuant to the grandfather rules in Notice 2018–68 and these proposed regulations, that remaining portion of the bonus is grandfathered compensation that is not subject to TCJA amendments. Similarly, if the corporation has discretion to recover compensation (in whole or in part), only the amount of compensation that the corporation is obligated to pay under applicable law that is not subject to potential recovery is grandfathered. The proposed regulations include examples illustrating these principles.

Applicable law may provide a corporation with contingent discretion to recover compensation. This issue was not addressed in Notice 2018–68. Under these proposed regulations, a corporation is not treated as currently having discretion merely because it will have discretion to recover an amount if a condition occurs subsequent to the vesting and payment of the compensation and the occurrence of the condition is objectively outside of the corporation's control. For example, pursuant to a written binding contract in effect on November 2, 2017, a corporation may be obligated under applicable law to pay $500,000 of compensation if the employee satisfies a vesting condition, but the corporation may be permitted to recover $300,000 from the employee if the employee is convicted of a felony within three calendar years from the date of payment. If the employee is not convicted of a felony within three calendar years from the date of payment, then the $500,000 is grandfathered. If, however, the employee is convicted of a felony within three years after the payment of the $500,000, then the corporation has discretion whether to recover the $300,000 from the employee. Accordingly, if the employee is convicted of a felony within three calendar years after the payment, $300,000 of the $500,000 is not grandfathered. This is true regardless of whether the corporation exercises its discretion to recover the $300,000. Because the corporation may not recover $200,000 of the $500,000 payment in any event, the $200,000 remains grandfathered regardless of whether the employee is convicted of a felony.

C. Account and Nonaccount Balance Plans

Notice 2018–68 includes examples illustrating the application of the grandfather rule to account balance plans, and those examples are incorporated into these proposed regulations. Commenters requested guidance on the application of the grandfather rule to nonaccount balance plans, and some of these commenters suggested that benefits accruing under a nonaccount balance plan after November 2, 2017, should be automatically grandfathered. The proposed regulations do not adopt this approach. Consistent with the text of section 13601(e) of TCJA providing the grandfather rule, the amount of compensation that is grandfathered under a nonaccount balance plan is the amount that the corporation is obligated to pay under applicable law on November 2, 2017. The proposed regulations include examples illustrating these rules.

Commenters also requested guidance on determining the amount of compensation that a corporation is obligated to pay under applicable law with respect to linked plan arrangements. In these arrangements, the amount payable to an employee under a NQDC plan is linked to a qualified employer plan. For example, a typical arrangement may provide that the amount of NQDC to be paid to an employee is the account balance (or an accumulated benefit) in a NQDC plan reduced by the account balance in a section 401(k) plan. These proposed regulations include an example involving this type of arrangement.

D. Earnings on Grandfathered Amounts in Account and Nonaccount Balance Plans

Notice 2018–68 includes an example illustrating the circumstances in which earnings credited to account balance plans after November 2, 2017, are grandfathered, as well as an example illustrating that those earnings are not grandfathered when the corporation retains the right under applicable law to amend the plan at any time either to stop or to reduce future credits (including earnings) to the account balance. Commenters suggested that earnings credited after November 2, 2017, on grandfathered amounts in nonaccount balance plans should also be grandfathered. The proposed regulations do not adopt the commenters' suggestion. Instead, consistent with TCJA and the guidance in Notice 2018–68, the proposed regulations provide that earnings credited after November 2, 2017, on grandfathered amounts are grandfathered only if the corporation is obligated to pay the earnings under applicable law pursuant to a written binding contract in effect on November 2, 2017.

Stakeholders asked how § 1.409A–3(j)(4)(ix)(C)(3) affects the determination of whether earnings credited on a grandfathered amount after November 2, 2017, are grandfathered if the corporation retains the right under applicable law to terminate the plan at any time in compliance with section 409A. Section 1.409A–3(j)(4)(ix)(C)(3) provides that, if a service recipient terminates a NQDC plan, then the time and form of payments may be accelerated, but payment may not be made within 12 months of the date of termination of the plan. The definition of written binding contract in Notice 2018–68 and these proposed regulations provides that earnings credited after November 2, 2017, on grandfathered amounts are grandfathered only if the corporation is obligated to pay the earnings under applicable law pursuant to a written binding contract in effect on November 2, 2017. Accordingly, if, under applicable law, the corporation is obligated to continue to credit earnings for amounts under the NQDC plan during the 12 months after terminating the plan, then the earnings would be grandfathered.[12] In that case, the grandfathered amount would be the amount that the corporation is obligated to pay under applicable law as of November 2, 2017, plus the 12 months of earnings that the corporation is obligated to credit under applicable law. However, any additional amounts that become payable under the plan after November 2, 2017, and earnings on those amounts would not be grandfathered.

Applicable law and the terms of the plan determine the amount of earnings that the corporation is obligated to credit for amounts under the plan during the 12 months after plan

[12] Section 1.409A–3(j)(4)(ix)(C) provides that if a service recipient terminates a NQDC plan (as defined in § 1.409A–1(c)) for one participant, then it must terminate the NQDC plan for all participants. Given this requirement, a corporation might refrain from terminating a NQDC plan and continue to credit earnings on a grandfathered amount after November 2, 2017. If a corporation is permitted under applicable law to terminate the NQDC plan, then only the amount it would be obligated to pay under applicable law if it did terminate the NQDC plan is grandfathered.

termination. Thus, for example, with respect to a nonaccount balance plan, under applicable law, the amount of earnings that the corporation is obligated to credit might be limited to the difference between the present value of the benefit under the plan as of November 2, 2017, and any increase in present value due solely to passage of time (12 months). Furthermore, with respect to a nonaccount balance plan that provides for a formula amount (for example, the amount payable under the plan is based on the participant's final salary and years of service), the amount of earnings that the corporation is obligated to credit under applicable law might be limited to a reasonable rate of interest to reflect the time value of money during the passage of time (12 months) applied to the benefit under the plan as of November 2, 2017 (and not reflecting any additional salary increase or years of service accumulated after November 2, 2017).

E. Severance Agreements

Commenters asked about the application of the grandfather rule in Notice 2018–68 to compensation payable pursuant to a severance agreement that is a written binding contract and is in effect on November 2, 2017. Severance payable under such a contract is grandfathered only if the amount of severance is based on compensation elements the employer is obligated to pay under the contract. For example, if the amount of severance is based on final base salary, the severance is grandfathered only if the corporation is obligated to pay both the base salary and the severance under applicable law pursuant to a written binding contract in effect on November 2, 2017. For this purpose, a corporation may be obligated to pay severance under a written binding contract as of November 2, 2017, even if the employee remains employed as of November 2, 2017, but only with respect to the amount the corporation would have been required to pay if the employee had been terminated as of November 2, 2017.

Commenters also asked whether all or a portion of severance is grandfathered if a portion of the amount is based on a variable component, such as a discretionary or performance bonus. The examples in these proposed regulations illustrate that each component of the severance formula is analyzed separately to determine the amount of severance that is grandfathered. For example, the amount of severance may be equal to two times the sum of: (1) Final base salary and (2) any bonus paid within 12 months prior to separation from service. In this example, the amount of severance is based on two components, base salary and bonus. Therefore, the entire amount of severance (based on both components) is grandfathered only if, under applicable law, the corporation is obligated to pay both portions, the base salary and the bonus pursuant to a written binding contract in effect on November 2, 2017.

F. Material Modification

1. In General

These proposed regulations adopt the definition of material modification in Notice 2018–68. Under that definition, a material modification occurs when the contract is amended to increase the amount of compensation payable to the employee. Furthermore, if a written binding contract is materially modified, it is treated as a new contract entered into as of the date of the material modification. Accordingly, amounts received by an employee under the contract before a material modification are not affected, but amounts received subsequent to the material modification are treated as paid pursuant to a new contract, rather than as paid pursuant to a written binding contract in effect on November 2, 2017. The adoption of a supplemental contract or agreement that provides for increased compensation, or the payment of additional compensation, is a material modification of a written binding contract if the facts and circumstances demonstrate that the additional compensation is paid on the basis of substantially the same elements or conditions as the compensation that is otherwise paid pursuant to the written binding contract in effect on November 2, 2017. However, a material modification of a written binding contract does not include a supplemental payment that is equal to or less than a reasonable cost-of-living increase over the payment made in the preceding year under that written binding contract. In that case, only the deduction for the reasonable cost-of-living increase is subject to section 162(m) as amended by TCJA. In addition, the failure, in whole or in part, to exercise negative discretion under a contract does not result in the material modification of that contract. Finally, if amounts are paid to an employee from more than one written binding contract (or if a single written document consists of several written binding contracts), then a material modification of one written binding contract does not automatically result in a material modification of the other contracts unless the material modification affects the amounts payable under those contracts.

2. Earnings on Grandfathered Amounts That are Subsequently Deferred

Notice 2018–68 provides rules for determining whether a material modification occurs if a written binding contract in effect on November 2, 2017, is subsequently modified to defer the payment of compensation. Under those rules, which are adopted in these proposed regulations, if the contract is modified to defer the payment of compensation, any compensation paid or to be paid that is in excess of the amount that was originally payable to the employee under the contract will not be treated as resulting in a material modification if the additional amount is based on either a reasonable rate of interest or a predetermined actual investment (whether or not assets associated with the amount originally owed are actually invested therein) such that the amount payable by the employer at the later date will be based on the actual rate of return on the predetermined actual investment (including any decrease, as well as any increase, in the value of the investment). The proposed regulations provide that a predetermined actual investment means a predetermined actual investment as defined in § 31.3121(v)(2)–1(d)(2)(i)(B), and also include examples illustrating these rules relating to the treatment of earnings.

However, even though the payment of earnings will not result in the contract being materially modified, this generally does not mean that the earnings are treated as grandfathered. For situations in which an employee defers an amount of grandfathered compensation after November 2, 2017, the earnings on the deferred amount are not grandfathered if, as of November 2, 2017, the corporation was not obligated under the terms of the contract to provide the deferral election and to pay the earnings on the deferred amount under applicable law. Pursuant to the definition of written binding contract in Notice 2018–68 and these proposed regulations, these earnings are not grandfathered because, as of November 2, 2017, the corporation was not obligated to pay them under applicable law.

3. Material Modification Prior to Payment of a Grandfathered Amount

Commenters asked whether a grandfathered amount of compensation is no longer considered grandfathered if the underlying compensation arrangement is materially modified after November 2, 2017, but before the

payment of the grandfathered amount. Pursuant to the definition of material modification in Notice 2018–68 and these proposed regulations, if the contract is materially modified after November 2, 2017, but before the payment of a grandfathered amount of compensation, then the compensation is treated as paid pursuant to the new contract and is no longer grandfathered. For example, if, under applicable law, a corporation is obligated to pay $100,000 on December 31, 2020, under a written binding contract in effect on November 2, 2017, then the $100,000 is grandfathered. If, on January 1, 2019, the contract is materially modified, then the $100,000 is treated as paid pursuant to a new contract and is not grandfathered.

4. Acceleration of Payment or Vesting

Under the definition of material modification in Notice 2018–68 and these proposed regulations, a modification of a written binding contract that accelerates the payment of compensation is a material modification unless the amount of compensation paid is discounted to reasonably reflect the time value of money. For example, if a corporation is obligated under applicable law to pay compensation on December 31, 2020, pursuant to a written binding contract in effect on November 2, 2017, then the compensation is grandfathered. If the corporation pays the entire amount of compensation on December 31, 2019 without a discount to reasonably reflect the time of value of money, then the entire amount of compensation is treated as paid pursuant to a new contract and is no longer grandfathered. Furthermore, any subsequent payment made pursuant to the contract is not grandfathered because the contract itself was materially modified when the prior payment was accelerated without a discount to reasonably reflect the time value of money.

Commenters asked whether accelerating the payment of compensation attributable to equity-based compensation is considered a material modification when the payment is subject to a substantial risk of forfeiture. For example, an option may be subject to a substantial risk of forfeiture if, on the date of grant, the terms of the option provide that an employee may exercise the option only after performing services for three years after the date of grant. In this example, if the terms of the option are subsequently modified to require performance of services for only two years, then the modification results in the lapse of a substantial risk of forfeiture. One might consider this a material modification because the employee may exercise the option and receive compensation attributable to the exercise earlier than provided in the terms of the option on the date of grant. However, commenters suggested that accelerating vesting of equity-based compensation should not be a material modification because the acceleration does not provide for an increase in the amount of compensation received. The commenters reasoned that the acceleration of vesting of an equity award for which the amount of compensation is always variable is unlike the acceleration of the payment of a fixed cash award in which the acceleration may always be considered an increase in compensation due to the time value of money. To support their recommendation, commenters pointed out that, with respect to incentive stock options, section 424(h)(3)(C) and § 1.424–1(e)(4)(ii) provide that acceleration of vesting of an incentive stock option is not a modification.

These proposed regulations adopt the commenters' suggestion. Specifically, these proposed regulations provide that for compensation received pursuant to the substantial vesting of restricted property, or the exercise of a stock option or stock appreciation right that do not provide for a deferral of compensation (as defined in § 1.409A–1(b)(5)(i) and (ii)), a modification of a written binding contract in effect on November 2, 2017, that results in a lapse of the substantial risk of forfeiture (as defined § 1.83–3(c)) is not considered a material modification. Likewise, with respect to other compensation arrangements, if an amount of compensation payable under a written binding contract in effect on November 2, 2017, is subject to a substantial risk of forfeiture (as defined in § 1.409A–1(d)), then a modification of the contract that results in a lapse of the substantial risk of forfeiture is not considered a material modification. Thus, for all forms of compensation, a modification to a written binding contract that accelerates vesting will not be considered a material modification.

The Treasury Department and the IRS considered alternatives to the commenters' suggestion. For example, the Treasury Department and the IRS considered an approach based on the rules under section 280G. Under those rules, an acceleration of vesting can give rise to an excess parachute payment under section 280G even if the timing of the payment is not accelerated. See § 1.280G–1, Q&A–24. In other words, the rules under section 280G are based on the principle that there is independent value attributable to the acceleration of vesting, even if the timing of the payment is unchanged. Given the limited scope of the section 162(m) grandfathering rule and its diminishing applicability over time, the Treasury Department and the IRS have determined that it is not necessary to apply that principle in this context.

G. Ordering Rule for Payments Consisting of Grandfathered and Non-Grandfathered Amounts

Some NQDC arrangements provide for a series of payments instead of a lump sum. For a NQDC arrangement that is a written binding contract entered into prior to November 2, 2017, only a portion of the amounts payable under the arrangement might be grandfathered depending on the terms of the arrangement and applicable law. To identify the grandfathered amount when payment under the arrangement is made in a series of payments, the proposed regulations provide that the grandfathered amount is allocated to the first otherwise deductible payment paid under the arrangement. If the grandfathered amount exceeds the payment, then the excess is allocated to the next otherwise deductible payment paid under the arrangement. This process is repeated until the entire grandfathered amount has been paid. For example, assume that a NQDC arrangement provides for an annual payment of $100,000 for three years, and only $120,000 is grandfathered. Pursuant to the proposed regulations, the entire $100,000 paid in the first year is grandfathered. In the second year, only $20,000 of the $100,000 payment is grandfathered; the remaining $80,000 paid in the second year is not grandfathered. In the third year, none of the $100,000 payment is grandfathered.

VII. Coordination With Section 409A

Section 409A addresses NQDC arrangements and sets forth certain requirements that must be met to avoid current income inclusion and certain additional income tax. NQDC arrangements must designate a time and form of payment, among other requirements, to comply with section 409A. Pursuant to § 1.409A–2(b)(7)(i), a payment may be delayed past the designated payment date to the extent that the service recipient reasonably anticipates that, if the payment were made as scheduled, the service recipient's deduction with respect to such payment would not be permitted due to the application of section

162(m).[13] Generally, a payment delayed in accordance with § 1.409A–2(b)(7)(i) must be paid no later than the service provider's first taxable year in which the deduction of such payment will not be barred by the application of section 162(m).

If any scheduled payment to a service provider in a service recipient's taxable year is delayed in accordance with § 1.409A–2(b)(7)(i), then the delay in payment is treated as a subsequent deferral election unless all scheduled payments to that service provider that could be delayed in accordance with § 1.409A–2(b)(7)(i) are also delayed.[14] A subsequent deferral election will violate section 409A if the election fails to satisfy the requirements of section 409A(a)(4)(C).[15] A similar rule under § 1.409A–1(b)(4)(ii) permits delayed payments of compensation that otherwise qualifies as a short-term deferral under § 1.409A–1(b)(4)(i) (commonly referred to as the short-term deferral exception).

Before TCJA, an individual who was a covered employee for one taxable year would not necessarily remain a covered employee for subsequent taxable years, and would not be a covered employee after separation from service. Accordingly, parties to NQDC arrangements anticipated that in these cases, pursuant to §§ 1.409A–1(b)(4)(ii) and 1.409A–2(b)(7)(i), the corporation would be able to make the payment when the individual separated from service (if not earlier), when the individual would no longer be a covered employee and the deduction for the payment would no longer be restricted due to the application of section 162(m). Because TCJA amendments to the definition of covered employee fundamentally alter the premise of §§ 1.409A–1(b)(4)(ii) and 1.409A–2(b)(7)(i), commenters asked whether a service recipient may delay the scheduled payment of grandfathered amounts in accordance with §§ 1.409A–1(b)(4)(ii) and 1.409A–2(b)(7)(i), without delaying the payment of non-grandfathered amounts, in circumstances in which the service recipient has discretion to delay the payment. Commenters stated that the service provider may not want the non-grandfathered payments delayed and that the corporation would be willing to pay those payments under the original schedule since a delay in many cases would not result in the corporation being able to deduct the payment.

The Treasury Department and the IRS have concluded that the rules should be modified to accommodate this change. Consequently, in circumstances in which the service recipient has discretion to delay the payment, a service recipient may delay the scheduled payment of grandfathered amounts in accordance with §§ 1.409A–1(b)(4)(ii) and 1.409A–2(b)(7)(i), without delaying the payment of non-grandfathered amounts, and the delay of the grandfathered amounts will not be treated as a subsequent deferral election. As discussed in section VI of this preamble, the amendments made to section 162(m) by TCJA do not apply to grandfathered amounts. Therefore, the deduction for amounts grandfathered under the amended section 162(m) is not subject to section 162(m) when paid to a former covered employee who separated from service. Thus, the payment of these grandfathered amounts may be delayed consistent with §§ 1.409A–1(b)(4)(ii) and 1.409A–2(b)(7)(i). The Treasury Department and the IRS intend to incorporate these modifications into the regulations under section 409A, and taxpayers may rely on the guidance in this paragraph of the preamble for any taxable year beginning after December 31, 2017, until the issuance of proposed regulations under section 409A incorporating these modifications and permitting taxpayers to rely on such proposed regulations under section 409A.

Even though §§ 1.409A–1(b)(4)(ii) and 1.409A–2(b)(7)(i) provide that the service recipient has discretion to delay a payment, and that the discretion is not required to be set forth in the written plan, the Treasury Department and the IRS understand that compensation arrangements in effect on November 2, 2017, may explicitly require the service recipient to delay a payment if the service recipient reasonably believes the deduction with respect to the payment will not be permitted under section 162(m). Commenters pointed out that with respect to a service provider who is a covered employee, non-grandfathered amounts may require the passage of a significant period of time before a payment of the entire amount would be deductible, and may possibly never become deductible if the service provider dies and the payment (or remaining amount due) is payable at death. Commenters requested that relief be provided so that compensation arrangements may be amended to no longer require the service recipient to delay a payment that the service recipient reasonably believes will not be deductible under section 162(m) without resulting in a failure to meet the requirements of section 409A. The Treasury Department and the IRS have determined that this type of relief is appropriate given the impact of TCJA amendments on application of the rules in §§ 1.409A–1(b)(4)(ii) and 1.409A–2(b)(7)(i). Accordingly, if a NQDC arrangement is amended to remove the provision requiring the corporation to delay a payment if the corporation reasonably anticipates at the time of the scheduled payment that the deduction would not be permitted under section 162(m), then the amendment will not result in an impermissible acceleration of payment under § 1.409A–3(j), and will not be considered a material modification for purposes of the grandfather rule under the amended section 162(m). The plan amendment must be made no later than December 31, 2020. If, pursuant to the amended plan, the corporation would have been required to make a payment (or payments) prior to December 31, 2020, then the payment (or payments) must be made no later than December 31, 2020. The Treasury Department and the IRS intend to incorporate these modifications into the regulations under section 409A, and taxpayers may rely on the guidance in this paragraph of the preamble for any taxable year beginning after December 31, 2017, until the issuance of proposed regulations under section 409A incorporating these modifications and permitting taxpayers to rely on such proposed regulations under section 409A.

Amounts payable under NQDC arrangements may consist of both grandfathered amounts and non-grandfathered amounts. With respect to these arrangements, employers may apply the guidance provided in the previous two paragraphs of this preamble. Accordingly, the plan may be amended to remove the provision requiring the corporation to delay the payment of non-grandfathered amounts

[13] In general, if a payment is delayed pursuant to § 1.409A–2(b)(7)(i), then the payment must be made either during the service provider's first taxable year in which the service recipient reasonably anticipates, or reasonably should anticipate, that the payment will not fail to be deductible because of section 162(m), if the payment is made during such year or, if later, during the period beginning on the day the service provider separates from service and ending on the later of the last day of the taxable year of the service recipient in which the separation from service occurs or the 15th day of the third month following the separation from service.

[14] See § 1.409A–2(b)(7) for additional requirements for the service recipient to delay a payment so that the delay is not treated as a subsequent deferral election, such as treating all payments to similarly situated service providers on a reasonably consistent basis.

[15] Pursuant to section 409A(a)(4)(C), a subsequent deferral election (i) must be made at least 12 months before the prior scheduled payment date, (ii) cannot be effective for at least 12 months after the date of the subsequent election, and (iii) must delay the payment at least 5 years from the original scheduled payment date.

if it is anticipated that the corporation's deduction with respect to the payments will not be permitted under section 162(m); notwithstanding such an amendment, the corporation may continue to delay payment of the grandfathered amounts in accordance with §§ 1.409A–1(b)(4)(ii) and 1.409A–2(b)(7)(i).

VIII. Proposed Applicability Dates

A. General Applicability Date

Generally, these regulations are proposed to apply to compensation that is otherwise deductible for taxable years beginning on or after [DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**]. Taxpayers may choose to rely on these proposed regulations until the applicability date of the final regulations, provided that taxpayers apply these proposed regulations consistently and in their entirety. Because these proposed regulations do not broaden the definition of ''covered employee'' as provided in Notice 2018–68 and do not restrict the application of the definition of ''written binding contract'' as provided in Notice 2018–68, except as provided by the special applicability dates described in section VIII.B of this preamble, taxpayers may no longer rely on Notice 2018–68 for taxable years ending on or after December 20, 2019, but instead may rely on these proposed regulations for those taxable years.

B. Special Applicability Dates

These regulations are proposed to include special applicability dates covering certain aspects of the following provisions of the proposed regulations:

1. Definition of covered employee.
2. Definition of predecessor of a publicly held corporation.
3. Definition of compensation.
4. Application of section 162(m) to a deduction for compensation otherwise deductible for a taxable year ending on or after a privately held corporation becomes a publicly held corporation.
5. Definitions of written binding contract and material modification.

First, the definition of covered employee is proposed to apply to taxable years ending on or after September 10, 2018, the publication date of Notice 2018–68, which provided guidance on the definition of covered employee. Notice 2018–68 also provided that the Treasury Department and the IRS anticipate that the guidance in the notice will be incorporated in future regulations that, with respect to the issues addressed in the notice, will apply to any taxable year ending on or after September 10, 2018. Because these proposed regulations adopt the definition of covered employee in Notice 2018–68, the guidance on the definition of covered employee in these proposed regulations is proposed to apply to taxable years ending on or after September 10, 2018. The Treasury Department and the IRS recognize, however, that the rules related to a corporation whose fiscal year and taxable year do not end on the same date were not discussed in Notice 2018–68. Accordingly, the proposed regulations provide that, for a corporation whose fiscal and taxable years do not end on the same date, the rule requiring the determination of the three most highly compensated executive officers to be made pursuant to the rules under the Exchange Act applies to taxable years beginning on or after December 20, 2019.

Second, the provisions defining a predecessor corporation of a publicly held corporation are proposed to apply to corporate transactions for which all events necessary for the transaction occur on or after [DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**]. With respect to the rules that apply to corporations that change from publicly held to privately held status or visa-versa, the definition of the term predecessor corporation of a publicly held corporation applies to a privately held corporation that again becomes a publicly held corporation on or after [DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**]. Accordingly, depending on the timing of any earlier transition from a publicly held corporation to a privately held corporation, the publicly held corporation that existed before the issuance of final regulations may be treated as a predecessor of a privately held corporation that becomes a publicly held corporation after the date of issuance of final regulations. Until the applicability date of the final regulations, taxpayers may rely on the definition of predecessor of a publicly held corporation in these proposed regulations or a reasonable good faith interpretation of the term ''predecessor.'' The Treasury Department and the IRS have determined, however, that excluding the following target corporations from the definition of the term ''predecessor'' in the following situations is not a reasonable good faith interpretation of the statute: (1) A publicly held target corporation the stock or assets of which are acquired by another publicly held corporation in a transaction to which section 381(a) applies, and (2) a publicly held target corporation, at least 80% of the total voting power, and at least 80% of the total value, of the stock of which is acquired by a publicly held acquiring corporation (including an affiliated group). No inference is intended regarding whether the treatment of a target corporation as other than a ''predecessor'' in any other situation is a reasonable good faith interpretation of the statute.

Third, as discussed in section IV.C. of this preamble, the rule that the definition of compensation in proposed § 1.162–33(c)(3) includes an amount equal to the publicly held corporation's distributive share of a partnership's deduction for compensation expense attributable to the compensation paid by the partnership is proposed to apply to any deduction for compensation that is otherwise allowable for a taxable year ending on or after December 20, 2019. The Treasury Department and the IRS are aware that arrangements currently exist that reflect an understanding that the allocated deduction would not be limited by section 162(m). Accordingly, this aspect of the definition of compensation would not apply to compensation paid pursuant to a written binding contract in effect on December 20, 2019 that is not materially modified after that date.

Fourth, the guidance on the applicability of section 162(m)(1) to the deduction for any compensation otherwise deductible for a taxable year ending on or after the date when a corporation becomes a publicly held corporation is proposed to apply to corporations that become publicly held after December 20, 2019. A corporation that was not a publicly held corporation and then becomes a publicly held corporation on or before December 20, 2019 may rely on the transition relief as provided in § 1.162–27(f)(1) until the earliest of the events provided in § 1.162–27(f)(2).

Fifth, the definitions of written binding contract and material modification are proposed to apply to taxable years ending on or after September 10, 2018, the publication date of Notice 2018–68, which provided guidance defining these terms. Notice 2018–68 also provided that the Treasury Department and IRS anticipated that the guidance in the notice would be incorporated in future regulations that, with respect to the issues addressed in the notice, would apply to any taxable year ending on or after September 10, 2018. Because these proposed regulations adopt the definitions of the terms ''written binding contract'' and ''material modification'' that were

included in Notice 2018–68, the guidance on these definitions in these proposed regulations is proposed to apply to taxable years ending on or after September 10, 2018.

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 (RFA) (5 U.S.C. chapter 6), it is hereby certified that these proposed regulations would not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that section 162(m)(1) applies only to publicly held corporations (for example, corporations that list securities on a national securities exchange and are rarely small entities) and only impacts those publicly held corporations that compensate certain executive officers in excess of $1 million in a taxable year. Notwithstanding this certification that the proposed regulations would not have a significant economic impact on a substantial number of small entities, the Treasury Department and the IRS invite comments on the impacts these proposed regulations may have on small entities. Pursuant to section 7805(f) of the Code, this proposed rule has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small entities.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are submitted timely to the IRS as prescribed in this preamble under the **ADDRESSES** heading. Treasury and the IRS request comments on all aspects of the proposed rules. All comments will be available at *www.regulations.gov* or upon request.

A public hearing has been scheduled for March 9, 2020, beginning at 10 a.m. in the Auditorium of the Internal Revenue Building, 1111 Constitution Avenue NW, Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For more information about having your name placed on the building access list to attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit an outline of the topics to be discussed and the time to be devoted to each topic by February 18, 2020. Submit a signed paper or electronic copy of the outline as prescribed in this preamble under the **ADDRESSES** heading. A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of these regulations is Ilya Enkishev, Office of Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes). However, other personnel from the Treasury Department and the IRS participated in the development of these regulations.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

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

■ **Par. 2.** Section 1.162–27 is amended by revising paragraphs (a) and (j)(1) to read as follows:

§ 1.162–27 Certain employee remuneration in excess of $1,000,000 not deductible for taxable years beginning on or after January 1, 1994, and for taxable years beginning prior to January 1, 2018

(a) *Scope.* This section provides rules for the application of the $1 million deduction limitation under section 162(m)(1) for taxable years beginning on or after January 1, 1994, and beginning prior to January 1, 2018, and, as provided in paragraph (j) of this section, for taxable years beginning after December 31, 2017. For rules concerning the applicability of section 162(m)(1) to taxable years beginning after December 31, 2017, see § 1.162–33. Paragraph (b) of this section provides the general rule limiting deductions under section 162(m)(1). Paragraph (c) of this section provides definitions of generally applicable terms. Paragraph (d) of this section provides an exception from the deduction limitation for compensation payable on a commission basis. Paragraph (e) of this section provides an exception for qualified performance-based compensation. Paragraphs (f) and (g) of this section provide special rules for corporations that become publicly held corporations and payments that are subject to section 280G, respectively. Paragraph (h) of this section provides transition rules, including the rules for contracts that are grandfathered and not subject to section 162(m)(1). Paragraph (j) of this section contains the effective date provisions, which also specify when these rules apply to the deduction for compensation otherwise deductible in a taxable year beginning after December 31, 2017. For rules concerning the deductibility of compensation for services that are not covered by section 162(m)(1) and this section, see section 162(a)(1) and § 1.162–7. This section is not determinative as to whether compensation meets the requirements of section 162(a)(1). For rules concerning the deduction limitation under section 162(m)(6) applicable to certain health insurance providers, see § 1.162–31.

* * * * *

(j) *Effective date*—(1) *In general.* Section 162(m) and this section apply to the deduction for compensation that is otherwise deductible by the corporation in taxable years beginning on or after January 1, 1994, and beginning prior to January 1, 2018. Section 162(m) and this section also apply to compensation that is a grandfathered amount (as defined in § 1.162–33(g)) at the time it is paid to the covered employee. For examples of the application of the rules of this section to grandfathered amounts paid during taxable years beginning after December 31, 2017, see § 1.162–33(g).

* * * * *

■ **Par. 3.** Section 1.162–33 is added to read as follows:

§ 1.162–33 Certain employee remuneration in excess of $1,000,000 not deductible for taxable years beginning after December 31, 2017

(a) *Scope.* This section provides rules for the application of the $1 million deduction limitation under section 162(m)(1) for taxable years beginning after December 31, 2017. For rules concerning the applicability of section 162(m)(1) to taxable years beginning on or after January 1, 1994, and prior to January 1, 2018, see § 1.162–27. Paragraph (b) of this section provides the general rule limiting deductions under section 162(m)(1). Paragraph (c)

of this section provides definitions of generally applicable terms. Paragraph (d) of this section provides rules for determining when a corporation becomes a publicly held corporation. Paragraph (e) of this section provides rules for payments that are subject to section 280G. Paragraph (f) of this section provides a special rule for coordination with section 4985. Paragraph (g) of this section provides transition rules, including the rules for contracts that are grandfathered. Paragraph (h) of this section sets forth the effective date provisions. For rules concerning the deductibility of compensation for services that are not covered by section 162(m)(1) and this section, see section 162(a)(1) and § 1.162–7. This section is not determinative as to whether compensation meets the requirements of section 162(a)(1). For rules concerning the deduction limitation under section 162(m)(6) applicable to certain health insurance providers, see § 1.162–31.

(b) *Limitation on deduction.* Section 162(m)(1) precludes a deduction under chapter 1 of the Internal Revenue Code by any publicly held corporation for compensation paid to any covered employee to the extent that the compensation for the taxable year exceeds $1,000,000.

(c) *Definitions*—(1) *Publicly held corporation*—(i) *General rule.* A publicly held corporation means any corporation that issues securities required to be registered under section 12 of the Exchange Act or that is required to file reports under section 15(d) of the Exchange Act. In addition, a publicly held corporation means any S corporation (as defined in section 1361(a)(1)) that issues securities that are required to be registered under section 12(b) of the Exchange Act, or that is required to file reports under section 15(d) of the Exchange Act. For purposes of this section, whether a corporation is publicly held is determined based solely on whether, as of the last day of its taxable year, the securities issued by the corporation are required to be registered under section 12 of the Exchange Act or the corporation is required to file reports under section 15(d) of the Exchange Act. Whether registration under the Exchange Act is required by rules other than those of the Exchange Act is irrelevant to this determination. A publicly traded partnership that is treated as a corporation under section 7704 (or otherwise) is a publicly held corporation if, as of the last day of its taxable year, its securities are required to be registered under section 12 of the Exchange Act or it is required to file reports under section 15(d) of the Exchange Act.

(ii) *Affiliated groups*—(A) *In general.* A publicly held corporation includes an affiliated group of corporations, as defined in section 1504 (determined without regard to section 1504(b)) that includes one or more publicly held corporations (as defined in paragraph (c)(1)(i) of this section). In the case of an affiliated group that includes two or more publicly held corporations as defined in paragraph (c)(1)(i) of this section, each member of the affiliated group that is a publicly held corporation as defined in paragraph (c)(1)(i) of this section is separately subject to this section, and the affiliated group as a whole is subject to this section. Thus, for example, assume that a publicly held corporation (as defined in paragraph (c)(1)(i) of this section) is a wholly-owned subsidiary of another publicly held corporation (as defined in paragraph (c)(1)(i) of this section), which is a wholly-owned subsidiary of a privately held corporation. In this case, the two subsidiaries are separately subject to this section, and all three corporations are members of an affiliated group that is subject to this section. Furthermore, each subsidiary has its own set of covered employees as defined in paragraphs (c)(2)(i) through (iv) of this section (although it is possible that the same individual may be a covered employee of both subsidiaries).

(B) *Proration of amount disallowed as a deduction.* If, in a taxable year, a covered employee (as defined in paragraphs (c)(2)(i) through (iv) of this section) of one member of an affiliated group is paid compensation by more than one member of the affiliated group, compensation paid by each member of the affiliated group is aggregated with compensation paid to the covered employee by all other members of the affiliated group (excluding compensation paid by any other publicly held corporation in the affiliated group, as defined in paragraph (c)(1)(i) of this section, of which the individual is also a covered employee as defined in paragraphs (c)(2)(i) through (iv) of this section). In the event that, in a taxable year, a covered employee (as defined in paragraphs (c)(2)(i) through (iv) of this section) is paid compensation by more than one publicly held corporation in an affiliated group and is also a covered employee of more than one publicly held payor corporation (as defined in paragraph (c)(1)(i) of this section) in the affiliated group, the amount disallowed as a deduction is determined separately with respect to each publicly held corporation of which the individual is a covered employee. Any amount disallowed as a deduction by this section must be prorated among the payor corporations (excluding any other publicly held payor corporation of which the individual is also a covered employee) in proportion to the amount of compensation paid to the covered employee (as defined in paragraphs (c)(2)(i) through (iv) of this section) by each such corporation in the taxable year. This process is repeated for each publicly held payor corporation of which the individual is a covered employee.

(iii) *Disregarded entities.* For purposes of paragraph (c)(1) of this section, a publicly held corporation includes a corporation that owns an entity that is disregarded as an entity separate from its owner within the meaning of § 301.7701–2(c)(2)(i) of this chapter if the disregarded entity issues securities required to be registered under section 12(b) of the Exchange Act, or is required to file reports under section 15(d) of the Exchange Act.

(iv) *Qualified subchapter S subsidiaries.* For purposes of paragraph (c)(1) of this section, a publicly held corporation includes an S corporation that owns a qualified subchapter S subsidiary as defined in section 1361(b)(3)(B) (QSub) if the QSub issues securities required to be registered under section 12(b) of the Exchange Act, or is required to file reports under section 15(d) of the Exchange Act.

(v) *Examples.* The following examples illustrate the provisions of this paragraph (c)(1). For each example, assume that no corporation is a predecessor of a publicly held corporation within the meaning of this paragraph (c)(2)(ii). Furthermore, for each example, unless provided otherwise, a reference to a publicly held corporation means a publicly held corporation as defined in paragraph (c)(1)(i) of this section. Additionally, for each example, assume that the corporation is a calendar year taxpayer and has a fiscal year ending December 31 for reporting purposes under the Exchange Act. These examples are not intended to provide guidance on the legal requirements of the Securities Act and Exchange Act and the rules thereunder (17 CFR part 240).

(A) *Example 1 (Corporation required to file reports under section 15(d) of the Exchange Act)*—(*1*) *Facts.* Corporation Z plans to issue debt securities in a public offering registered under the Securities Act. Corporation Z is not required to file reports under section 15(d) of the Exchange Act with respect to any other class of securities and does not have another class of securities required to be registered

under section 12 of the Exchange Act. On April 1, 2021, the Securities Act registration statement for Corporation Z's debt securities is declared effective by the SEC. As a result, Corporation Z is required to file reports under section 15(d) of the Exchange Act. Accordingly, as of December 31, 2021, the last day of its taxable year, Corporation Z is required to file reports under section 15(d) of the Exchange Act.

(*2*) *Conclusion.* Corporation Z is a publicly held corporation for its 2021 taxable year because it is required to file reports under section 15(d) of the Exchange Act as of the last day of its taxable year.

(B) *Example 2 (Corporation not required to file reports under section 15(d) of the Exchange Act)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(1)(v)(A) of this section (*Example 1*), except that, on January 1, 2022, pursuant to section 15(d) of the Exchange Act, Corporation Z's obligation to file reports under section 15(d) is automatically suspended for the fiscal year ending December 31, 2022, because Corporation Z meets the statutory requirements for an automatic suspension to file reports under section 15(d). Accordingly, as of December 31, 2022, Corporation Z is not required to file reports under section 15(d) of the Exchange Act.

(*2*) *Conclusion.* Corporation Z is not a publicly held corporation for its 2022 taxable year because it is not required to file reports under section 15(d) of the Exchange Act as of as of the last day of its taxable year.

(C) *Example 3 (Corporation not required to file reports under section 15(d) of the Exchange Act)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(1)(v)(B) of this section (*Example 2*), except that, on January 1, 2022, pursuant to section 15(d) of the Exchange Act, Corporation Z's obligation to file reports under section 15(d) is not automatically suspended for the fiscal year ending December 31, 2022 because Corporation Z does not meet the statutory requirements for automatic suspension. Instead, on May 2, 2022, Corporation Z is eligible to suspend its section 15(d) reporting obligation under Rule 12h–3 of the Exchange Act (17 CFR 240.12h–3) and files Form 15, Certification and Notice of Termination of Registration under Section 12(g) of the Securities Exchange Act of 1934 or Suspension of Duty to File Reports under Sections 13 and 15(d) of the Securities Exchange Act of 1934 (or its successor), to suspend its section 15(d) reporting obligation for its fiscal year ending December 31, 2022. Accordingly, as of December 31, 2022, Corporation Z is not required to file reports under section 15(d) of the Exchange Act.

(*2*) *Conclusion.* Corporation Z is not a publicly held corporation for its 2022 taxable year because it is not required to file reports under section 15(d) of the Exchange Act as of the last day of its taxable year.

(D) *Example 4 (Corporation required to file reports under section 15(d) of the Exchange Act)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(1)(v)(C) of this section (*Example 3*), except that, Corporation Z does not utilize Rule 12h–3 under the Exchange Act (17 CFR 240.12h–3) to file a Form 15, Certification and Notice of Termination of Registration under Section 12(g) of the Securities Exchange Act of 1934 or Suspension of Duty to File Reports under Sections 13 and 15(d) of the Securities Exchange Act of 1934 (or its successor), to suspend its section 15(d) reporting obligation during its fiscal year ending December 31, 2022. Accordingly, Corporation Z's reporting obligation under section 15(d) of the Exchange Act is not suspended for its fiscal year ending December 31, 2022.

(*2*) *Conclusion.* Corporation Z is a publicly held corporation for its 2022 taxable year because it is required to file reports under section 15(d) of the Exchange Act as of the last day of its taxable year.

(E) *Example 5 (Corporation required to file reports under section 15(d) of the Exchange Act)*—(*1*) *Facts.* Corporation Y is a wholly-owned subsidiary of Corporation X, which is required to file reports under the Exchange Act. Corporation Y issued a class of debt securities in a public offering registered under the Securities Act, and therefore is required to file reports under Exchange Act Section 15(d), including for its fiscal year ending December 31, 2020. Corporation Y has no other class of securities registered under the Exchange Act. In its Form 10–K, Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 (or its successor), for the 2020 fiscal year, Corporation Y may omit Item 11 Executive Compensation (required by Part III of Form 10–K), which requires disclosure of compensation of certain executive officers because it is wholly-owned by Corporation X and the other conditions of General Instruction I to Form 10–K are satisfied.

(*2*) *Conclusion.* Corporation Y is a publicly held corporation for its 2020 taxable year because it is required to file reports under section 15(d) of the Exchange Act as of the last day of its taxable year.

(F) *Example 6 (Corporation not required to file reports under section 15(d) of the Exchange Act and not required to register securities under section 12 of the Exchange Act)*—(*1*) *Facts.* Corporation A has a class of securities registered under section 12(g) of the Exchange Act. For its 2020 taxable year, Corporation A is a publicly held corporation. On September 30, 2021, Corporation A is eligible to terminate the registration of its securities under section 12(g) of the Exchange Act pursuant to Rule 12g–4(a)(2) of the Exchange Act (17 CFR 240.12g–4(a)(2)), but does not terminate the registration of its securities prior to December 31, 2021. Because Corporation A did not issue securities in a public offering registered under the Securities Act, Corporation A is not required to file reports under section 15(d) of the Exchange Act.

(*2*) *Conclusion.* Corporation A is not a publicly held corporation for its 2021 taxable year because, as of the last day of its taxable year, the securities issued by Corporation A are not required to be registered under section 12 of the Exchange Act and Corporation A is not required to file reports under section 15(d) of the Exchange Act.

(G) *Example 7 (Corporation required to file reports under section 15(d) of the Exchange Act)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(1)(v)(F) of this section (*Example 6*), except that Corporation A previously issued a class of securities in a public offering registered under the Securities Act. Furthermore, on October 1, 2021, Corporation A terminates the registration of its securities under section 12(g) of the Exchange Act. Because Corporation A issued a class of securities in a public offering registered under the Securities Act and is not eligible to suspend its reporting obligation under section 15(d) of the Exchange Act, as of December 31, 2021, Corporation A is required to file reports under section 15(d) of the Exchange Act.

(*2*) *Conclusion.* Corporation A is a publicly held corporation for its 2021 taxable year because it is required to file reports under section 15(d) of the Exchange Act as of the last day of its taxable year.

(H) *Example 8 (Corporation not required to file reports under section 15(d) of the Exchange Act and not required to register securities under section 12 of the Exchange Act)*—(*1*) *Facts.* On November 1, 2021, Corporation B is an issuer with only one class of equity securities. On November 5, 2021, Corporation B files a registration statement for its equity securities under section 12(g) of the Exchange Act. Corporation B's filing of its registration statement is voluntary because the Exchange Act does not require Corporation B to register its class of securities under section 12(g) of the Exchange Act based on the number and composition of its record holders. On December 1, 2021, the Exchange Act registration statement for Corporation B's securities is declared effective by the SEC. As of December 31, 2021, the last day of its taxable year, Corporation B continues to have its class of equity securities registered voluntarily under section 12 of the Exchange Act. Furthermore, Corporation B is not required to file reports under section 15(d) of the Exchange Act because it did not register any class of securities in a public offering under the Securities Act.

(*2*) *Conclusion.* Corporation B is not a publicly held corporation for its 2021 taxable year because, as of the last day of that taxable year, the securities issued by Corporation B are not required to be registered under section 12 of the Exchange Act and Corporation B is not required to file reports under section 15(d) of the Exchange Act.

(I) *Example 9 (Corporation not required to file reports under section 15(d) of the Exchange Act and not required to register securities under section 12 of the Exchange Act)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(1)(v)(H) of this section (*Example 8*), except that, on December 31, 2022, because of a change in circumstances, under the Exchange Act, Corporation B must register its class of equity securities under section 12(g) of the Exchange Act within 120 days of December 31, 2022. On February 1, 2023, the Exchange Act registration statement for Corporation B's securities is declared effective by the SEC.

(*2*) *Conclusion.* Corporation B is not a publicly held corporation for its 2022 taxable year because, as of the last day of that taxable year, Corporation B is not required to file reports under section 15(d) of the Exchange Act, and the class of equity securities issued

by Corporation B is not yet required to be registered under section 12 of the Exchange Act. Corporation B has 120 days following December 31, 2022, to file a registration statement to register its class of equity securities under section 12(g) of the Exchange Act.

(J) *Example 10 (Securities of foreign private issuer in the form of ADRs traded in the over-the-counter market)*—(*1*) *Facts.* For its fiscal and taxable years ending December 31, 2021, Corporation W is a foreign private issuer. Because Corporation W has not registered an offer or sale of securities under the Securities Act, it is not required to file reports under section 15(d) of the Exchange Act. Corporation W qualifies for an exemption from registration of its securities under section 12(g) of the Exchange Act pursuant to Rule 12g3–2(b) under the Exchange Act (17 CFR 240.12g3–2(b)). Corporation W wishes to have its securities traded in the U.S. in the over-the-counter market in the form of ADRs. Because Corporation W qualifies for an exemption pursuant to Rule 12g3–2(b) under the Exchange Act (17 CFR 240.12g3–2(b)), Corporation W is not required to register its securities underlying the ADRs under section 12 of the Exchange Act. However, the depositary bank is required to register the ADRs under the Securities Act. Even though the depositary bank is required to register the ADRs under the Securities Act, such registration of the ADRs does not create a requirement for either the depositary bank or Corporation W to file reports under section 15(d) of the Exchange Act. On February 3, 2021, the Securities Act registration statement for the ADRs is declared effective by the SEC. On February 4, 2021, Corporation W's ADRs begin trading in the over-the-counter market. On December 31, 2021, the securities of Corporation W are not required to be registered under Section 12 of the Exchange Act because Corporation W qualifies for an exemption pursuant to Rule 240.12g3–2(b) of the Exchange Act. Furthermore, on December 31, 2021, Corporation W is not required to file reports under section 15(d) of the Exchange Act.

(*2*) *Conclusion.* Corporation W is not a publicly held corporation for its 2021 taxable year because, as of the last day of that taxable year, the securities underlying the ADRs are not required to be registered under section 12 of the Exchange Act and Corporation W is not required to file reports under section 15(d) of the Exchange Act. The conclusion would be the same if Corporation W had its securities traded in the over-the-counter market other than in the form of ADRs.

(K) *Example 11 (Securities of foreign private issuer in the form of ADRs quoted on Over the Counter Bulletin Board)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(1)(v)(J) of this section (*Example 10*), except that Corporation W has its securities quoted on the Over the Counter Bulletin Board (OTCBB) in the form of ADRs. Because Corporation W qualifies for an exemption pursuant to Rule 12g3–2(b) of the Exchange Act (17 CFR 240.12g3–2(b)), Corporation W is not required to register its securities underlying the ADRs under section 12 of the Exchange Act. However, the depositary bank is required to register the ADRs under the Securities Act. Section 6530(b)(1) of the OTCBB Rules requires that a foreign equity security may be quoted on the OTCBB only if the security is registered with the SEC pursuant to section 12 of the Exchange Act and the issuer of the security is current in its reporting obligations. To comply with section 6530(b)(1) of the OTCBB Rules, on February 5, 2021, Corporation W files a registration statement for its class of securities underlying the ADRs under section 12(g) of the Exchange Act. On February 26, 2021, the Exchange Act registration statement for Corporation W's securities is declared effective by the SEC. As of December 31, 2021, Corporation W is subject to the reporting obligations under the section 12 of the Exchange Act as a result of section 12 registration.

(*2*) *Conclusion.* Corporation W is not a publicly held corporation for its 2021 taxable year because, as of the last day of that taxable year, its ADRs and the securities underlying the ADRs are not required by the Exchange Act to be registered under section 12, and Corporation W is not required to file reports under section 15(d) of the Exchange Act. The conclusion would be the same if Corporation W had its securities traded on the OTCBB other than in the form of ADRs.

(L) *Example 12 (Securities of foreign private issuer in the form of ADRs listed on a national securities exchange without a capital raising transaction)*—(*1*) *Facts.* For its fiscal and taxable years ending December 31, 2021, Corporation V is a foreign private issuer. Corporation V wishes to list its securities on the New York Stock Exchange (NYSE) in the form of ADRs without a capital raising transaction. Under the Exchange Act, Corporation V is required to register its securities underlying the ADRs under section 12(b) of the Exchange Act. Because the ADRs and the deposited securities are separate securities, the depositary bank is required to register the ADRs under the Securities Act. On February 2, 2021, Corporation V's registration statement under section 12(b) of the Exchange Act in connection with the underlying securities, and the depositary bank's registration statement under the Securities Act in connection with the ADRs, are declared effective by the SEC. On March 1, 2021, Corporation V's securities begin trading on the NYSE in the form of ADRs. As of December 31, 2021, Corporation V is not required to file reports under section 15(d) of the Exchange Act; however, the securities underlying the ADRs are required to be registered under section 12(b) of the Exchange Act.

(*2*) *Conclusion.* Corporation V is a publicly held corporation for its 2021 taxable year because, as of the last day of that taxable year, the securities underlying the ADRs are required to be registered under section 12 of the Exchange Act. The conclusion would be the same if Corporation V had its securities listed on the NYSE other than in the form of ADRs.

(M) *Example 13 (Securities of foreign private issuer in the form of ADRs listed on a national securities exchange with a capital raising transaction)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(1)(v)(L) of this section (*Example 12*), except that Corporation V wishes to raise capital and have its securities listed on the NYSE in the form of ADRs. Corporation V is required to register the offer of securities underlying the ADRs under the Securities Act and to register the class of those securities under section 12(b) of the Exchange Act. The depositary bank is required to register the ADRs under the Securities Act. On February 2, 2021, Corporation V's registration statements under the Securities Act and section 12(b) of the Exchange Act, and the registration statement for the ADRs under the Securities Act, are declared effective by the SEC. As of December 31, 2021, Corporation V is not required to file reports under section 15(d) of the Exchange Act; however, the securities underlying the ADRs are required to be registered under section 12(b) of the Exchange Act.

(*2*) *Conclusion.* Corporation V is a publicly held corporation for its 2021 taxable year because, as of the last day of that taxable year, its securities underlying the ADRs are required to be registered under section 12 of the Exchange Act. The conclusion would be the same if Corporation V had its securities listed on the NYSE other than in the form of ADRs.

(N) *Example 14 (Foreign private issuer incorporates subsidiary in the United States to issue debt securities and subsequently issues a guarantee)*—(*1*) *Facts.* Corporation T is a corporation incorporated in Country S (which is not the United States). For its fiscal and taxable years ending December 31, 2021, Corporation T is a foreign private issuer. Corporation T wishes to access the U.S. capital markets. Corporation T incorporates Corporation U in the United States to issue debt securities. On January 15, 2021, the SEC declares Corporation U's Securities Act registration statement effective. Corporation U is a wholly-owned subsidiary of Corporation T. To enhance the credit of Corporation U and the marketability of Corporation U's debt securities, Corporation T issues a guarantee of Corporation U's securities and, as required, registers the guarantee under the Securities Act on the registration statement that the SEC declares effective on January 15, 2021. On December 31, 2021, Corporations T and U are required to file reports under section 15(d) of the Exchange Act.

(*2*) *Conclusion.* Corporations T and U are publicly held corporations for their 2021 taxable years because they are required to file reports under section 15(d) of the Exchange Act as of the last day of their taxable years.

(O) *Example 15 (Affiliated group composed of two corporations, one of which is a publicly held corporation)*—(*1*) *Facts.* Employee D, a covered employee of Corporation N, performs services and receives compensation from Corporations N and O, members of an affiliated group of corporations. Corporation N, the parent corporation, is a publicly held corporation. Corporation O is a direct subsidiary of Corporation N and is a privately held corporation. The total compensation paid to Employee D from all affiliated group members is $3,000,000 for the taxable year, of which Corporation N pays $2,100,000 and Corporation O pays $900,000.

(*2*) *Conclusion.* Because the compensation paid by all affiliated group members is aggregated for purposes of section 162(m)(1), $2,000,000 of the aggregate compensation paid is nondeductible. Corporations N and O each are treated as paying a ratable portion of the nondeductible compensation. Thus, two thirds of each corporation's payment will be nondeductible. Corporation N has a nondeductible compensation expense of $1,400,000 ($2,100,000 × $2,000,000/$3,000,000). Corporation O has a nondeductible compensation expense of $600,000 ($900,000 × $2,000,000/$3,000,000).

(P) *Example 16 (Affiliated group composed of two corporations, one of which is a publicly held corporation)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(1)(v)(O) of this section (*Example 15*), except that, Corporation O is a publicly held corporation and Corporation N is a privately held corporation, and Employee D is a covered employee of Corporation O (instead of Corporation N).

(*2*) *Conclusion.* The result is the same as in paragraph (c)(1)(v)(T) of this section (*Example 15*). Even though Corporation O is a subsidiary that is a publicly held corporation, it is still a member of the affiliated group comprised of Corporations N and O. Accordingly, $2,000,000 of the aggregate compensation paid is nondeductible. Thus, Corporations N and O each are treated as paying a ratable portion of the nondeductible compensation.

(Q) *Example 17 (Affiliated group composed of two publicly held corporations)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(1)(v)(O) of this section (*Example 15*), except that Corporation O is also a publicly held corporation. As in paragraph (c)(1)(v)(O) of this section (*Example 15*), Employee D is not a covered employee of Corporation O.

(*2*) *Conclusion.* The result is the same as in paragraph (c)(1)(v)(O) of this section (*Example 15*). Even though Corporation O is a subsidiary that is a publicly held corporation, it is still a member of the affiliated group comprised of Corporations N and O. Corporations N and O are payor corporations that are members of an affiliated group for purposes of prorating the amount disallowed as a deduction. Accordingly, $2,000,000 of the aggregate compensation paid is nondeductible. Thus, Corporations N and O each are treated as paying a ratable portion of the nondeductible compensation.

(R) *Example 18 (Affiliated group composed of two publicly held corporations)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(1)(v)(Q) of this section (*Example 17*), except that Employee D is also a covered employee of Corporation O.

(*2*) *Conclusion.* Even though Corporations N and O are each publicly held corporations and separately subject to this section, they are still members of the affiliated group comprised of Corporations N and O. Because Employee D is a covered employee of both Corporations N and O, which are each a separate publicly held corporation, the determination of the amount disallowed as a deduction is made separately for each publicly held corporation. Accordingly, Corporation N has a nondeductible compensation expense of $1,100,000 (the excess of $2,100,000 over $1,000,000), and Corporation O has no nondeductible compensation expense because the amount it paid to Employee D was below $1,000,000.

(S) *Example 19 (Affiliated group composed of three corporations, one of which is a publicly held corporation)*—(*1*) *Facts.* Employee C, a covered employee of Corporation P, performs services for, and receives compensation from, Corporations P, Q, and R, members of an affiliated group of corporations. Corporation P, the parent corporation, is a publicly held corporation. Corporation Q is a direct subsidiary of Corporation P, and Corporation R is a direct subsidiary of Corporation Q. Corporations Q and R are both privately held corporations. The total compensation paid to Employee C from all affiliated group members is $3,000,000 for the taxable year, of which Corporation P pays $1,500,000, Corporation Q pays $900,000, and Corporation R pays $600,000.

(*2*) *Conclusion.* Because the compensation paid by all affiliated group members is aggregated for purposes of section 162(m)(1), $2,000,000 of the aggregate compensation paid is nondeductible. Corporations P, Q, and R are each treated as paying a ratable portion of the nondeductible compensation. Thus, two thirds of each corporation's payment will be nondeductible. Corporation P has a nondeductible compensation expense of $1,000,000 ($1,500,000 × $2,000,000/$3,000,000). Corporation Q has a nondeductible compensation expense of $600,000 ($900,000 × $2,000,000/$3,000,000). Corporation R has a nondeductible compensation expense of $400,000 ($600,000 × $2,000,000/$3,000,000).

(T) *Example 20 (Affiliated group composed of three corporations, one of which is a publicly held corporation)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(1)(v)(S) of this section (*Example 19*), except that Corporation Q is a publicly held corporation and Corporation P is a privately held corporation, and Employee C is a covered employee of Corporation Q (instead of Corporation P).

(*2*) *Conclusion.* The result is the same as in paragraph (c)(1)(v)(S) of this section (*Example 19*). Even though Corporation Q is a subsidiary that is a publicly held corporation, it is still a member of the affiliated group comprised of Corporations P, Q, and R. Accordingly, $2,000,000 of the aggregate compensation paid is nondeductible. Thus, Corporations P, Q, and R are each treated as paying a ratable portion of the nondeductible compensation.

(U) *Example 21 (Affiliated group composed of three corporations, two of which are publicly held corporations)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(1)(v)(T) of this section (*Example 20*), except that Corporation R is also a publicly held corporation. As in paragraph (c)(1)(v)(T) of this section (*Example 20*), Corporation Q is a publicly held corporation, Corporation P is a privately held corporation, and Employee C is a covered employee of Corporation Q but not a covered employee of Corporation R.

(*2*) *Conclusion.* The result is the same as in paragraph (c)(1)(v)(T) of this section (*Example 20*). Even though Corporation R is a subsidiary that is a publicly held corporation, it is still a member of the affiliated group comprised of Corporations P, Q, and R. Accordingly, $2,000,000 of the aggregate compensation paid is nondeductible. Thus, Corporations P, Q, and R are each treated as paying a ratable portion of the nondeductible compensation.

(V) *Example 22 (Affiliated group composed of three publicly held corporations)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(1)(v)(S) of this section (*Example 19*), except that, Corporations Q and R are also publicly held corporations, and Employee C is a covered employee of both Corporations P and Q, but is not a covered employee of Corporation R.

(*2*) *Conclusion.* Even though Corporations Q and R are subsidiaries that are publicly held corporations and separately subject to this section, they are still members of the affiliated group comprised of Corporations P, Q, and R. Because Employee C is a covered employee of both Corporations P and Q, the determination of the amount disallowed as a deduction is prorated among Corporation P and R, and separately prorated among Corporations Q and R. With respect to Corporations P and R, $1,100,000 of the aggregate compensation is nondeductible (the difference between the total compensation of $2,100,000 paid by Corporations P and R and the $1,000,000 deduction limitation). Corporations P and R are each treated as paying a ratable portion of the nondeductible compensation. Accordingly, Corporation P has a nondeductible compensation expense of $785,714 ($1,500,000 × $1,100,000/$2,100,000), and Corporation R has a nondeductible compensation expense of $314,285 ($600,000 × $1,100,000/$2,100,000). With respect to Corporations Q and R, $500,000 of the aggregate compensation is nondeductible (the difference between the total compensation of $1,500,000 paid by Corporations Q and R and the $1,000,000 deduction limitation). Accordingly, Corporation Q has a nondeductible compensation expense of $300,000 ($900,000 × $500,000/$1,500,000), and Corporation R has a nondeductible compensation expense of $200,000 ($600,000 x $500,000/$1,500,000). The total amount of nondeductible compensation expense with respect to Corporation R is $514,285.

(W) *Example 23 (Affiliated group composed of three publicly held corporations)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(1)(v)(V) of this section (*Example 22*), except that Employee C does not perform any services for Corporation R and does not receive any compensation from Corporation R.

(*2*) *Conclusion.* Even though Corporations Q and R are subsidiaries that are publicly held corporations and separately subject to this section, they are still members of the affiliated group comprised of Corporations P, Q, and R. Because Employee C performs services only for Corporations P and Q and because Employee C is a covered employee of both Corporations P and Q, which are each a separate publicly held corporation, the determination of the amount disallowed as a deduction is made separately for each

publicly held corporation. Accordingly, Corporation P has a nondeductible compensation expense of $500,000 (the excess of $1,500,000 over $1,000,000), and Corporation Q has no nondeductible compensation expense because the amount it paid to Employee C was below $1,000,000.

(X) *Example 24 (Affiliated group composed of three corporations, one of which is a publicly held corporation*—(*1*) *Facts.* The facts are the same as in paragraph (c)(1)(v)(S) of this section (*Example 19*), except that Corporation R is a direct subsidiary of Corporation P instead of being a direct subsidiary of Corporation Q.

(*2*) *Conclusion.* The result is the same as in paragraph (c)(1)(v)(S) of this section (*Example 19*). Corporations P, Q, and R are members of an affiliated group. Accordingly, $2,000,000 of the aggregate compensation paid is nondeductible. Thus, Corporations P, Q, and R are each treated as paying a ratable portion of the nondeductible compensation.

(Y) *Example 25 (Affiliated group composed of three publicly held corporations*)—(*1*) *Facts.* The facts are the same as in paragraph (c)(1)(v)(X) of this section (*Example 24*), except that Corporations Q and R are also publicly held corporations, and Employee C is a covered employee of both Corporations P and Q.

(*2*) *Conclusion.* The result is the same as in paragraph (c)(1)(v)(V) of this section (*Example 22*). Even though Corporations Q and R are subsidiaries that are publicly held corporations and separately subject to this section, they are still members of the affiliated group comprised of Corporations P, Q, and R. Because Employee C is a covered employee of both Corporations P and Q, the determination of the amount disallowed as a deduction is prorated among Corporation P and R, and separately among Corporations Q and R.

(Z) *Example 26 (Disregarded entity)*—(*1*) *Facts.* Corporation G is a privately held corporation for its 2020 taxable year. Entity H, a limited liability company, is wholly-owned by Corporation G and is disregarded as an entity separate from its owner under § 301.7701–2(c)(2)(i). As of December 31, 2020, Entity H is required to file reports under section 15(d) of the Exchange Act.

(2) *Conclusion.* Because Entity H is required to file reports under section 15(d) of the Exchange Act and is disregarded as an entity separate from its owner Corporation G, Corporation G is a publicly held corporation under paragraph (c)(1)(iii) of this section for its 2020 taxable year.

(2) *Covered employee*—(i) *General rule.* Except as provided in paragraph (c)(2)(v) of this section, with respect to a publicly held corporation as defined in paragraph (c)(1) of this section (without regard to paragraph (c)(1)(ii) of this section), for the publicly held corporation's taxable year, a covered employee means any of the following—

(A) The principal executive officer (PEO) or principal financial officer (PFO) of the publicly held corporation serving at any time during the taxable year, including individuals acting in either such capacity.

(B) The three highest compensated executive officers of the publicly held corporation for the taxable year (other than the principal executive officer or principal financial officer, or an individual acting in such capacity), regardless of whether the executive officer is serving at the end of the publicly held corporation's taxable year, and regardless of whether the executive officer's compensation is subject to disclosure for the last completed fiscal year under the executive compensation disclosure rules under the Exchange Act. The amount of compensation used to identify the three most highly compensated executive officers for the taxable year is determined pursuant to the executive compensation disclosure rules under the Exchange Act (using the taxable year as the fiscal year for purposes of making the determination), regardless of whether the corporation's fiscal year and taxable year end on the same date.

(C) Any individual who was a covered employee of the publicly held corporation (or any predecessor of a publicly held corporation, as defined in paragraph (c)(2)(ii) of this section) for any preceding taxable year beginning after December 31, 2016. For taxable years beginning prior to January 1, 2018, covered employees are identified in accordance with the rules in § 1.162–27(c)(2).

(ii) *Predecessor of a publicly held corporation*—(A) *Publicly held corporations that become privately held.* For purposes of this paragraph (c)(2)(ii), a predecessor of a publicly held corporation includes a publicly held corporation that, after becoming a privately held corporation, again becomes a publicly held corporation for a taxable year ending before the 36-month anniversary of the due date for the corporation's U.S. Federal income tax return (disregarding any extensions) for the last taxable year for which the corporation was previously publicly held.

(B) *Corporate reorganizations.* A predecessor of a publicly held corporation includes a publicly held corporation the stock or assets of which are acquired in a corporate reorganization (as defined in section 368(a)(1)).

(C) *Corporate divisions.* A predecessor of a publicly held corporation includes a publicly held corporation that is a distributing corporation (within the meaning of section 355(a)(1)(A)) that distributes the stock of a controlled corporation (within the meaning of section 355(a)(1)(A)) to its shareholders in a distribution or exchange qualifying under section 355(a)(1) (corporate division). The rule of this paragraph (c)(2)(ii)(C) applies only with respect to covered employees of the distributing corporation who commence the performance of services for the controlled corporation (or for a corporation affiliated with the controlled corporation that receives stock of the controlled corporation in the corporate division) within the period beginning 12 months before and ending 12 months after the distribution.

(D) *Affiliated groups.* A predecessor of a publicly held corporation includes a publicly held corporation that becomes a member of an affiliated group (as defined in paragraph (c)(1)(ii) of this section).

(E) *Asset acquisitions.* If a publicly held corporation, including one or more members of an affiliated group as defined in paragraph (c)(1)(ii) of this section (acquiror), acquires at least 80% of the operating assets (determined by fair market value on the date of acquisition) of another publicly held corporation (target), then the target is a predecessor of the acquiror. For an acquisition of assets that occurs over time, only assets acquired within a 12-month period are taken into account to determine whether at least 80% of the target's operating assets were acquired. However, this 12-month period is extended to include any continuous period that ends on, or begins on, any day during which the acquiror has an arrangement to purchase, directly or indirectly, assets of the target. Additions to the assets of target by a shareholder made as part of a plan or arrangement to avoid the application of this subsection to acquiror's purchase of target's assets are disregarded in applying this paragraph. This paragraph (c)(2)(ii)(E) applies only with respect to covered employees of the target who commence the performance of services for the acquiror (or a corporation affiliated with the acquiror) within the period beginning 12 months before and ending 12 months after the date of the transaction as defined in paragraph (c)(2)(ii)(I) of this section (incorporating any extensions to the 12-month period made pursuant to this paragraph).

(F) *Predecessor of a predecessor.* For purposes of this paragraph (c)(2)(ii), a reference to a predecessor of a corporation includes each predecessor of the corporation and the predecessor or predecessors of any prior predecessor or predecessors.

(G) *Corporations that are not publicly held at the time of the transaction and sequential transactions*—(*1*) *Predecessor corporation is not publicly held at the time of the transaction.* If a corporation that was previously publicly held (the

first corporation) would be a predecessor to another corporation (the second corporation) under the rules of this paragraph (c)(2)(ii) but for the fact that it is not a publicly held corporation at the time of the relevant transaction (or transactions), the first corporation is a predecessor of a publicly held corporation if the second corporation is a publicly held corporation at the time of the relevant transaction (or transactions) and the relevant transaction (or transactions) take place during a taxable year ending before the 36-month anniversary of the due date for the first corporation's U.S. Federal income tax return (excluding any extensions) for the last taxable year for which the first corporation was previously publicly held.

(*2*) *Second corporation is not publicly held at the time of the transaction.* If a corporation that is publicly held (the first corporation) at the time of the relevant transaction (or transactions) would be a predecessor to another corporation (the second corporation) under the rules of this paragraph (c)(2)(ii) but for the fact that the second corporation is not a publicly held corporation at the time of the relevant transaction (or transactions), the first corporation is a predecessor of a publicly held corporation if the second corporation becomes a publicly held corporation for a taxable year ending before the 36-month anniversary of the due date for the first corporation's U.S. Federal income tax return (excluding any extensions) for the first corporation's last taxable year in which the transaction is taken into account.

(*3*) *Neither corporation is publicly held at the time of the transaction.* If a corporation that was previously publicly held (the first corporation) would be a predecessor to another corporation (the second corporation) under the rules of this paragraph (c)(2)(ii) but for the fact that neither it nor the second corporation is a publicly held corporation at the time of the relevant transaction (or transactions), the first corporation is a predecessor of a publicly held corporation if the second corporation becomes a publicly held corporation for a taxable year ending before the 36-month anniversary of the due date for the first corporation's U.S. Federal income tax return (excluding any extensions) for the last taxable year for which the first corporation was previously publicly held.

(*4*) *Sequential transactions.* If a corporation that was previously publicly held (the first corporation) would be a predecessor to another corporation (the second corporation) under the rules of this paragraph (c)(2)(ii) but for the fact that the first corporation is (or its assets are) transferred to one or more intervening corporations prior to being transferred to the second corporation, and if each intervening corporation would be a predecessor of a publicly held corporation with respect to the second corporation if the intervening corporation or corporations were publicly held corporations, then paragraphs (c)(2)(ii)(G)(*1*) through (*3*) of this section also apply without regard to the intervening corporations.

(H) *Elections under sections 336(e) and 338.* For purposes of this paragraph (c)(2), when a corporation makes an election to treat as an asset purchase either the sale, exchange, or distribution of stock pursuant to regulations under section 336(e) or the purchase of stock pursuant to regulations under section 338, the corporation that issued the stock is treated as the same corporation both before and after such transaction.

(I) *Date of transaction.* For purposes of this paragraph (c)(2)(ii), the date that a transaction is treated as having occurred is the date on which all events necessary for the transaction to be described in the relevant provision have occurred.

(J) *Publicly traded partnership.* For purposes of applying this paragraph (c)(2)(ii), a publicly traded partnership is a predecessor of a publicly held corporation if under the same facts and circumstances a corporation substituted for the publicly traded partnership would be a predecessor of the publicly held corporation, and at the time of the transaction the publicly traded partnership is treated as a publicly held corporation as defined in paragraph (c)(1)(i) of this section. In making this determination, the rules in paragraphs (c)(2)(ii)(A) through (I) of this section apply to publicly traded partnerships by analogy.

(iii) *Disregarded entities.* If a publicly held corporation under paragraph (c)(1) of this section owns an entity that is disregarded as an entity separate from its owner under § 301.7701–2(c)(2)(i) of this chapter, then the covered employees of the publicly held corporation are determined pursuant to paragraphs (c)(2)(i) and (ii) of this section. The executive officers of the entity that is disregarded as an entity separate from its corporate owner under § 301.7701–2(c)(2)(i) of this chapter are neither covered employees of the entity nor of the publicly held corporation unless they meet the definition of covered employee in paragraphs (c)(2)(i) and (ii) of this section with respect to the publicly held corporation, in which case they are covered employees for its taxable year.

(iv) *Qualified subchapter S subsidiaries.* If a publicly held corporation under paragraph (c)(1) of this section owns an entity that is a QSub under section 1361(b)(3)(B), then the covered employees of the publicly held corporation are determined pursuant to paragraphs (c)(2)(i) and (ii) of this section. The executive officers of the QSub are neither covered employees of the QSub nor of the publicly held corporation unless they meet the definition of covered employee in paragraphs (c)(2)(i) and (ii) of this section with respect to the publicly held corporation, in which case they are covered employees for its taxable year.

(v) *Covered employee of an affiliated group.* A person who is identified as a covered employee in paragraphs (c)(2)(i) through (iv) of this section for a publicly held corporation's taxable year is also a covered employee for the taxable year of a publicly held corporation as defined in paragraph (c)(1)(ii) of this section.

(vi) *Examples.* The following examples illustrate the provisions of this paragraph (c)(2). For each example, assume that the corporation has a taxable year that is a calendar year and has a fiscal year ending December 31 for reporting purposes under the Exchange Act. Additionally, for each example, unless explicitly provided, assume that none of the employees were covered employees for any taxable year preceding the first taxable year set forth in that example (since being a covered employee for a preceding taxable year would provide a separate and independent basis for classifying that employee as a covered employee for a subsequent taxable year).

(A) *Example 1 (Covered employees of members of an affiliated group)—(1) Facts.* Corporations A, B, and C are direct wholly-owned subsidiaries of Corporation D. Corporation D is a publicly held corporation as defined in paragraph (c)(1)(i) of this section because its class of securities is required to be registered under section 12 of the Exchange Act as of December 31, 2020. Corporation A is a publicly held corporation as defined in paragraph (c)(1)(i) of this section because it is required to file reports under section 15(d) of the Exchange Act as of December 31, 2020. Corporations B and C are not publicly held corporations for their 2020 taxable years. Employee E served as the PEO of Corporation D from January 1, 2020, to March 31, 2020. Employee F served as the PEO of Corporation D from April 1, 2020, to December 31, 2020. Employee G served as the PEO of Corporation A for its entire 2020 taxable year. Employee H served as the PEO of Corporation B for its entire 2020 taxable year. Employee I served as the PEO of Corporation C for its entire 2020 taxable year. From April 1, 2020, through September 30,

2020, Employee E served as an advisor (not as a PEO) to Employee I and received compensation from Corporation C for these services. In 2020, all four corporations paid compensation to their respective PEOs.

(*2*) *Conclusion (Employees F and E).* Because both Employees E and F served as the PEO during Corporation D's 2020 taxable year, both Employees E and F are covered employees for Corporation D's 2020 and subsequent taxable years. Corporations D and C are members of an affiliated group as defined in paragraph (c)(1)(ii) of this section. Because Employee E received compensation from Corporations D and C, the compensation paid by both corporations is aggregated. Any amount disallowed as a deduction by this section is prorated between Corporations D and C in proportion to the amount of compensation paid to Employee E by each corporation in 2020.

(*3*) *Conclusion (Employee G).* Because Employee G served as a PEO of Corporation A, a publicly held corporation, Employee G is a covered employee of Corporation A for its 2020 and subsequent taxable years.

(*4*) *Conclusion (Employee H).* Even though Employee H served as the PEO of Corporation B, Employee H is not a covered employee of Corporation B for its 2020 taxable year, because Corporation B is considered a publicly held corporation solely by reason of being a member of an affiliated group as defined in paragraph (c)(1)(ii) of this section.

(*5*) *Conclusion (Employee I).* Even though Employee I served as the PEO of Corporation C, Employee I is not a covered employee of Corporation C for its 2020 taxable year, because Corporation C is considered a publicly held corporation solely by reason of being a member of an affiliated group as defined in paragraph (c)(1)(ii) of this section. The aggregation of the compensation paid to Employee E by Corporations D and C (for purposes of determining the amount of deduction disallowed by this section) is immaterial to determining whether Employee I is a covered employee of Corporation C.

(B) *Example 2 (Covered employees of a publicly held corporation)*—(*1*) *Facts.* Corporation J is a publicly held corporation. Corporation J is not a smaller reporting company or emerging growth company for purposes of reporting under the Exchange Act. For 2020, Employee K served as the sole PEO of Corporation J and Employees L and M both served as the PFO of Corporation J at different times during the year. Employees N, O, and P were, respectively, the first, second, and third highest compensated executive officers of Corporation J for 2020 other than the PEO and PFO, and all three retired before the end of 2020. Employees Q, R, and S were, respectively, Corporation J's fourth, fifth, and sixth highest compensated executive officers other than the PEO and PFO for 2020, and all three were serving at the end of 2020. On March 1, 2021, Corporation J filed its Form 10–K, Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 with the SEC. With respect to Item 11, Executive Compensation (as required by Part III of Form 10–K, or its successor), Corporation J disclosed the compensation of Employee K for serving as the PEO, Employees L and M for serving as the PFO, and Employees Q, R, and S pursuant to Item 402 of Regulation S–K, 17 CFR 229.402(a)(3)(iii). Corporation J also disclosed the compensation of Employees N and O pursuant to Item 402 of Regulation S–K, 17 CFR 229.402(a)(3)(iv).

(*2*) *Conclusion (PEO).* Because Employee K served as the PEO during 2020, Employee K is a covered employee for Corporation J's 2020 taxable year.

(*3*) *Conclusion (PFO).* Because Employees L and M served as the PFO during 2020, Employees L and M are covered employees for Corporation J's 2020 taxable year.

(*4*) *Conclusion (Three Highest Compensated Executive Officers).* Even though the executive compensation disclosure rules under the Exchange Act require Corporation J to disclose the compensation of Employees N, O, Q, R, and S for 2020, Corporation J's three highest compensated executive officers who are covered employees for its 2020 taxable year are Employees N, O, and P, because these are the three highest compensated executive officers other than the PEO and PFO for 2020.

(C) *Example 3 (Covered employees of a smaller reporting company)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(2)(vi)(B) of this section (*Example 2*), except that Corporation J is a smaller reporting company or emerging growth company for purposes of reporting under the Exchange Act. Accordingly, with respect to Item 11, Executive Compensation (as required by Part III of Form 10–K, or its successor), Corporation J disclosed the compensation of Employee K for serving as the PEO, Employees Q and R pursuant to Item 402(m) of Regulation S–K, 17 CFR 229.402(m)(2)(ii), and Employees N and O pursuant to Item 402(m) of Regulation S–K, 17 CFR 229.402(m)(2)(iii).

(*2*) *Conclusion.* The result is the same as in paragraph (c)(2)(vi)(L) of this section (*Example 2*). For purposes of identifying a corporation's covered employees, it is not relevant whether the reporting obligation under the Exchange Act for smaller reporting companies and emerging growth companies apply to the corporation, nor is it relevant whether the specific executive officers' compensation must be disclosed pursuant to the disclosure rules under the Exchange Act applicable to the corporation.

(D) *Example 4 (Covered employees of a publicly held corporation that is not required to file a Form 10–K)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(2)(vi)(B) of this section (*Example 2*), except that on February 4, 2021, Corporation J files Form 15, Certification and Notice of Termination of Registration under Section 12(g) of the Securities Exchange Act of 1934 or Suspension of Duty to File Reports under Sections 13 and 15(d) of the Securities Exchange Act of 1934 (or its successor), to terminate the registration of its securities. Corporation J's duty to file reports under Section 13(a) of the Exchange Act is suspended upon the filing of the Form 15 and, as a result, Corporation J is not required to file a Form 10–K and disclose the compensation of its executive officers for 2020.

(*2*) *Conclusion.* The result is the same as in paragraph (c)(2)(vi)(B) of this section (*Example 2*). Covered employees include executive officers of a publicly held corporation even if the corporation is not required to disclose the compensation of its executive officers under the Exchange Act. Therefore, Employees K, L, M, N, O, and P are covered employees for 2020. The conclusion would be different if Corporation J filed Form 15, Certification and Notice of Termination of Registration under Section 12(g) of the Securities Exchange Act of 1934 or Suspension of Duty to File Reports under Sections 13 and 15(d) of the Securities Exchange Act of 1934 (or its successor), to terminate the registration of its securities prior to December 31, 2020. In that case, Corporation J would not be a publicly held corporation for its 2020 taxable year, and, therefore, Employees K, L, M, N, O, and P would not be covered employees for Corporation J's 2020 taxable year.

(E) *Example 5 (Covered employees of two publicly held corporations after a corporate transaction)*—(*1*) *Facts.* Corporation T is a domestic publicly held corporation for its 2019 taxable year. Corporation U is a domestic privately held corporation for its 2019 and 2020 taxable years. On July 31, 2020, Corporation U acquires for cash 80% of the only class of outstanding stock of Corporation T. The group (comprised of Corporations U and T) elects to file a consolidated Federal income tax return. As a result of this election, Corporation T has a short taxable year ending on July 31, 2020. Corporation T does not change its fiscal year for reporting purposes under the Exchange Act to correspond to the short taxable year. Corporation T remains a domestic publicly held corporation for its short taxable year ending on July 31, 2020, and its subsequent taxable year ending on December 31, 2020, for which it files a consolidated Federal income tax return with Corporation U. For Corporation T's taxable year ending July 31, 2020, Employee V serves as the only PEO, and Employee W serves as the only PFO. Employees X, Y, and Z are the three most highly compensated executive officers of Corporation T for the taxable year ending July 31, 2020, other than the PEO and PFO. As a result of the acquisition, effective July 31, 2020, Employee V ceases to serve as the PEO of Corporation T. Instead, Employee AA begins serving as the PEO of Corporation T on August 1, 2020. Employee V continues to provide services for Corporation T and never serves as PEO again (or as an individual acting in such capacity). For Corporation T's taxable year ending December 31, 2020, Employee AA serves as the only PEO, and Employee W serves as the only PFO. Employees X, Y, and Z continue to serve as executive officers of Corporation T during the taxable year ending December 31, 2020. Employees BB, CC, and DD are the three most highly compensated executive officers of Corporation T, other than the PEO and PFO, for the taxable year ending December 31, 2020.

(*2*) *Conclusion (Employee V).* Because Employee V served as the PEO during Corporation T's short taxable year ending July 31, 2020, Employee V is a covered

employee for Corporation T's short taxable year ending July 31, 2020. Furthermore, Employee V is a covered employee for Corporation T's short taxable year ending July 31, 2020, even though Employee V's compensation is required to be disclosed pursuant to the executive compensation disclosure rules under the Exchange Act only for the fiscal year ending December 31, 2020. Because Employee V was a covered employee for Corporation T's short taxable year ending July 31, 2020, Employee V is also a covered employee for Corporation T's short taxable year ending December 31, 2020.

(*3*) *Conclusion (Employee W).* Because Employee W served as the PFO during Corporation T's short taxable years ending July 31, 2020, and December 31, 2020, Employee W is a covered employee for both taxable years. Furthermore, Employee W is a covered employee for Corporation T's short taxable year ending July 31, 2020, even though Employee W's compensation is required to be disclosed pursuant to the executive compensation disclosure rules under the Exchange Act only for the fiscal year ending December 31, 2020. Employee W would be a covered employee for Corporation T's short taxable year ending December 31, 2020, even if Employee W did not serve as the PFO during this taxable year because Employee W was a covered employee for Corporation T's short taxable year ending July 31, 2020.

(*4*) *Conclusion (Employee AA).* Because Employee AA served as the PEO during Corporation T's short taxable year ending December 31, 2020, Employee AA is a covered employee for this taxable year.

(*5*) *Conclusion (Employees X, Y, and Z).* Employees X, Y, and Z are covered employees for Corporation T's short taxable years ending July 31, 2020, and December 31, 2020. Employees X, Y, and Z are covered employees for Corporation T's short taxable year ending July 31, 2020, because these employees are the three highest compensated executive officers for this taxable year. Employees X, Y, and Z are covered employees for Corporation T's short taxable year ending December 31, 2020, because they were covered employees for Corporation T's short taxable year ending July 31, 2020. Accordingly, Employees X, Y, and Z would be covered employees for Corporation T's short taxable years ending July 31, 2020, and December 31, 2020, even if their compensation would not be required to be disclosed pursuant to the executive compensation disclosure rules under the Exchange Act.

(*6*) *Conclusion (Employees BB, CC, and DD).* Employees BB, CC, and DD are covered employees for Corporation T's short taxable year ending December 31, 2020 because these employees are the three highest compensated executive officers for this taxable year.

(F) *Example 6 (Predecessor of a publicly held corporation)*—(*1*) *Facts.* Corporation EE is a publicly held corporation for its 2021 taxable year. Corporation EE is a privately held corporation for its 2022 and 2023 taxable years. For its 2024 taxable year, Corporation EE is a publicly held corporation.

(*2*) *Conclusion.* Corporation EE is a predecessor of a publicly held corporation within the meaning of paragraph (c)(2)(ii)(A) of this section because it became a publicly held corporation for a taxable year ending prior to April 15, 2025. Therefore, for Corporation EE's 2024 taxable year, the covered employees of Corporation EE include the covered employees of Corporation EE for its 2021 taxable year and any additional covered employees determined pursuant to paragraph (c)(2) of this section.

(G) *Example 7 (Predecessor of a publicly held corporation)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(2)(vi)(F) of this section (*Example 6*), except that Corporation EE remains a privately held corporation until it becomes a publicly held corporation for its 2027 taxable year.

(*2*) *Conclusion.* Corporation EE is not a predecessor of a publicly held corporation within the meaning of paragraph (c)(2)(ii)(A) of this section because it became a publicly held corporation for a taxable year ending after April 15, 2025. Therefore, any covered employee of Corporation EE for its 2021 taxable year is not a covered employee of Corporation EE for its 2027 taxable year due to that individual's status as a covered employee of Corporation EE for a preceding taxable year beginning after December 31, 2016 (but may be a covered employee due to status during the 2027 taxable year).

(H) *Example 8 (Predecessor of a publicly held corporation that is party to a merger)*—(*1*) *Facts.* On June 30, 2021, Corporation FF (a publicly held corporation) merged into Corporation GG (a publicly held corporation) in a transaction that qualifies as a reorganization under section 368(a)(1)(A), with Corporation GG as the surviving corporation. As a result of the merger, Corporation FF has a short taxable year ending June 30, 2021. Corporation FF is a publicly held corporation for this short taxable year. Corporation GG does not have a short taxable year and is a publicly held corporation for its 2021 taxable year.

(*2*) *Conclusion.* Corporation FF is a predecessor of a publicly held corporation within the meaning of paragraph (c)(2)(ii)(B) of this section. Therefore, any covered employee of Corporation FF for its short taxable year ending June 30, 2021, is a covered employee of Corporation GG for its 2021 taxable year. Accordingly, for Corporation GG's 2021 and subsequent taxable years, the covered employees of Corporation GG include the covered employees of Corporation FF (for a preceding taxable year beginning after December 31, 2016) and any additional covered employees determined pursuant to paragraph (c)(2) of this section.

(I) *Example 9 (Predecessor of a publicly held corporation that is party to a merger)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(2)(vi)(H) of this section (*Example 8*), except that, after the merger, Corporation GG is a privately held corporation for its 2021 taxable year.

(*2*) *Conclusion.* Because Corporation GG is a privately held corporation for its 2021 taxable year, it is not subject to section 162(m)(1) for this taxable year.

(J) *Example 10 (Predecessor of a publicly held corporation that is party to a merger)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(2)(vi)(I) of this section (*Example 9*), except Corporation GG becomes a publicly held corporation on June 30, 2023, and is a publicly held corporation for its 2023 taxable year.

(*2*) *Conclusion.* Because Corporation GG became a publicly held corporation for a taxable year ending prior to April 15, 2025, Corporation FF is a predecessor of a publicly held corporation within the meaning of paragraph (c)(2)(ii)(G) of this section. Therefore, any covered employee of Corporation FF for its short taxable year ending June 30, 2021, is a covered employee of Corporation GG for its 2023 and subsequent taxable years. Accordingly, for Corporation GG's 2023 and subsequent taxable years, the covered employees of Corporation GG include the covered employees of Corporation FF (for a preceding taxable year beginning after December 31, 2016) and any additional covered employees determined pursuant to paragraph (c)(2) of this section.

(K) *Example 11 (Predecessor of a publicly held corporation that is party to a merger)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(2)(vi)(J) of this section (*Example 10*), except that Corporation FF is a privately held corporation for its taxable year ending June 30, 2021, but was a publicly held corporation for its 2020 taxable year.

(*2*) *Conclusion.* Even though Corporation FF was a privately held corporation when it merged with Corporation GG on June 30, 2021, Corporation FF may still be a considered a predecessor corporation if Corporation GG becomes a publicly held corporation within a taxable year ending prior to April 15, 2024. Because Corporation GG became a publicly held corporation for a taxable year ending December 31, 2023, Corporation FF is a predecessor of a publicly held corporation within the meaning of paragraph (c)(2)(ii)(G) of this section. Therefore, any covered employee of Corporation FF for its 2020 taxable year is a covered employee of Corporation GG for its 2024 and subsequent taxable years. Accordingly, for Corporation GG's 2023 and subsequent taxable years, the covered employees of Corporation GG include the covered employees of Corporation FF (for a preceding taxable year beginning after December 31, 2016) and any additional covered employees determined pursuant to paragraph (c)(2) of this section.

(L) *Example 12 (Predecessor of a publicly held corporation that is party to a merger and subsequently becomes member of an affiliated group)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(2)(vi)(I) of this section (*Example 9*). Additionally, on June 30, 2022, Corporation GG becomes a member of an affiliated group (as defined in paragraph (c)(1)(ii) of this section) that files a consolidated Federal income tax return. Corporation II is the parent corporation of the group and is a publicly held corporation. Employee HH was a covered employee of Corporation FF for its taxable year ending June 30, 2021. On July 1, 2022, Employee HH becomes an employee of Corporation II.

(*2*) *Conclusion.* By becoming a member of an affiliated group (as defined in paragraph (c)(1)(ii) of this section) on June 30, 2022,

Corporation GG became a publicly held corporation for a taxable year ending prior to April 15, 2025. Therefore, Corporation FF is a predecessor of a publicly held corporation (Corporation GG) within the meaning of paragraph (c)(2)(ii)(G) of this section. Furthermore, Corporation FF is a predecessor of a publicly held corporation (Corporation II) within the meaning of paragraph (c)(2)(ii)(G) of this section. Accordingly, for Corporation II's 2022 and subsequent taxable years, Employee HH is a covered employee of Corporation II because Employee HH was a covered employee of Corporation FF for its taxable year ending June 30, 2021.

(M) *Example 13 Predecessor of a publicly held corporation that is party to a merger and subsequently becomes member of an affiliated group)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(2)(vi)(L) of this section (*Example 12*), except that, Corporation FF was a privately held corporation for its taxable year ending June 30, 2021, and Employee HH was a covered employee of Corporation FF for its taxable year ending December 31, 2020.

(*2*) *Conclusion.* Even though Corporation FF was a privately held corporation when it merged with Corporation GG on June 30, 2021, Corporation FF may still be a considered a predecessor corporation if Corporation GG becomes a publicly held corporation for a taxable year ending prior to April 15, 2024. Because Corporation GG became a publicly held corporation for its 2022 taxable year by becoming a member of an affiliated group (as defined in paragraph (c)(1)(ii) of this section), Corporation FF is a predecessor of a publicly held corporation (Corporation GG) within the meaning of paragraph (c)(2)(ii)(G) of this section. Furthermore, Corporation FF is a predecessor of a publicly held corporation (Corporation II) within the meaning of paragraph (c)(2)(ii)(G) of this section. Therefore, any covered employee of Corporation FF for its 2020 taxable year is a covered employee of Corporation II for its 2022 and subsequent taxable years. Accordingly, for Corporation II's 2022 taxable year, Employee HH is a covered employee of Corporation II because Employee HH was a covered employee of Corporation FF for its 2020 taxable year.

(N) *Example 14 (Predecessor of a publicly held corporation that is a party to a merger)*—(*1*) *Facts.* Corporation JJ is a publicly held corporation for its 2019 taxable year. Corporation JJ is incorporated in State KK. On June 1, 2019, Corporation JJ formed a wholly-owned subsidiary, Corporation LL. Corporation LL is a publicly held corporation incorporated in State MM. On June 30, 2021, Corporation JJ merged into Corporation LL under State MM law in a transaction that qualifies as a reorganization under section 368(a)(1)(A), with Corporation LL as the surviving corporation. As a result of the merger, Corporation JJ has a short taxable year ending June 30, 2021. Corporation JJ is a publicly held corporation for this short taxable year.

(*2*) *Conclusion.* Corporation JJ is a predecessor of a publicly held corporation within the meaning of paragraph (c)(2)(ii)(B) of this section. Therefore, any covered employee of Corporation JJ for its short taxable year ending June 30, 2021, is a covered employee of Corporation LL for its taxable years ending after June 30, 2021. Accordingly, for taxable years ending after June 30, 2021, the covered employees of Corporation LL include the covered employees of Corporation JJ (for a preceding taxable year beginning after December 31, 2016) and any additional covered employees determined pursuant to paragraph (c)(2) of this section.

(O) *Example 15 (Predecessor of a publicly held corporation becomes member of an affiliated group)*—(*1*) *Facts.* Corporations NN and OO are publicly held corporations for their 2021 and 2022 taxable years. On June 30, 2021, Corporation OO acquires for cash 100% of the only class of outstanding stock of Corporation NN. The group (comprised of Corporations NN and OO) elects to file a consolidated income tax return. As a result of this election, Corporation NN has a short taxable year ending on June 30, 2021. Corporation NN is a publicly held corporation for its taxable year ending June 30, 2021, and a privately held corporation for subsequent taxable years. On June 30, 2022, Corporation OO completely liquidates Corporation NN.

(*2*) *Conclusion.* After Corporation OO acquired Corporation NN, Corporations NN and OO comprised an affiliated group as defined in paragraph (c)(1)(ii) of this section. Thus, Corporation NN is a predecessor of a publicly held corporation within the meaning of paragraph (c)(2)(ii)(D) of this section. Therefore, any covered employee of Corporation NN for its short taxable year ending June 30, 2021, is a covered employee of Corporation OO for its taxable years ending after June 30, 2021. Accordingly, for taxable years ending after June 30, 2021, the covered employees of Corporation OO include the covered employees of Corporation NN (for a preceding taxable year beginning after December 31, 2016) and any additional covered employees determined pursuant to paragraph (c)(2) of this section.

(P) *Example 16 (Predecessor of a publicly held corporation becomes member of an affiliated group)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(2)(vi)(O) of this section (*Example 15*), except that Corporation OO is a privately held corporation on June 30, 2021, and for its 2021 and 2022 taxable years.

(*2*) *Conclusion.* Because Corporation OO is a privately held corporation for its 2021 and 2022 taxable years, it is not subject to section 162(m)(1) for these taxable years.

(Q) *Example 17 (Predecessor of a publicly held corporation becomes member of an affiliated group)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(2)(vi)(P) of this section (*Example 16*), except that on October 1, 2022, Corporation OO's Securities Act registration statement in connection with its initial public offering is declared effective by the SEC, and Corporation OO is a publicly held corporation for its 2022 taxable year.

(*2*) *Conclusion (Taxable Year Ending December 31, 2021).* Because Corporation OO is a privately held corporation for its 2021 taxable year, it is not subject to section 162(m)(1) for this taxable year.

(*3*) *Conclusion (Taxable Year Ending December 31, 2022).* For the 2022 taxable year, Corporations NN and OO comprised an affiliated group as defined in paragraph (c)(1)(ii) of this section. Corporation NN is a predecessor of a publicly held corporation within the meaning of paragraph (c)(2)(ii)(D) and (F) of this section because Corporation OO became a publicly held corporation for a taxable year ending prior to April 15, 2025. Therefore, any covered employee of Corporation NN for its short taxable year ending June 30, 2021, is a covered employee of Corporation OO for its 2022 and subsequent taxable years. Accordingly, for Corporation OO's 2022 and subsequent taxable years, the covered employees of Corporation OO include the covered employees of Corporation NN (for a preceding taxable year beginning after December 31, 2016) and any additional covered employees determined pursuant to paragraph (c)(2) of this section.

(R) *Example 18 (Predecessor of a publicly held corporation and asset acquisition)*—(*1*) *Facts.* Corporations PP and QQ are publicly held corporations for their 2020 and 2021 taxable years. On June 30, 2021, Corporation PP acquires for cash 80% of the operating assets (determined by fair market value) of Corporation QQ. Employees RR, SS, TT, and UU were covered employees for Corporation QQ's taxable year ending December 31, 2020. On April 1, 2020, Employee RR becomes an employee of Corporation PP. On June 30, 2021, Employee SS becomes an employee of Corporation PP. On October 1, 2021, Employee TT becomes an employee of Corporation PP. On August 1, 2022, Employee UU becomes an employee of Corporation PP.

(*2*) *Conclusion.* Because Corporation PP acquired 80% of Corporation QQ's operating assets (determined by fair market value), Corporation QQ is a predecessor of a publicly held corporation within the meaning of paragraph (c)(2)(ii)(E) of this section. Therefore, any covered employee of Corporation QQ for its 2020 taxable year (who commenced services for Corporation PP within the 12 months before or the 12 months after the acquisition) is a covered employee of Corporation PP for its 2021 and subsequent taxable years. Accordingly, for Corporation PP's 2021 and subsequent taxable years, the covered employees of Corporation PP include Employees RR, SS, and TT, and any additional covered employees determined pursuant to paragraph (c)(2) of this section. Because Employee UU became an employee of Corporation PP after June 30, 2022, Employee UU is not a covered employee of Corporation PP for its 2022 taxable year, but may be a covered employee of Corporation PP by application of paragraph (c)(2) of this section to Employee UU's employment at Corporation PP.

(S) *Example 19 (Predecessor of a publicly held corporation and asset acquisition)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(2)(vi)(R) of this section (*Example 18*), except that Corporation PP is a privately held corporation on June 30, 2021 and for its 2021 taxable year.

(*2*) *Conclusion.* Because Corporation PP is a privately held corporation for its 2021 taxable year, it is not subject to section 162(m)(1) for this taxable year.

(T) *Example 20 (Predecessor of a publicly held corporation and asset acquisition)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(2)(vi)(S) of this section (*Example 19*), except that, on October 1, 2022, Corporation PP's Securities Act registration statement in connection with its initial public offering is declared effective by the SEC, and Corporation PP is a publicly held corporation for 2022 taxable year.

(*2*) *Conclusion (2021 taxable year).* Because Corporation PP is a privately held corporation for its 2021 taxable year, it is not subject to section 162(m)(1) for this taxable year.

(*3*) *Conclusion (2022 taxable year).* Corporation QQ is a predecessor of a publicly held corporation within the meaning of paragraph (c)(2)(ii)(G) of this section because Corporation PP became a publicly held corporation for a taxable year ending prior to April 15, 2025. Therefore, any covered employee of Corporation QQ for its 2020 taxable year is a covered employee of Corporation PP for its 2022 and subsequent taxable years. Accordingly, for Corporation PP's 2022 and subsequent taxable years, the covered employees of Corporation PP include the covered employees of Corporation QQ and any additional covered employees determined pursuant to paragraph (c)(2) of this section.

(U) *Example 21 (Predecessor of a publicly held corporation and asset acquisition)*—(*1*) *Facts.* Corporations VV, WW, and XX are publicly held corporations for their 2020 and 2021 taxable years. Corporations VV and WW are members of an affiliated group. Corporation WW is a direct subsidiary of Corporation VV. On June 30, 2021, Corporation VV acquires for cash 40% of the operating assets (determined by fair market value) of Corporation XX. On January 31, 2022, Corporation WW acquires an additional 40% of the operating assets (determined by fair market value) of Corporation XX. Employees YY, ZZ, and AAA are covered employees for Corporation XX's 2020 taxable year. Employees BBB and CCC are covered employees for Corporation XX's 2021 taxable year. On January 15, 2021, Employee AAA becomes an employee of Corporation WW. On July 1, 2021, Employee YY becomes an employee of Corporation WW. On February 1, 2022, Employees ZZ and BBB become employees of Corporation WW. On June 30, 2023, Employee CCC becomes an employee of Corporation WW.

(*2*) *Conclusion.* Because an affiliated group, comprised of Corporations VV and WW, acquired 80% of Corporation XX's operating assets (determined by fair market value), Corporation XX is a predecessor of a publicly held corporation within the meaning of paragraph (c)(2)(ii)(E) of this section. Therefore, any covered employee of Corporation XX for its 2020 and 2021 taxable years (who commenced services for Corporation WW within the period beginning 12 months before and ending 12 months after the acquisition), is a covered employee of Corporation WW for its 2021, 2022 and subsequent taxable years. Accordingly, for Corporation WW's 2021 and subsequent taxable years, the covered employees of Corporation WW include Employees AAA and YY, and any additional covered employees determined pursuant to paragraph (c)(2) of this section. For Corporation WW's 2022 and subsequent taxable years, the covered employees of Corporation WW include Employees AAA, YY, ZZ and BBB, and any additional covered employees determined pursuant to paragraph (c)(2) of this section. Because Employee CCC became an employee of Corporation WW after January 31, 2023, Employee CCC is not a covered employee of Corporation WW for its 2023 taxable year, but may be a covered employee of Corporation WW by application of this paragraph (c)(2) to Employee CCC's employment at Corporation WW.

(V) *Example 22 (Predecessor of a publicly held corporation and asset acquisition)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(2)(vi)(U) of this section (*Example 21*), except that Corporations VV and WW are not publicly held corporations on June 30, 2021, and for their 2021 taxable years.

(*2*) *Conclusion.* Because Corporations VV and WW are not publicly held corporations for their 2021 taxable years, they are not subject to section 162(m)(1) for this taxable year.

(W) *Example 23 (Predecessor of a publicly held corporation and asset acquisition)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(2)(vi)(V) of this section (*Example 22*), except that, on October 1, 2022, Corporation VV's Securities Act registration statement in connection with its initial public offering is declared effective by the SEC, and Corporation VV is a publicly held corporation for its 2022 taxable year.

(*2*) *Conclusion (2021 taxable year).* Because Corporations VV and WW are not publicly held corporations for their 2021 taxable years, they are not subject to section 162(m)(1) for this taxable year.

(*3*) *Conclusion (2022 taxable year).* Corporation XX is a predecessor of a publicly held corporation within the meaning of paragraph (c)(2)(ii)(G) of this section because the affiliated group, comprised of Corporations VV and WW, became a publicly held corporation for a taxable year ending prior to April 15, 2024. Therefore, any covered employee of Corporation XX for its 2020 taxable year is a covered employee of Corporation WW for its 2022 taxable year. Accordingly, for Corporation WW's 2022 and subsequent taxable years, the covered employees of Corporation WW include the covered employees of Corporation XX (for a preceding taxable year beginning after December 31, 2016) and any additional covered employees determined pursuant to this paragraph (c)(2).

(X) *Example 24 (Predecessor of a publicly held corporation and a division)*—(*1*) *Facts.* Corporation DDD is a publicly held corporation for its 2021 and 2022 taxable years. On March 2, 2021, Corporation DDD forms a wholly-owned subsidiary, Corporation EEE, and transfers assets to it. On April 1, 2022, Corporation DDD distributes all shares of Corporation EEE to its shareholders in a transaction described in section 355(a)(1). On April 1, 2022, Corporation EEE's Securities Act registration statement in connection with its initial public offering is declared effective by the SEC. Corporation EEE is a publicly held corporation for its 2022 taxable year. Employee FFF serves as the PFO of Corporation DDD from January 1, 2022, to March 31, 2022. On April 2, 2022, Employee FFF joins Corporation EEE to serve as an advisor (as a common law employee) to the PFO of Corporation EEE. After March 31, 2022, Employee FFF ceases to provide services for Corporation EEE.

(*2*) *Conclusion.* Because the distribution of the stock of Corporation EEE is a transaction described under section 355(a)(1), Corporation DDD is a predecessor of Corporation EEE within the meaning of paragraph (c)(2)(ii)(C) of this section. Accordingly, Corporation DDD is a predecessor of Corporation EEE within the meaning of paragraph (c)(2)(ii)(A) of this section even if Corporation EEE was a privately held corporation prior to its 2022 taxable year. Because Employee FFF was a covered employee of Corporation DDD for its 2022 taxable year, Employee FFF is a covered employee of Corporation EEE for its 2022 taxable year. The result is the same whether Employee FFF performs services for Corporation EEE as a common law employee or an independent contractor.

(Y) *Example 25 (Predecessor of a publicly held corporation and a division)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(2)(vi)(X) of this section (*Example 24*), except that, Corporation DDD exchanges 100% of the shares of Corporation EEE with Corporation GGG in a transaction described in section 355(a)(1) and Corporation EEE does not register any class of securities with the SEC. Furthermore, Employee FFF performs services for Corporation GGG instead of for Corporation EEE. Corporation GGG is a privately held corporation for its 2022 taxable year. On October 1, 2023, Corporation GGG's Securities Act registration statement in connection with its initial public offering is declared effective by the SEC. Corporation GGG is a publicly held corporation for its 2023 taxable year. On January 1, 2028, Employee FFF begins serving as a director of Corporation DDD. Corporation DDD is a publicly held corporation for its 2028 taxable year.

(*2*) *Conclusion (2022 taxable year).* Because Corporation GGG is a privately held corporation for its 2022 taxable year, section 162(m)(1) does not limit the deduction for compensation deductible for this taxable year.

(*3*) *Conclusion (2023 taxable year).* Because the exchange of the stock of Corporation EEE is a transaction described under section 355(a)(1), because Corporations EEE and GGG are an affiliated group, and because Corporation GGG became a publicly held corporation for a taxable year ending prior to April 15, 2025, Corporation DDD is a predecessor of Corporation GGG within the meaning of paragraphs (c)(2)(ii)(D) and (G) of this section. Employee FFF was a covered employee of Corporation DDD for its 2022 taxable year, and began performing services for Corporation GGG following April 1, 2021, and before April 1, 2023. Therefore, Employee FFF is a covered employee of Corporation GGG for its 2023 taxable year.

(*4*) *Conclusion (2028 taxable year).* Because Employee FFF served as the PFO of

Corporation DDD from January 1, 2022, to March 31, 2022, Employee FFF was a covered employee of Corporation DDD for its 2022 taxable year. Because an individual who is a covered employee for a taxable year remains a covered employee for all subsequent taxable years (even after the individual has separated from service), Employee FFF is a covered employee of Corporation DDD for its 2028 taxable year.

(Z) *Example 26 (Predecessor of a publicly held corporation and a division)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(2)(vi)(Y) of this section (*Example 25*), except that, Employee FFF begins performing services for Corporation GGG on June 30, 2023, instead of on April 2, 2022, and never performs services for Corporation DDD after June 30, 2023. Furthermore, on June 30, 2023, Employee HHH, a covered employee of Corporation EEE for all of its taxable years, begins performing services for Corporation GGG as an independent contractor advising its PEO but not serving as a PEO.

(*2*) *Conclusion (2023 taxable year).* Because the exchange of the stock of Corporation EEE is a transaction described under section 355(a)(1) and because Corporation GGG became a publicly held corporation for a taxable year ending before April 15, 2025, Corporation DDD is a predecessor of Corporation GGG within the meaning of paragraphs (c)(2)(ii)(D) and (G) of this section. Even though Employee FFF was a covered employee of Corporation DDD for its 2022 taxable year, because Employee FFF began performing services for Corporation GGG after April 1, 2023, Employee FFF is not a covered employee of Corporation GGG for its 2023 taxable year. However, if Employee FFF is a PEO, PFO, or one of the three highest compensated executives (other than the PEO or PFO) of Corporation GGG for its 2023 or subsequent taxable years, then Employee FFF is a covered employee of Corporation GGG for such taxable year (and subsequent taxable years). Because Employee HHH was a covered employee of Corporation EEE for its 2022 taxable year, Employee is a covered employee of Corporation GGG for its 2023 taxable year.

(AA) *Example 27 (Predecessor of a publicly held corporation and election under section 338(h)(10))*—(*1*) *Facts.* Corporation III is the common parent of a group of corporations filing consolidated returns that includes Corporation JJJ as a member. Corporation III wholly-owns Corporation JJJ, a publicly held corporation within the meaning of paragraph (c)(1)(i) of this section. On June 30, 2021, Corporation LLL purchases Corporation JJJ from Corporation III. Corporation III and Corporation LLL make a timely election under section 338(h)(10) with respect to the purchase of Corporation JJJ stock. For its taxable year after the purchase ending December 31, 2021, Corporation JJJ continues to be a publicly held corporation within the meaning of paragraph (c)(1)(i) of this section.

(*2*) *Conclusion.* As provided in paragraph (c)(2)(ii)(H), Corporation JJJ is treated as the same corporation for purposes for purposes of paragraph (c)(2). Accordingly, any covered employee of Corporation JJJ for its short taxable year ending June 30, 2021, is a covered employee of Corporation JJJ for its short taxable year ending on December 31, 2021, and subsequent taxable years.

(BB) *Example 28 (Disregarded entity)*—(*1*) *Facts.* Corporation MMM is a privately held corporation for its 2020 taxable year. Entity NNN is a wholly-owned limited liability company and is disregarded as an entity separate from its owner, Corporation MMM, under § 301.7701–2(c)(2)(i) of this chapter. As of December 31, 2020, Entity NNN is required to file reports under section 15(d) of the Exchange Act. For the 2020 taxable year, Employee OOO is the PEO and Employee PPP is the PFO of Corporation MMM. Employees QQQ, RRR, and SSS are the three most highly compensated executive officers of Corporation MMM (other than Employees OOO and PPP). Employee TTT is the PFO of Entity NNN and does not perform any policy making functions for Corporation MMM. Entity NNN has no other executive officers.

(2) *Conclusion.* Because Entity NNN is disregarded as an entity separate from its owner, Corporation MMM, and is required to file reports under section 15(d) of the Exchange Act, Corporation MMM is a publicly held corporation under paragraph (c)(1)(iii) of this section for its 2020 taxable year. Even though Employee TTT is a PFO of Entity NNN, Employee TTT is not considered a PFO of Corporation MMM under paragraph (c)(2)(iii) of this section. As PEO and PFO, Employees OOO and PPP are covered employees of Corporation MMM under paragraph (c)(2)(i) of this section. Additionally, as the three most highly compensated executive officers of Corporation MMM (other than Employees OOO and PPP), Employees QQQ, RRR, and SSS are also covered employees of Corporation MMM under paragraph (c)(2)(i) of this section for Corporation MMM's 2020 taxable year because their compensation would be disclosed if Corporation MMM were subject to the SEC executive compensation disclosure rules. The conclusion would be the same if Entity NNN was not required to file reports under section 15(d) of the Exchange Act and Corporation MMM was a publicly held corporation pursuant to paragraph (c)(1)(i) instead of paragraph (c)(1)(iii) of this section.

(CC) *Example 29 (Disregarded entity)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(2)(vi)(BB) of this section (*Example 28*), except that Employee TTT performs a policy making function for Corporation MMM. If Corporation MMM were subject to the SEC executive compensation disclosure rules, then Employee TTT would be treated as an executive officer of Corporation MMM pursuant to 17 CFR 240.3b–7 for purposes of determining the three highest compensated executive officers for Corporation MMM's 2020 taxable year. Employees QQQ, RRR and SSS are the three most highly compensated executive officers of Corporation MMM (other than Employees OOO and PPP). Employee TTT is compensated more than Employee QQQ, but less than Employees RRR and SSS.

(2) *Conclusion.* Because Entity NNN is disregarded as an entity separate from its owner, Corporation MMM, and is required to file reports under section 15(d) of the Exchange Act, Corporation MMM is a publicly held corporation under paragraph (c)(1)(iii) of this section for its 2020 taxable year. As PEO and PFO, Employees OOO and PPP are covered employees of Corporation MMM under paragraph (c)(2)(i) of this section. Employee TTT is one of the three highest compensated executive officers for Corporation MMM's taxable year. Because Employees TTT, RRR, and SSS are the three most highly compensated executive officers of Corporation MMM (other than Employees OOO and PPP), they are covered employees of Corporation MMM under paragraph (c)(2)(i) of this section for Corporation MMM's 2020 taxable year because their compensation would be disclosed if Corporation MMM were subject to the SEC executive compensation disclosure rules. The conclusion would be the same if Entity NNN was not required to file reports under section 15(d) of the Exchange Act and Corporation MMM was a publicly held corporation pursuant to paragraph (c)(1)(i) instead of paragraph (c)(1)(iii) of this section.

(DD) *Example 30 (Individual as covered employee of a publicly held corporation that includes the affiliated group)*—(*1*) *Facts.* Corporations UUU and VVV are publicly held corporations for their 2020, 2021, and 2022 taxable years. Corporation VVV is a direct subsidiary of Corporation UUU. Employee WWW is an employee, but not a covered employee, of Corporation UUU for its 2020, 2021, and 2022 taxable years. From April 1, 2020, to September 30, 2020, Employee WWW performs services for Corporation VVV. Employee WWW does not perform any services for Corporation VVV for its 2021 and 2022 taxable years. Employee WWW is a covered employee of Corporation VVV for its 2020, 2021, and 2022 taxable years. For the 2020 taxable year, Employee WWW receives compensation for services provided to Corporations UUU and VVV only from Corporation UUU in the amount of $1,500,000. Employee WWW receives $2,000,000 from Corporation UUU for performing services for Corporation UUU during each of its 2021 and 2022 taxable years. On June 30, 2022, Corporation VVV pays $500,000 to Employee WWW from a nonqualified deferred compensation plan that complies with section 409A.

(*2*) *Conclusion (2020 taxable year).* Because Employee WWW is a covered employee of Corporation VVV and because the affiliated group of corporations (composed of Corporations UUU and VVV) is a publicly held corporation, Employee WWW is a covered employee of the publicly held corporation that is the affiliated group pursuant to paragraph (c)(2)(v) of this section. Accordingly, compensation paid by Corporations UUU and VVV is aggregated for purposes of section 162(m)(1) and, as a result, $500,000 of the aggregate compensation paid is nondeductible. The conclusion would be the same if Corporation UUU was a privately held corporation for its 2020 taxable year.

(*3*) *Conclusion (2021 taxable year).* Because Employee WWW is a covered employee of Corporation VVV pursuant to paragraph (c)(2)(i)(C) of this section and because the affiliated group of corporations (composed of Corporations UUU and VVV) is a publicly

held corporation, Employee WWW is a covered employee of the publicly held corporation that is the affiliated group pursuant to paragraph (c)(2)(v) of this section. Accordingly, compensation paid by Corporations UUU and VVV is aggregated for purposes of section 162(m)(1) and, as a result, $1,000,000 of the aggregate compensation paid is nondeductible. The conclusion would be the same if Corporation UUU was a privately held corporation for its 2021 taxable year.

(*4*) *Conclusion (2022 taxable year).* Because Employee WWW is a covered employee of Corporation VVV pursuant to paragraph (c)(2)(i)(C) of this section and because the affiliated group of corporations (composed of Corporations UUU and VVV) is a publicly held corporation, Employee WWW is a covered employee of the publicly held corporation that is the affiliated group pursuant to paragraph (c)(2)(v) of this section. Accordingly, compensation paid by Corporations UUU and VVV is aggregated for purposes of section 162(m)(1) and, as a result, $1,500,000 of the aggregate compensation paid is nondeductible. The conclusion would be the same if Corporation UUU was a privately held corporation for its 2022 taxable year.

(EE) *Example 31 (Individual as covered employee of a publicly held corporation that includes the affiliated group)*—(*1*) *Facts.* Corporation BBBB is a publicly held corporation for its 2020 through 2022 taxable years. Corporations YYY and ZZZ are direct subsidiaries of Corporation BBBB and are privately held corporations for their 2020 through 2022 taxable years. Employee AAAA serves as the PFO of Corporation BBBB from January 1, 2020 to December 31, 2020, when Employee AAAA separates from service. On January 1, 2021, Employee AAAA commences employment with Corporation YYY. In 2021, Employee AAAA receives compensation from Corporation YYY in excess of $1,000,000. On April 1, 2022, Employee AAAA commences employment with Corporation ZZZ. On September 30, 2022, Employee AAAA separates from service from Corporations YYY and ZZZ. In 2022, Employee AAAA receives compensation from Corporations YYY and ZZZ in excess of $1,000,000. For the 2021 and 2022 taxable years, Employee AAA does not serve as either the PEO or PFO of Corporations YYY and ZZZ, and is not one of the three highest compensated executive officers (other than the PEO or PFO) of Corporations YYY and ZZZ.

(*2*) *Conclusion (2021 taxable year).* Employee AAAA is a covered employee of Corporation BBBB for the 2020 taxable year and subsequent taxable years. Because Employee AAAA is a covered employee of Corporation BBBB and because the affiliated group of corporations (composed of Corporations BBBB, YYY, and ZZZ) is a publicly held corporation, Employee AAAA is a covered employee of the publicly held corporation that is the affiliated group pursuant to paragraph (c)(2)(v) of this section for the 2020 taxable year and subsequent taxable years. Therefore, Corporation YYY's deduction for compensation paid to Employee AAAA for the 2021 taxable year is subject to limitation under section 162(m)(1). The result would be the same if Corporation YYY was a publicly held corporation as defined in paragraph (c)(1)(i) of this section.

(*3*) *Conclusion (2022 taxable year).* Because Employee AAAA is a covered employee of Corporation BBBB and because the affiliated group of corporations (composed of Corporations BBBB, YYY, and ZZZ) is a publicly held corporation, Employee AAAA is a covered employee of the publicly held corporation that is the affiliated group pursuant to paragraph (c)(2)(v) of this section. Therefore, Corporation YYY's and ZZZ's deduction for compensation paid to Employee AAAA for the 2022 taxable year is subject to limitation under section 162(m)(1). Because the compensation paid by all affiliated group members is aggregated for purposes of section 162(m)(1), $1,000,000 of the aggregate compensation paid is nondeductible. Corporations YYY and ZZZ each are treated as paying a ratable portion of the nondeductible compensation. The result would be the same if either Corporation YYY or ZZZ (or both) was a publicly held corporation as defined in paragraph (c)(1)(i).

(3) *Compensation*—(i) *In general.* For purposes of the deduction limitation described in paragraph (b) of this section, compensation means the aggregate amount allowable as a deduction under chapter 1 of the Internal Revenue Code for the taxable year (determined without regard to section 162(m)(1)) for remuneration for services performed by a covered employee in any capacity, whether or not the services were performed during the taxable year. Compensation includes an amount that is includible in the income of, or paid to, a person other than the covered employee (including a beneficiary after the death of the covered employee) for services performed by the covered employee.

(ii) *Compensation paid by a partnership.* For purposes of paragraph (c)(3)(i) of this section, compensation includes an amount equal to a publicly held corporation's distributive share of a partnership's deduction for compensation expense attributable to the remuneration paid by the partnership for services performed by a covered employee of the publicly held corporation.

(iii) *Exceptions.* Compensation does not include—

(A) Remuneration covered in section 3121(a)(5)(A) through (D) (concerning remuneration that is not treated as wages for purposes of the Federal Insurance Contributions Act);

(B) Remuneration consisting of any benefit provided to or on behalf of an employee if, at the time the benefit is provided, it is reasonable to believe that the employee will be able to exclude it from gross income; or

(C) Salary reduction contributions described in section 3121(v)(1).

(iv) *Examples.* The following examples illustrate the provisions of this paragraph (c)(3). For each example, assume that the corporation is a calendar year taxpayer.

(A) *Example 1*—(*1*) *Facts.* Corporation Z is a publicly held corporation for its 2020 taxable year, during which Employee A serves as the PEO of Corporation Z and also serves on the board of directors of Corporation Z. In 2020, Corporation Z paid $1,200,000 to Employee A plus an additional $50,000 fee for serving as chair of the board of directors of Corporation Z. These amounts are otherwise deductible for Corporation Z's 2020 taxable year.

(*2*) *Conclusion.* The $1,200,000 paid to Employee A in 2020 plus the additional $50,000 director's fee paid to Employee A in 2020 are compensation within the meaning of paragraph (c)(3) of this section. Therefore, Corporation Z's $1,250,000 deduction for the 2020 taxable year is subject to limitation under section 162(m)(1).

(B) *Example 2*—(*1*) *Facts.* Corporation X is a publicly held corporation for its 2020 through 2024 taxable years. Employee B serves as the PEO of Corporation X for its 2020 taxable year. In 2020, Corporation X established a new nonqualified retirement plan for its executive officers. The retirement plan provides for the distribution of benefits over a three-year period beginning after a participant separates from service. Employee B separates from service in 2021 and becomes a member of the board of directors of Corporation X in 2022. In 2022, Employee B receives a $75,000 fee for services as a director and $1,500,000 as the first payment under the retirement plan. Employee B continues to serve on the board of directors until 2023 when Employee B dies before receiving the retirement benefit for 2023 and before becoming entitled to any director's fees for 2023. In 2023 and 2024, Corporation X pays the $1,500,000 annual retirement benefits to Person C, a beneficiary of Employee B.

(*2*) *Conclusion (2022 Taxable Year).* In 2022, Corporation X paid Employee B $1,575,000, including $1,500,000 under the retirement plan and $75,000 in director's fees. The retirement benefit and the director's fees are compensation within the meaning of this paragraph (c)(3). Therefore, Corporation X's $1,575,000 deduction for the 2022 taxable year is subject to limitation under section 162(m)(1).

(*3*) *Conclusion (2023 and 2024 Taxable Years).* In 2023 and 2024, Corporation X made payments to Person C of $1,500,000 under the retirement plan. The retirement benefits are compensation within the meaning of this paragraph (c)(3). Therefore, Corporation X's deduction for each annual payment of $1,500,000 for the 2023 and 2024 taxable years is subject to limitation under section 162(m)(1).

(D) *Example 3*—(*1*) *Facts.* Corporation T is a publicly held corporation for its 2021 taxable year. Corporation S is a privately held corporation for its 2021 taxable year. On January 2, 2021, Corporations S and T form

a general partnership. Under the partnership agreement, Corporations S and T each have a 50% share of the partnership's income, loss, and deductions. For the taxable year ending December 31, 2021, Employee D, a covered employee of Corporation T, performs services for the partnership, and the partnership pays $800,000 to Employee D for these services, $400,000 of which is allocated to Corporation T.

(*2*) *Conclusion.* Because Corporation T's distributive share of the partnership's $400,000 deduction is attributable to the compensation paid by the partnership for services performed by Employee D, a covered employee of Corporation T, the $400,000 is compensation within the meaning of this paragraph (c)(3) and section 162(m)(1) limits Corporation T's deduction for this expense for the 2021 taxable year. Corporation T's $400,000 share of the partnership's deduction is aggregated with Corporation T's deduction for compensation paid to Employee D, if any, in determining the amount allowable as a deduction to Corporation T for remuneration paid to Employee D for Corporation T's 2021 taxable year. See § 1.702–1(a)(8)(iii). The result is the same whether the covered employee performs services for the partnership as a common law employee, an independent contractor, or a partner, and whether the payment for services is a payment under section 707(a) or a guaranteed payment under section 707(c).

(4) *Securities Act.* The Securities Act means the Securities Act of 1933.

(5) *Exchange Act.* The Exchange Act means the Securities Exchange Act of 1934.

(6) *SEC.* The SEC means the United States Securities and Exchange Commission.

(7) *Foreign Private Issuer.* A foreign private issuer means an issuer as defined in 17 CFR 240.3b–4(c).

(8) *American Depositary Receipt (ADR).* An American Depositary Receipt means a negotiable certificate that evidences ownership of a specified number (or fraction) of a foreign private issuer's securities held by a depositary (typically, a U.S. bank).

(9) *Privately held corporation.* A privately held corporation is a corporation that is not a publicly held corporation as defined in paragraph (c)(1) of this section (without regard to paragraph (c)(1)(ii) of this section).

(d) *Corporations that become publicly held*—(1) *In general.* In the case of a corporation that was a privately held corporation and then becomes a publicly held corporation, the deduction limitation of paragraph (b) of this section applies to any compensation that is otherwise deductible for the taxable year ending on or after the date that the corporation becomes a publicly held corporation. A corporation is considered to become publicly held on the date that its registration statement becomes effective either under the Securities Act or the Exchange Act. The rules in this section apply to a partnership that becomes a publicly traded partnership that is a publicly held corporation within the meaning of paragraph (c)(1)(i) of this section.

(2) *Example.* The following example illustrates the provision of this paragraph (d).

(i) *Facts.* In 2021, Corporation E plans to issue debt securities in a public offering registered under the Securities Act. Corporation E is not required to file reports under section 15(d) of the Exchange Act with respect to any other class of securities and does not have another class of securities required to be registered under section 12 of the Exchange Act. On December 18, 2021, the Securities Act registration statement for Corporation Z's debt securities is declared effective by the SEC.

(ii) *Conclusion.* Corporation E is considered to become a publicly held corporation on December 18, 2021 because it is now required to file reports under section 15(d) of the Exchange Act. The deduction limitation of paragraph (b) of this section applies to any remuneration that is otherwise deductible for Corporation E's taxable year ending on or after December 18, 2021.

(e) *Coordination with disallowed excess parachute payments under section 280G.* The $1,000,000 limitation in paragraph (b) of this section is reduced (but not below zero) by the amount (if any) that would have been included in the compensation of the covered employee for the taxable year but for being disallowed by reason of section 280G. For example, assume that during a taxable year a corporation pays $1,500,000 to a covered employee. Of the $1,500,000, $600,000 is an excess parachute payment, as defined in section 280G(b)(1), and a deduction for that excess parachute payment is disallowed by reason of section 280G(a). Because the $1,000,000 limitation in paragraph (b) of this section is reduced by the amount of the excess parachute payment, the corporation may deduct $400,000 ($1,000,000 − $600,000), and $500,000 of the otherwise deductible amount is nondeductible by reason of section 162(m)(1). Thus $1,100,000 (of the total $1,500,000 payment) is non-deductible, reflecting the disallowance related to the excess parachute payment under section 280G and the application of section 162(m)(1).

(f) *Coordination with excise tax on specified stock compensation.* The $1,000,000 limitation in paragraph (b) of this section is reduced (but not below zero) by the amount (if any) of any payment (with respect to such employee) of the tax imposed by section 4985 directly or indirectly by the expatriated corporation (as defined in section 4985(e)(2)) or by any member of the expanded affiliated group (as defined in section 4985(e)(4)) that includes such corporation.

(g) *Transition rules*—(1) *Amount of compensation payable under a written binding contract which was in effect on November 2, 2017*—(i) *General rule.* This section does not apply to the deduction for remuneration payable under a written binding contract that was in effect on November 2, 2017, and that is not modified in any material respect on or after such date (a grandfathered amount). Instead, section 162(m), as in effect prior to its amendment by Public Law 115–97, applies to limit the deduction for such remuneration. Accordingly, because § 1.162–27 implemented section 162(m), as in effect prior to its amendment by Public Law 115–97, the rules of § 1.162–27 determine the applicability of the deduction limitation under section 162(m) with respect to the payment of a grandfathered amount. Remuneration is a grandfathered amount only to the extent that as of November 2, 2017, the corporation was and remains obligated under applicable law (for example, state contract law) to pay the remuneration under the contract if the employee performs services or satisfies the applicable vesting conditions. Accordingly, this section applies to the deduction for any amount of remuneration that exceeds the grandfathered amount if the employee performs services or satisfies the applicable vesting conditions. If a grandfathered amount and non-grandfathered amount are otherwise deductible for the same taxable year and, under the rules of § 1.162–27, the deduction of some or all of the grandfathered amount may be limited (for example, the grandfathered amount does not satisfy the requirements of § 1.162–27(e)(2) through (5) as qualified performance-based compensation), then the grandfathered amount is aggregated with the non-grandfathered amount to determine the deduction disallowance for the taxable year under section 162(m)(1) (so that the deduction limit applies to the excess of the aggregated amount over $1 million). If a portion of the remuneration payable under a contract is a grandfathered amount and a portion is subject to this section and payment under the contract is made in a series of payments, the grandfathered amount is allocated to the first payment of an amount under the contract that is otherwise deductible. If the grandfathered amount exceeds the initial payment, the excess is allocated

to the next payment of an amount under the contract that is otherwise deductible, and this process is repeated until the entire grandfathered amount has been paid.

(ii) *Contracts that are terminable or cancelable.* If a written binding contract is renewed after November 2, 2017, this section (and not § 1.162–27) applies to any payments made after the renewal. A written binding contract that is terminable or cancelable by the corporation without the employee's consent after November 2, 2017, is treated as renewed as of the earliest date that any such termination or cancellation, if made, would be effective. Thus, for example, if the terms of a contract provide that it will be automatically renewed or extended as of a certain date unless either the corporation or the employee provides notice of termination of the contract at least 30 days before that date, the contract is treated as renewed as of the date that termination would be effective if that notice were given. Similarly, for example, if the terms of a contract provide that the contract will be terminated or canceled as of a certain date unless either the corporation or the employee elects to renew within 30 days of that date, the contract is treated as renewed by the corporation as of that date (unless the contract is renewed before that date, in which case, it is treated as renewed on that earlier date). Alternatively, if the corporation will remain legally obligated by the terms of a contract beyond a certain date at the sole discretion of the employee, the contract will not be treated as renewed as of that date if the employee exercises the discretion to keep the corporation bound to the contract. A contract is not treated as terminable or cancelable if it can be terminated or canceled only by terminating the employment relationship of the employee. A contract is not treated as renewed if upon termination or cancellation of the contract the employment relationship continues but would no longer be covered by the contract. However, if the employment continues after such termination or cancellation, payments with respect to such post-termination or post-cancellation employment are not made pursuant to the contract (and, therefore, are not grandfathered amounts).

(iii) *Compensation payable under a plan or arrangement.* If a compensation plan or arrangement is binding, the deduction for the amount that the corporation is obligated to pay pursuant to written binding contract in effect on November 2, 2017, to an employee pursuant to the plan or arrangement is not subject to this section even if the employee was not eligible to participate in the plan or arrangement as of November 2, 2017, if the employee was employed on November 2, 2017, by the corporation that maintained the plan or arrangement, or the employee had the right to participate in the plan or arrangement under a written binding contract as of that date.

(iv) *Compensation subject to recovery by corporation.* If the corporation is obligated or has discretion to recover compensation paid in a taxable year only upon the future occurrence of a condition that is objectively outside of the corporation's control, then the corporation's right to recovery is disregarded for purposes of determining the grandfathered amount for the taxable year. If the condition occurs, only the amount the corporation is obligated to pay under applicable law remains grandfathered taking into account the occurrence of the condition. Whether or not the corporation exercises its discretion to recover any compensation does not affect the amount of compensation that the corporation remains obligated to pay under applicable law.

(2) *Material modifications*—(i) If a written binding contract is modified after November 2, 2017, this section (and not § 1.162–27) applies to any payments made after the modification. A material modification occurs when the contract is amended to increase the amount of compensation payable to the employee. If a written binding contract is materially modified, it is treated as a new contract entered into as of the date of the material modification. Thus, amounts received by an employee under the contract before a material modification are not affected, but amounts received subsequent to the material modification are treated as paid pursuant to a new contract, rather than as paid pursuant to a written binding contract in effect on November 2, 2017.

(ii) A modification of the contract that accelerates the payment of compensation is a material modification unless the amount of compensation paid is discounted to reasonably reflect the time value of money. If the contract is modified to defer the payment of compensation, any compensation paid or to be paid that is in excess of the amount that was originally payable to the employee under the contract will not be treated as resulting in a material modification if the additional amount is based on applying to the amount originally payable either a reasonable rate of interest or the rate of return on a predetermined actual investment as defined in § 31.3121(v)(2)–1(d)(2)(i)(B) of this chapter, (whether or not assets associated with the amount originally owed are actually invested therein) such that the amount payable by the employer at the later date will be based on the reasonable rate of interest or the actual rate of return on the predetermined actual investment (including any decrease, as well as any increase, in the value of the investment).

(iii) The adoption of a supplemental contract or agreement that provides for increased compensation, or the payment of additional compensation, is a material modification of a written binding contract if the facts and circumstances demonstrate that the additional compensation to be paid is based on substantially the same elements or conditions as the compensation that is otherwise paid pursuant to the written binding contract. However, a material modification of a written binding contract does not include a supplemental payment that is equal to or less than a reasonable cost-of-living increase over the payment made in the preceding year under that written binding contract. In addition, the failure, in whole or in part, to exercise negative discretion under a contract does not result in the material modification of that contract.

(iv) If a grandfathered amount is subject to a substantial risk of forfeiture (as defined in § 1.409A–1(d)), then a modification of the contract that results in a lapse of the substantial risk of forfeiture is not considered a material modification. For compensation received pursuant to the substantial vesting of restricted property, or the exercise of a stock option or stock appreciation right that do not provide for a deferral of compensation (as defined in § 1.409A–1(b)(5)(i) and (ii)), a modification of a written binding contract in effect on November 2, 2017, that results in a lapse of the substantial risk of forfeiture (as defined § 1.83–3(c)) is not considered a material modification.

(3) *Examples.* The following examples illustrate the provisions of this paragraph (g). For each example, assume for all relevant years that the corporation is a publicly held corporation within the meaning of paragraph (c)(1) of this section and is a calendar year taxpayer. Furthermore, assume that, for each example, if any arrangement is subject to section 409A, then the arrangement complies with section 409A, and that no arrangement is subject to section 457A.

(i) *Example 1 (Multi-year agreement for annual salary)*—(A) *Facts.* On October 2,

2017, Corporation X executed a 3-year employment agreement with Employee A for an annual salary of $2,000,000 beginning on January 1, 2018. Employee A serves as the PFO of Corporation X for the 2017 through 2020 taxable years. The agreement provides for automatic extensions after the 3-year term for additional 1-year periods, unless the corporation exercises its option to terminate the agreement within 30 days before the end of the 3-year term or, thereafter, within 30 days before each anniversary date. Termination of the employment agreement does not require the termination of Employee A's employment with Corporation X. Under applicable law, the agreement for annual salary constitutes a written binding contract in effect on November 2, 2017, to pay $2,000,000 of annual salary to Employee A for three years through December 31, 2020.

(B) *Conclusion.* If this § 1.162–33 applies, Employee A is a covered employee for Corporation X's 2018 through 2020 taxable years. Because the October 2, 2017, employment agreement is a written binding contract to pay Employee A an annual salary of $2,000,000, this section does not apply (and § 1.162–27 does apply) to the deduction for Employee A's annual salary. Pursuant to § 1.162–27(c)(2), Employee A is not a covered employee for Corporation X's 2018 through 2020 taxable years. Accordingly, the deduction for Employee A's annual salary for the 2018 through 2020 taxable years is not subject to section 162(m)(1). However, the employment agreement is treated as renewed on January 1, 2021, unless it is previously terminated, and the deduction limit of this section (and not § 1.162–27) will apply to the deduction for any payments made under the employment agreement on or after that date.

(ii) *Example 2 (Agreement for severance based on annual salary and discretionary bonus)*—(A) *Facts.* The facts are the same as in paragraph (g)(3)(i) of this section (*Example 1*), except that the employment agreement also requires Corporation X to pay Employee A severance if Corporation X terminates the employment relationship without cause within the term of the agreement. The amount of severance is equal to the sum of two times Employee A's annual salary plus two times Employee A's discretionary bonus (if any) paid within 12 months preceding termination. Under applicable law, the agreement for severance constitutes a written binding contract in effect on November 2, 2017, to pay $4,000,000 (two times Employee A's $2,000,000 annual salary) if Corporation X terminates Employee A's employment without cause within the term of the agreement.

(B) *Conclusion.* If this § 1.162–33 applies, Employee A is a covered employee for Corporation X's 2018 through 2020 taxable years. Because the October 2, 2017, employment agreement is a written binding contract to pay Employee A $4,000,000 if Employee A is terminated without cause prior to December 31, 2020, this section does not apply (and § 1.162–27 does apply) to the deduction for $4,000,000 of Employee A's severance. Pursuant to § 1.162–27(c)(2), Employee A is not a covered employee for Corporation X's 2018 through 2020 taxable years. Accordingly, the deduction for $4,000,000 of Employee A's severance is not subject to section 162(m)(1). However, the employment agreement is treated as renewed on January 1, 2021, unless it is previously terminated, and this section (and not § 1.162–27) will apply to the deduction for any payments made under the employment agreement, including for severance, on or after that date.

(iii) *Example 3 (Agreement for severance based on annual salary and discretionary bonus)*—(A) *Facts.* The facts are the same as in paragraph (g)(3)(ii) of this section (*Example 2*), except that, on October 31, 2017, Corporation X paid Employee A a discretionary bonus of $10,000. Under applicable law, the agreement for severance constitutes a written binding contract in effect on November 2, 2017, to pay $4,000,000 (two times Employee A's $2,000,000 annual salary) if Corporation X terminates Employee A's employment without cause prior to December 31, 2020, and $20,000 if Corporation X terminates Employee A's employment without cause prior to October 31, 2018. On June 30, 2018, Corporation X terminates Employee A without cause and makes a $4,020,000 severance payment to Employee A.

(B) *Conclusion.* If this § 1.162–33 applies, Employee A is a covered employee for Corporation X's 2018 taxable year. Because the October 2, 2017, agreement is a written binding contract to pay Employee A $4,000,000 if Employee A is terminated without cause prior to December 31, 2020, and $20,000 if Corporation X terminates Employee A's employment without cause prior to October 31, 2018, this section does not apply (and § 1.162–27 does apply) to the deduction for Employee A's severance payment of $4,020,000. Pursuant to § 1.162–27(c)(2), Employee A is not a covered employee for Corporation X's 2018 taxable year. Accordingly, the deduction for the entire $4,020,000 of Employee A's severance payment is not subject to section 162(m)(1).

(iv) *Example 4 (Effect of discretionary bonus payment on agreement for severance based on annual salary and discretionary bonus)*—(A) *Facts.* The facts are the same as in paragraph (g)(3)(ii) of this section (*Example 2*), except that, on May 14, 2018, Corporation X paid a $600,000 discretionary bonus to Employee A and, on April 30, 2019, terminated Employee A's employment without cause. Pursuant to the terms of the employment agreement for severance, on May 1, 2019, Corporation X made a $5,200,000 severance payment (the sum of two times the $2,000,000 annual salary and two times the $600,000 discretionary bonus) to Employee A.

(B) *Conclusion.* If this § 1.162–33 applies, Employee A is a covered employee for Corporation X's 2019 taxable year. Because the October 2, 2017, agreement is a written binding contract to pay Employee A $4,000,000 if Employee A is terminated without cause prior to December 31, 2020, this section does not apply (and § 1.162–27 does apply) to the deduction for $4,000,000 of Employee A's severance payment. Accordingly, the deduction for $4,000,000 of Employee A's severance payment is not subject to section 162(m)(1). Because the October 2, 2017, agreement is not a written binding contract to pay Employee A a discretionary bonus, the deduction for $1,200,000 (based on the discretionary bonus) of the $5,200,000 payment is subject to this section (and not § 1.162–27).

(v) *Example 5 (Effect of adjustment to annual salary on severance)*—(A) *Facts.* The facts are the same as in paragraph (g)(3)(ii) of this section (*Example 2*), except that the employment agreement provides for discretionary increases in salary and, on January 1, 2019, Corporation X increased Employee A's annual salary from $2,000,000 to $2,050,000, an increase that was less than a reasonable, cost-of-living adjustment.

(B) *Conclusion (Annual salary):* If this § 1.162–33 applies, Employee A is a covered employee for Corporation X's 2018 through 2020 taxable years. Because the October 2, 2017, agreement is a written binding contract to pay Employee A an annual salary of $2,000,000, this section does not apply (and § 1.162–27 does apply) to the deduction for Employee A's annual salary unless the change in the salary is a material modification. Even though the $50,000 increase is paid on the basis of substantially the same elements or conditions as the salary that is otherwise paid under the contract, the $50,000 increase does not constitute a material modification because it is less than or equal to a reasonable cost-of-living increase to the $2,000,000 annual salary Corporation X is required to pay under applicable law as of November 2, 2017. However, the deduction for the $50,000 increase is subject to this section (and not § 1.162–27).

(C) *Conclusion (Severance payment):* Because the October 2, 2017, agreement is a written binding contract to pay Employee A severance of $4,000,000, this section would not apply (and § 1.162–27 would apply) to the deduction for this amount of severance unless the change in the employment agreement is a material modification. Even though the $100,000 increase in severance (two times the $50,000 increase in salary) would be paid on the basis of substantially the same elements or conditions as the severance that would otherwise be paid pursuant to the written binding contract, the $50,000 increase in salary on which it is based does not constitute a material modification of the written binding contract since it is less than or equal to a reasonable cost-of-living increase. However, the deduction for the $100,000 increase in severance is subject to this section (and not § 1.162–27).

(vi) *Example 6 (Effect of adjustment to annual salary on severance)*—(A) *Facts.* The facts are the same as in paragraph (g)(3)(v) of this section (*Example 5*), except that, on January 1, 2019, Corporation X increased Employee A's annual salary from $2,000,000 to $3,000,000, an increase that exceeds a reasonable, cost-of-living adjustment.

(B) *Conclusion (Annual salary):* If this § 1.162–33 applies, Employee A is a covered employee for Corporation X's 2018 through 2020 taxable years. Because the October 2, 2017, agreement is a written binding contract to pay Employee A an annual salary of $2,000,000, this section does not apply (and

§ 1.162–27 does apply) to the deduction for Employee A's annual salary unless the change in the employment agreement is a material modification. The $1,000,000 increase is a material modification of the written binding contract because the additional compensation is paid on the basis of substantially the same elements or conditions as the compensation that is otherwise paid pursuant to the written binding contract, and it exceeds a reasonable, annual cost-of-living increase from the $2,000,000 annual salary for 2018 that Corporation X is required to pay under applicable law as of November 2, 2017. Because the written binding contract is materially modified as of January 1, 2019, the deduction for all annual salary paid to Employee A in 2019 and thereafter is subject to this section (and not § 1.162–27).

(C) *Conclusion (Severance payment):* Because the October 2, 2017, agreement is a written binding contract to pay Employee A severance of $4,000,000, this section would not apply (and § 1.162–27 would apply) to the deduction for this amount of severance unless the change in the employment agreement is a material modification. The additional $2,000,000 (two times the $1,000,000 increase in annual salary) constitutes a material modification of the written binding contract because the $1,000,000 increase in salary on which it is based constitutes a material modification of the written binding contract since it exceeds a reasonable cost-of-living increase from the $2,000,000 annual salary for 2018 that Corporation X is required to pay under applicable law as of November 2, 2017. Because the agreement is materially modified as of January 1, 2019, the deduction for any amount of severance payable to Employee A under the severance agreement is subject to this section (and not § 1.162–27).

(vii) *Example 7 (Elective deferral of an amount that corporation was obligated to pay under applicable law)*—(A) *Facts.* The facts are the same as in paragraph (g)(3)(i) of this section (*Example 1*), except that, on December 15, 2018, Employee A makes a deferral election under a NQDC plan to defer $200,000 of annual salary earned and payable in 2019. Pursuant to the deferred compensation agreement, the $200,000, including earnings, is to be paid in a lump sum at Employee A's separation from service. The earnings are based on the Standard & Poor's 500 Index. Under applicable law, pursuant to the written binding contract in effect on November 2, 2017, (and absent the deferral agreement) Corporation X would have been obligated to pay $200,000 to Employee A in 2019, but is not obligated to pay any earnings on the $200,000 deferred pursuant to the deferral election Employee A makes on December 15, 2018. Employee A separates from service on December 15, 2020. On December 15, 2020, Corporation X pays $250,000 (the deferred $200,000 of salary plus $50,000 in earnings).

(B) *Conclusion.* If this § 1.162–33 applies, Employee A is a covered employee for Corporation X's 2020 taxable year. Employee A's deferred compensation agreement is not a material modification of the written binding contract in effect on November 2, 2017, because the earnings to be paid under the deferred compensation agreement are based on a predetermined actual investment (as defined in § 31.3121(v)(2)–1(d)(2)(i)(B)). The deduction for the $50,000 of earnings to be paid that exceed the amount originally payable to Employee A under the written binding contract ($200,000 of salary) are subject to this section (and not § 1.162–27). This section does not apply (and § 1.162–27 does apply) to the deduction for the $200,000 portion of the $250,000 payment because Corporation X was obligated under applicable law to pay as of November 2, 2017. Pursuant to § 1.162–27(c)(2), Employee A is not a covered employee for Corporation X's 2020 taxable year; thus, the deduction for the $200,000 payment is not subject to section 162(m)(1).

(viii) *Example 8 (Compensation subject to mandatory recovery by corporation)*—(A) *Facts.* Employee B serves as the PFO of Corporation Z for its 2017 through 2019 taxable years. On October 2, 2017, Corporation Z executed a bonus agreement with Employee B that provides for a performance bonus of $3,000,000 to be paid on May 1, 2019, if Corporation Z's net earnings increase by at least 10% for its 2018 taxable year based on the financial statements filed with the SEC. The agreement prohibits Corporation Z from reducing the amount of the bonus for any reason but provides that, if the bonus is paid and subsequently the financial statements are restated to show that the net earnings did not increase by at least 10%, then Corporation Z shall recover the $3,000,000 from Employee B within six months of the restatement. Under applicable law, the agreement for the performance bonus constitutes a written binding contract in effect on November 2, 2017, to pay $3,000,000 to Employee B if Corporation Z's net earnings increase by at least 10% for its 2018 taxable year based on the financial statements filed with the SEC. On May 1, 2019, Corporation Z pays $3,000,000 to Employee B because its net earnings increased by at least 10% of its 2018 taxable year.

(B) *Conclusion.* If this § 1.162–33 applies, Employee B is a covered employee for Corporation Z's 2019 taxable year. The terms of the contract providing for recovery of the $3,000,000 do not preclude Corporation Z from being contractually obligated under applicable law to pay $3,000,000 to Employee B if the net earnings increase by at least 10% for its 2018 taxable year. Because the October 2, 2017, agreement is a written binding contract to pay Employee B $3,000,000 if Corporation Z's net earnings increase by at least 10% for its 2018 taxable year based on the financial statements filed with the SEC, this section does not apply (and § 1.162–27 does apply) to the deduction for the $3,000,000 payment. Pursuant to § 1.162–27(c)(2), Employee B is not a covered employee for Corporation Z's 2019 taxable year, so the deduction for the $3,000,000 payment is not subject to section 162(m)(1).

(ix) *Example 9 (Compensation subject to discretionary recovery by corporation)*—(A) *Facts.* The facts are the same as in paragraph (g)(3)(viii) of this section (*Example 8*), except that the agreement provides that, if the financial statements are restated to show that the net earnings did not increase by at least 10%, then Corporation Z may, in its discretion, recover all or a portion of the $3,000,000 bonus from Employee B within six months of the restatement. Under applicable law, the agreement constitutes a written binding contract in effect on November 2, 2017, to pay $3,000,000 to Employee B if the conditions are met. However, under applicable law, taking into account the employer's ability to exercise discretion and the employer's past exercise of such discretion with respect to a recovery in the event of an earnings restatement, on November 2, 2017, the bonus plan is a written binding contract only with respect to $500,000 if Corporation Z's financial statements are restated to show that the net earnings did not increase by at least 10%. On May 1, 2019, Corporation Z pays $3,000,000 to Employee B. On July 1, 2019, Corporation Z's financial statements are restated to show that its net earnings did not increase by at least 10% for its 2018 taxable year. On July 30, 2019, Corporation Z recovers $1,000,000 from Employee B.

(B) *Conclusion.* If this § 1.162–33 applies, Employee B is a covered employee for Corporation Z's 2019 taxable year. Because the October 2, 2107, agreement is a written binding contract to pay Employee B $3,000,000 if the applicable conditions are met, this section does not apply (and § 1.162–27 does apply) to the deduction for the $3,000,000 provided Corporation Z's financial statements are not restated to show that its net earnings did not increase by at least 10%. However, because Corporation Z's financial statements were so restated, then, on November 2, 2017, under applicable law, taking into account the employer's ability to exercise discretion and the employer's past exercise of such discretion, the bonus plan constitutes a written binding contract to pay only $500,000. Because Corporation Z recovered $1,000,000 of the $3,000,000 payment, this section does not apply (and § 1.162–27 does apply) to the deduction for $500,000 of the $2,000,000 that Corporation Z did not recover. Pursuant to § 1.162–27(c)(2), Employee B is not a covered employee for Corporation Z's 2019 taxable year, so the deduction for the $500,000 is not subject to section 162(m)(1). The deduction for the remaining $1,500,000 is subject to this section (and not § 1.162–27).

(x) *Example 10 (Compensation subject to discretionary recovery by corporation based on a condition)*—(A) *Facts.* The facts are the same as in paragraph (g)(3)(viii) of this section (*Example 8*), except that the agreement does not include a provision regarding an earnings restatement. Instead, the agreement provides that Corporation Z may, in its discretion, require Employee B to repay the $3,000,000 bonus if, within three years from the date of payment, Employee B engages in willful or reckless behavior that has a material adverse impact on Corporation Z, or is convicted of, or pleads *nolo contendre* or guilty to a felony. Under applicable law, the agreement constitutes a written binding contract in effect on November 2, 2017, to pay $3,000,000 to Employee B if the conditions are met.

However, under applicable law, taking into account the employer's ability to exercise discretion and the employer's past exercise of such discretion, if conditions arise to permit Corporation Z to recover the $3,000,000 bonus from Employee B, then the bonus plan established on October 2, 2017, constitutes a written binding contract to pay only $2,000,000 to Employee B if Corporation Z's net earnings increase by at least 10% for its 2018 taxable year based on the financial statements filed with the SEC. On May 1, 2019, Corporation Z pays $3,000,000 to Employee B. Prior to May 1, 2022, Employee B does not engage in willful or reckless behavior that has a material adverse impact on Corporation Z, and is not convicted of, or plead *nolo contendre* or guilty to a felony.

(B) *Conclusion.* If this § 1.162–33 applies, Employee B is a covered employee for Corporation Z's 2019 taxable year. Because the October 2, 2017, agreement is a written binding contract under applicable law to pay Employee B $3,000,000 if the applicable conditions are met, this section does not apply (and § 1.162–27 does apply) to the deduction for the $3,000,000. Pursuant to § 1.162–27(c)(2), Employee B is not a covered employee for Corporation Z's 2019 taxable year, so the deduction for the $3,000,000 is not subject to section 162(m)(1).

(xi) *Example 11 (Compensation subject to discretionary recovery by corporation based on a condition)*—(A) *Facts.* The facts are the same as in paragraph (g)(3)(x) of this section (*Example 10*), except that, on April 1, 2021, Employee B pleads guilty to a felony. Because Employee B pled guilty to a felony prior to May 1, 2022, Corporation Z has discretion to recover the $3,000,000 bonus from Employee B. Corporation Z chooses not to recover any amount of the $3,000,000 from Employee B.

(B) *Conclusion.* If this § 1.162–33 applies, Employee B is a covered employee for Corporation Z's 2019 taxable year. Because Employee B pled guilty to a felony prior to May 1, 2022, the bonus plan constitutes a written binding contract in effect on November 2, 2017, to pay only $2,000,000 to Employee B if the applicable conditions were met. Accordingly, this section does not apply (and § 1.162–27 does apply) to the deduction for the $2,000,000 portion of the $3,000,000. Pursuant to § 1.162–27(c)(2), Employee B is not a covered employee for Corporation Z's 2019 taxable year; thus, the deduction for the $2,000,000 portion of the $3,000,000 is not subject to section 162(m)(1). The deduction for the remaining $1,000,000 of the $3,000,000 is subject to this section (and not § 1.162–27).

(xii) *Example 12 (Election to defer bonus)*—(A) *Facts.* On December 31, 2015, Employee C, an employee of Corporation Y, makes an election under a NQDC plan to defer the entire amount that would otherwise be paid to Employee C on December 31, 2016, under Corporation Y's 2016 annual bonus plan. Pursuant to the NQDC plan, the earnings on the deferred amount may be based on either of the following two investment choices (but not the greater of the two): Annual total shareholder return for Corporation Y or Moody's Average Corporate Bond Yield. On a prospective basis, Employee C may change the investment measure. The deferred amount and the earnings thereon are to be paid in a lump sum at Employee C's separation from service. Employee C initially elects to have earnings based on annual total shareholder return for Corporation Y. On December 31, 2018, Employee C elects to have earnings based on Moody's Average Corporate Bond Yield. The bonus plan provides that Corporation Y may not reduce the bonus or any applicable earnings. Employee C earns a $200,000 bonus for the 2016 taxable year. Under applicable law, the deferred compensation agreement constitutes a written binding contract in effect on November 2, 2017, to pay the $200,000 bonus plus earnings. Specifically, Corporation Y is obligated to pay earnings on the $200,000 deferred pursuant to the deferral election Employee C makes on December 31, 2015. On January 1, 2018, Employee C is promoted to serve as PEO of Corporation Y and becomes a covered employee for the first time. On December 15, 2020, Employee C separates from service and Corporation Y pays $225,000 (the deferred $200,000 bonus plus $25,000 in earnings) to Employee C.

(B) *Conclusion.* If this § 1.162–33 applies, Employee C is a covered employee for Corporation Y's 2020 taxable year because Employee C served as the PEO of Corporation Y during the taxable year. The December 31, 2015, agreement is a written binding contract to pay the $200,000 bonus plus earnings. Furthermore, Employee C's December 31, 2018, election to change the earnings measure does not constitute a material modification. Accordingly, this section does not apply (and § 1.162–27 does apply) to the deduction for the $225,000 payment from Corporation Y to Employee C. Pursuant to § 1.162–27(c)(2), Employee C is not a covered employee because Employee C did not serve as the PEO at the close of the Corporation Y's taxable year, so the deduction for the $225,000 payment is not subject to section 162(m)(1).

(xiii) *Example 13 (Nonaccount balance plan)*—(A) *Facts.* On November 2, 2012, Employee D commences employment with Corporation W as its PFO. Employee D separates from service as PFO on January 7, 2020. For each taxable year, Employee D receives a base salary of $2,000,000. On January 1, 2016, Corporation W and Employee D enter into a NQDC arrangement that is a nonaccount balance plan (as defined in § 1.409A–1(c)(2)(i)(C). Under the terms of the plan, Corporation W will pay Employee D a lump sum payment equal to 25% of Employee D's base salary in the year of separation from service multiplied by 1/12 for each month of service. The plan provides that this payment will be made six months after separation from service and that Corporation W may, at any time, amend the plan to reduce the amount of future benefits; however, Corporation W may not reduce the benefit accrued prior to the date of the amendment. Furthermore, under the terms of the plan and in accordance with § 1.409A–3(j)(4)(ix)(C)(3), if Corporation W terminates the plan, the payments due under the plan may be accelerated to any date no earlier than 12 months after the date of termination and no later than 24 months after the date of termination. Under applicable law, if an employer terminates a NQDC plan and does not make a payment until 12 months after the date of termination, then, to reflect the time value of money, the employer is obligated to pay a reasonable rate of interest (compounded annually) on any benefit accrued under the plan at the date of termination until the date of payment. Assume for this purpose that for all applicable periods 3% is a reasonable rate of interest. As of November 2, 2017, Employee D has 60 months of service for Corporation W as calculated under the NQDC plan terms. Under applicable law, the plan constitutes a written binding contract in effect on November 2, 2017, to pay $2,575,000. The $2,575,000 is equal to the amount Corporation W is obligated to pay if it terminated the plan on November 2, 2017 (25% × $2,000,000 × 1/12 × 60 months of service ($2,500,000), plus a 3% reasonable rate of interest that the $2,500,000 earns after plan termination ($75,000)). On January 7, 2020, when Employee D separates from service, Corporation D pays $3,583,333.33 (25% × $2,000,000 × 1/12 × 86 months of service).

(B) *Conclusion.* If this § 1.162–33 applies, Employee D is a covered employee for Corporation W's 2020 taxable year. Because, as of November 2, 2017, the plan is a written binding contract with respect to $2,575,000, this section does not apply (and § 1.162–27 does apply) to the deduction for the $2,575,000 portion of the $3,583,333.33 payment. Pursuant to § 1.162–27(c)(2), Employee D is not a covered employee, so the deduction for the $2,575,000 portion of the $3,583,333.33 payment is not subject to section 162(m)(1). The deduction for the remaining $1,008,333.33 portion of the $3,583,333.33 payment is subject to this section (and not § 1.162–27).

(xiv) *Example 14 (Nonaccount balance plan with offset)*—(A) *Facts.* The facts are the same as in paragraph (g)(3)(xiii) of this section (*Example 13*), except that the plan provides that the amount to be paid to an employee is decreased by the employee's account balance in Corporation W's 401(k) plan on the date of separation from service. The terms of the offset comply with section 409A. On November 2, 2017, and July 7, 2020, Employee D's account balance in the 401(k) plan is $500,000 and $600,000, respectively. Under applicable law, the NQDC plan constitutes a written binding contract in effect on November 2, 2017, to pay $2,075,000, which is equal to the amount of remuneration Corporation W is obligated to pay if it terminated the NQDC plan on November 2, 2017. The $2,075,000 is the difference between the $500,000 401(k) plan account balance on November 2, 2017, and the $2,500,000 accumulated benefit (25% × $2,000,000 × 1/12 × 60 months of service), plus the 3% interest that the $2,500,000 earns after plan termination ($75,000). On July 7, 2020, under the terms of the NQDC plan, Corporation D pays $2,983,333.33 (the difference between the $600,000 401(k) account balance on July 7, 2020, and $3,583,333.33 (25% × $2,000,000 × 1/12 × 86 months of service)).

(B) *Conclusion.* If this § 1.162–33 applies, Employee D is a covered employee for Corporation W's 2020 taxable year. Because, as of November 2, 2017, the plan is a written binding contract with respect to $2,075,000, this section does not apply (and § 1.162–27 does apply) to the deduction for $2,075,000 of the $2,983,333.33 payment. Pursuant to § 1.162–27(c)(2), Employee D is not a covered employee, so the deduction for the $2,075,000 portion of the $2,983,333.33 payment is not subject to section 162(m)(1). The deduction for the remaining $908,333.33 portion of the $2,983,333.33 payment is subject to this section (and not § 1.162–27).

(xv) *Example 15 (Nonaccount balance plan)*—(A) *Facts.* The facts are the same as in paragraph (g)(3)(xiii) of this section (*Example 13*), except that the nonaccount balance plan provides that Corporation W will pay Employee D a lump sum payment of $5,000,000 on November 7, 2020, if Employee D provides services from January 1, 2016, through June 30, 2017. Under applicable law, the plan constitutes a written binding contract in effect on November 2, 2017, to pay $4,712,979.55, which is the sum of $4,575,708.30 (the amount of remuneration Corporation W is obligated to pay if it reduced the amount of future benefits to $0 on November 2, 2017) and the increase in present value of $137,271.55 (the difference between $4,575,708.30 and $4,712,979.55 (the present value of $5,000,000 on November 2, 2018)). On November 7, 2020, Corporation W makes a lump sum payment of $5,000,000 to Employee D.

(B) *Conclusion.* If this § 1.162–33 applies, Employee D is a covered employee for Corporation W's 2020 taxable year. Because, as of November 2, 2017, the plan is a written binding contract with respect to $4,712,979.55, this section does not apply (and § 1.162–27 does apply) to the deduction for the $4,712,979.55 portion of the $5,000,000 payment. Pursuant to § 1.162–27(c)(2), Employee D is not a covered employee, so the deduction for the $4,712,979.55 portion of the $5,000,000 payment is not subject to section 162(m)(1). The deduction for the remaining $287,020.45 portion of the $5,000,000 payment is subject to this section (and not § 1.162–27).

(xvi) *Example 16 (Performance bonus plan with negative discretion)*—(A) *Facts.* Employee E serves as the PEO of Corporation V for the 2017 and 2018 taxable years. On February 1, 2017, Corporation V establishes a bonus plan, under which Employee E will receive a cash bonus of $1,500,000 if a specified performance goal is satisfied. The compensation committee retains the right, if the performance goal is met, to reduce the bonus payment to no less than $400,000 if, in its judgment, other subjective factors warrant a reduction. On November 2, 2017, under applicable law which takes into account the employer's ability to exercise negative discretion, the bonus plan established on February 1, 2017, constitutes a written binding contract to pay $400,000. On March 1, 2018, the compensation committee certifies that the performance goal was satisfied, but exercises its discretion to reduce the award to $500,000. On April 1, 2018, Corporation V pays $500,000 to Employee E. The payment satisfies the requirements of § 1.162–27(e)(2) through (5) as qualified performance-based compensation.

(B) *Conclusion.* If this § 1.162–33 applies, Employee E is a covered employee for Corporation V's 2018 taxable year. Because the February 1, 2017, plan is a written binding contract to pay Employee E $400,000 if the performance goal is satisfied, this section does not apply (and § 1.162–27 does apply) to the deduction for the $400,000 portion of the $500,000 payment. Furthermore, the failure of the compensation committee to exercise its discretion to reduce the award further to $400,000, instead of $500,000, does not result in a material modification of the contract. Pursuant to § 1.162–27(e)(1), the deduction for the $400,000 payment is not subject to section 162(m)(1) because the payment satisfies the requirements of § 1.162–27(e)(2) through (5) as qualified performance-based compensation. The deduction for the remaining $100,000 of the $500,000 payment is subject to this section (and not § 1.162–27) and therefore the status as qualified performance-based compensation is irrelevant to the application of section 162(m)(1) to this remaining portion.

(xvii) *Example 17 (Account balance plan)*—(A) *Facts.* Employee F serves as the PFO of Corporation U for the 2016 through 2018 taxable years. On January 4, 2016, Corporation U and Employee F enter into a NQDC arrangement that is an account balance plan. Under the terms of the plan, Corporation A will pay Employee X's account balance on June 30, 2019, but only if Employee F continues to serve as the PFO through December 31, 2018. Pursuant to the terms of the plan, Corporation U credits $100,000 to Employee F's account annually on December 31 of each year for three years beginning on December 31, 2016, and credits earnings and losses on the account balance daily. The plan also provides that Corporation U may, in its discretion and at any time, amend the plan either to stop or to reduce the amount of future credits; however, Corporation U may not reduce Employee F's account balance credited before the date of any such amendment. Under the terms of the plan and in accordance with § 1.409A–3(j)(4)(ix)(C)(3), if Corporation U terminates the plan, the payment under the plan may be accelerated, but may not be made within 12 months of the date of termination. Under the plan terms and applicable law, if Corporation U terminates the plan, then it is obligated to pay any earnings that accumulated through the date of payment. Under applicable law, the plan constitutes a written binding contract in effect on November 2, 2017, to pay $100,000 of remuneration that Corporation U credited to the account balance on December 31, 2016, plus any earnings credited on that amount through November 2, 2018, which is equal to the amount Corporation U is obligated to pay if it terminates the plan on November 2, 2017 (*i.e.,* after that date, Corporation U is obligated to credit earnings but not any further contributions). On November 2, 2017, Employee E's account balance under the plan is $110,000. On November 2, 2018, Employee E's account balance under the plan would be $115,000 (the $110,000 account balance on November 2, 2017, plus $5,000 earnings on that amount). On June 30, 2019, Corporation U pays Employee F $350,000, the account balance on June 30, 2019.

(B) *Conclusion.* If this § 1.162–33 applies, Employee F is a covered employee for Corporation U's 2019 taxable year because Employee F served as the PFO of Corporation U during the taxable year. Because the January 4, 2016, agreement constitutes a written binding contract to pay $115,000, this section does not apply (and § 1.162–27 does apply) to the deduction for the $115,000 portion of the $350,000. Pursuant to § 1.162–27(c)(2), Employee F is not a covered employee of Corporation U for the 2019 taxable year, so the deduction for the $115,000 portion of the $350,000 is not subject to section 162(m)(1). The deduction for the remaining $235,000 portion of the payment is subject to this section (and not § 1.162–27).

(xviii) *Example 18 (Effect of increasing credits to an account balance plan)*—(A) *Facts.* The facts are the same as in paragraph (g)(3)(xvii) of this section (*Example 17*), except that on January 1, 2018, Corporation U increased the amount it would credit to Employee F's account on December 31, 2018 to $200,000. The amount of the increase exceeds a reasonable, annual cost-of-living increase. On June 30, 2019, Corporation U pays Employee F the account balance of $455,000 (including earnings).

(B) *Conclusion.* If this § 1.162–33 applies, Employee F is a covered employee for Corporation U's 2019 taxable year. The January 1, 2018 increase in the amount credited to the account balance plan is a material modification of the plan because the additional compensation (the excess of $200,000 over $100,000) credited under the plan is credited on the basis of substantially the same elements or conditions as the compensation that would otherwise be credited pursuant to the plan ($100,000), and it exceeds a reasonable, annual cost-of-living increase. Because the plan is materially modified as of January 1, 2018, and all payments under the plan are made on or after January 1, 2018, the deduction for all payments under the plan is subject to this section (and not § 1.162–27).

(xix) *Example 19 (Equity-based compensation with underlying grants made prior to November 2, 2017)*—(A) *Facts.* On January 2, 2017, Corporation T executed a 4-year employment agreement with Employee G to serve as its PEO, and Employee G serves as the PEO for the four-year term. Pursuant to the employment agreement, on January 2, 2017, Corporation T executed a grant agreement and granted to Employee G nonqualified stock options to purchase 1,000 shares of Corporation T stock, stock appreciation rights (SARs) on 1,000 shares, and 1,000 shares of Corporation T restricted stock. On the date of grant, the stock options had no readily ascertainable fair market value as defined in § 1.83–7(b), and neither the stock options nor the SARs provided for a deferral of compensation under §§ 1.409A–1(b)(5)(i)(A) and (B). The stock options,

SARs, and shares of restricted stock are subject to a substantial risk of forfeiture and all substantially vest on January 2, 2020. Employee G may exercise the stock options and the SARs at any time from January 2, 2020, through January 2, 2027. On January 2, 2020, Employee G exercises the stock options and the SARs, and the 1,000 shares of restricted stock become substantially vested (as defined in § 1.83–3(b)). The grant agreement pursuant to which grants of the stock options, SARs, and shares of restricted stock are made constitutes a written binding contract under applicable law. The compensation attributable to the stock options and the SARs satisfy the requirements of § 1.162–27(e)(2) through (5) as qualified performance-based compensation.

(B) *Conclusion.* If this § 1.162–33 applies, Employee G is a covered employee for Corporation T's 2020 taxable year. Because the January 2, 2017, grant agreement constitutes a written binding contract, this section does not apply (and § 1.162–27 does apply) to the deduction for compensation received pursuant to the exercise of the stock options and the SARs, or the restricted stock becoming substantially vested (as defined in § 1.83–3(b)). Pursuant to § 1.162–27(e)(1), the deduction attributable to the stock options and the SARs is not subject to section 162(m)(1) because the compensation satisfies the requirements of § 1.162–27(e)(2) through (5) as qualified performance-based compensation. However, the deduction attributable to the restricted stock is subject to section 162(m)(1) because the compensation does not satisfy the requirements of § 1.162–27(e)(2) through (5) as qualified performance-based compensation.

(xx) *Example 20 (Equity-based compensation with underlying grants made prior to November 2, 2017 for which vesting is accelerated)*—(A) *Facts.* The facts are the same as in paragraph (g)(3)(xix) of this section (*Example 19*), except that, on December 31, 2018, Corporation T modifies the grant agreement pursuant to which grants are made to provide that the stock options, SARs, and shares of Corporation T restricted stock are vested as of January 2, 2019. On January 3, 2019, Employee G exercises the stock options and the SARs.

(B) *Conclusion.* If this § 1.162–33 applies, Employee G is a covered employee for Corporation T's 2019 taxable year. The modification of the January 2, 2017, grant agreement is not a material modification. Because the January 2, 2017, agreement under which grants were made constitutes a written binding contract, this section does not apply (and § 1.162–27 does apply) to the deduction for compensation received pursuant to the exercise of the stock options and the SARs, or the restricted stock becoming vested. Pursuant to § 1.162–27(e)(2)(iii)(B), the acceleration of substantial vesting of the stock options and SARs is not an impermissible increase in compensation to disqualify the compensation attributable to the stock options and SARs from satisfying the requirements of § 1.162–27(e)(2) through (5) as qualified performance-based compensation, so the deduction attributable to the stock options and the SARs is not subject to section 162(m)(1). However, the deduction attributable to the restricted stock is subject to section 162(m)(1) because the compensation does not satisfy the requirements of § 1.162–27(e)(2) through (5) as qualified performance-based compensation.

(xxi) *Example 21 (Plan in which an employee is not a participant on November 2, 2017)*—(A) *Facts.* On October 2, 2017, Employee H executes an employment agreement with Corporation Y to serve as its PFO, and commences employment with Corporation Y. The employment agreement, which is a written binding contract under applicable law, provides that if Employee H continues in his position through April 1, 2018, Employee H will become eligible to participate in the NQDC plan of Corporation Y and that Employee H's benefit accumulated on that date will be $3,000,000. On April 1, 2021, Employee H receives a payment of $4,500,000 (the increase from $3,000,000 to $4,500,000 is not a result of a material modification as defined in paragraph (g)(2) of this section), which is the entire benefit accumulated under the plan through the date of payment.

(B) *Conclusion.* If this § 1.162–33 applies, Employee H is a covered employee for Corporation Y's 2021 taxable year. Even though Employee H was not eligible to participate in the NQDC plan on November 2, 2017, Employee H had the right to participate in the plan under a written binding contract as of that date. Because the amount required to be paid pursuant to the written binding contract is $3,000,000, this section does not apply (and § 1.162–27 does apply) to the deduction for the $3,000,000 portion of the $4,500,000. Pursuant to § 1.162–27(c)(2), Employee H is not a covered employee of Corporation Y for the 2021 taxable year. Accordingly, the deduction for the $3,000,000 portion of the $4,500,000 is not subject to section 162(m)(1). The deduction for the remaining $1,500,000 portion of the payment is subject to this section (and not § 1.162–27).

(xxii) *Example 22 (Material modification of annual salary)*—(A) *Facts.* On January 2, 2017, Corporation R executed a 5-year employment agreement with Employee I to serve as Corporation R's PFO, providing for an annual salary of $1,800,000. The agreement constitutes a written binding contract under applicable law. In 2017 and 2018, Employee I receives the salary of $1,800,000 per year. In 2019, Corporation R increases Employee I's salary by $40,000, which is less than a reasonable cost-of-living increase from $1,800,000. On January 1, 2020, Corporation R increases Employee I's salary to $2,400,000. The $560,000 increase exceeds a reasonable, annual cost-of-living increase from $1,840,000.

(B) *Conclusion ($1,840,000 Payment in 2019).* If this § 1.162–33 applies, Employee I is a covered employee for Corporation R's 2018 through 2020 taxable years. Because the January 1, 2017, agreement is a written binding contract to pay Employee I an annual salary of $1,800,000, this section does not apply (and § 1.162–27 does apply) to the deduction for Employee I's annual salary unless the change in the employment agreement is a material modification. Pursuant to § 1.162–27(c)(2), Employee I is not a covered employee of Corporation R for the 2019 taxable year, so the deduction for the $1,800,000 salary is not subject to section 162(m)(1). Even though the $40,000 increase is made on the basis of substantially the same elements or conditions as the salary, the $40,000 increase does not constitute a material modification of the written binding contract because the $40,000 is less than or equal to a reasonable cost-of-living increase applied to the $1,800,000 annual salary Corporation R owes under the agreement. However, the deduction for the $40,000 increase is subject to this section (and not § 1.162–27).

(C) *Conclusion (Salary increase to $2,400,000 in 2020).* The $560,000 increase in salary in 2020 is a material modification of the written binding contract because the additional compensation is paid on the basis of substantially the same elements or conditions as the salary, and it exceeds a reasonable, annual cost-of-living increase from $1,840,000. Because the written binding contract is materially modified as of January 1, 2020, the deduction for all salary paid to Employee I on and after January 1, 2020 is subject is subject to this section (and not § 1.162–27).

(xxiii) *Example 23 (Additional payment not considered a material modification)*—(A) *Facts.* The facts are the same as in paragraph (g)(3)(xxii) of this section (*Example 22*), except that instead of an increase in salary, in 2020 Employee I receives a restricted stock grant subject to Employee I's continued employment for the balance of the contract.

(B) *Conclusion.* The restricted stock grant is not a material modification of the written binding contract because any additional compensation paid to Employee I under the grant is not paid on the basis of substantially the same elements and conditions as Employee I's salary. However, the deduction attributable to the restricted stock grant is subject to this section (and not § 1.162–27).

(xxiv) *Example 24 (Modification of written binding contract to provide for accelerated vesting)*—(A) *Facts.* Employee J serves as the PFO of Corporation Q for the 2017 through 2020 taxable years. On July 14, 2017, Corporation Q and Employee J enter into an agreement providing that Corporation Q will pay $2,000,000 to Employee J if Employee J continues to serve as the PFO until the third anniversary of the agreement (July 14, 2020). The agreement provides that Corporation Q will make the payment on the date Employee J meets the service requirement. The right to the $2,000,000 payment is subject to a substantial risk of forfeiture as defined in § 1.409A–1(d). Under applicable law, the plan constitutes a written binding contract in effect on November 2, 2017, to pay $2,000,000 to Employee J if Employee J serves as the PFO through July 14, 2020. On November 29, 2019, Corporation Q modifies the written binding contract to provide for substantial vesting of the $2,000,000 on that date and pays the $2,000,000 to Employee J.

(B) *Conclusion.* If this § 1.162–33 applies, Employee J is a covered employee for Corporation Q's 2019 taxable year because

Employee J served as the PFO of Corporation Q during the taxable year. Because the July 14, 2017, agreement constitutes a written binding contract to pay $2,000,000, this section does not apply (and § 1.162–27 does apply) to the deduction for the $2,000,000 unless the contract is materially modified. Pursuant to § 1.162–27(c)(2), Employee J is not a covered employee of Corporation Q for the 2019 taxable year. The change in terms of the contract on November 29, 2019, to accelerate vesting but to otherwise pay the amounts under the original terms is not a material modification. Accordingly, the deduction for the $2,000,000 is not subject to section 162(m)(1).

(h) *Effective/Applicability dates*—(1) *Effective date.* These regulations are effective on [DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**].

(2) *Applicability dates*—(i) *General applicability date.* Except as otherwise provided in paragraph (h)(2)(ii) of this section, these regulations apply to taxable years beginning on or after [DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**].

(ii) *Special applicability dates*—(A) *Definition of covered employee.* The definition of covered employee in paragraph (c)(2)(i) of this section applies to taxable years ending on or after September 10, 2018. However, for a corporation whose fiscal year and taxable year do not end on the same date, the rule in paragraph (c)(2)(i)(B) requiring the determination of the three most highly compensated executive officers to be made pursuant to the rules under the Exchange Act applies to taxable years ending on or after December 20, 2019.

(B) *Definition of predecessor of a publicly held corporation*—(*1*) *Publicly held corporations that become privately held.* The definition of predecessor of a publicly held corporation in paragraph (c)(2)(ii)(A) of this section applies to any publicly held corporation that becomes a privately held corporation for a taxable year beginning after December 31, 2017, and, subsequently, again becomes a publicly held corporation on or after [DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**]. Accordingly, the definition of predecessor of a publicly held corporation in paragraph (c)(2)(ii)(A) of this section does not apply to any publicly held corporation that became a privately held corporation for a taxable year beginning before January 1, 2018, with respect to the earlier period as a publicly held corporation; or a publicly held corporation that becomes a privately held corporation for a taxable year beginning after December 31, 2017, and, subsequently, again becomes a publicly held corporation before [DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**].

(*2*) *Corporate transactions.* The definition of predecessor of a publicly held corporation in paragraphs (c)(2)(ii)(B) through (H) of this section applies to corporate transactions that occur (as provided in the transaction timing rule of paragraph (c)(2)(ii)(I) of this section) on or after [DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**].

(C) *Definition of compensation.* The definition of compensation provided in paragraph (c)(3)(ii) of this section (relating to allocable shares of partnership deductions for compensation paid) applies to any deduction for compensation that is otherwise allowable for a taxable year ending on or after December 20, 2019. However, this definition of compensation does not apply to compensation paid pursuant to a written binding contract that is in effect on December 20, 2019 and that is not materially modified after that date. For purposes of this paragraph (h)(3), written binding contract and material modification have the same meanings as provided in paragraphs (g)(1) and (g)(2) of this section.

(D) *Corporations that become publicly held.* The rule in paragraph (d) of this section (providing that the deduction limitation of paragraph (b) of this section applies to a deduction for any compensation that is otherwise deductible for the taxable year ending on or after the date that a privately held corporation becomes a publicly held corporation) applies to corporations that become publicly held on or after December 20, 2019. A privately held corporation that becomes a publicly held corporation before December 20, 2019 may rely on the transition rules provided in § 1.162–27(f)(1) until the earliest of the events provided in § 1.162–27(f)(2).

(E) *Transition rules.* The transition rules in paragraphs (g)(1) and (2) of this section (providing that this section does not apply to remuneration payable under a written binding contract which was in effect on November 2, 2017, and which is not modified in any material respect on or after such date) apply to taxable years ending on or after September 10, 2018.

■ **Par. 4.** Section 1.338–1 is amended by revising paragraph (b)(2)(i) to read as follows:

§ 1.338–1 General principles, status of old target and new target.

* * * * *

(b) * * *

(2) * * *

(i) The rules applicable to employee benefit plans (including those plans described in sections 79, 104, 105, 106, 125, 127, 129, 132, 137, and 220), qualified pension, profit-sharing, stock bonus and annuity plans (sections 401(a) and 403(a)), simplified employee pensions (section 408(k)), tax qualified stock option plans (sections 422 and 423), welfare benefit funds (sections 419, 419A, 512(a)(3), and 4976), voluntary employee benefit associations (section 501(c)(9) and the regulations thereunder (26 CFR 1.501(c)(9)–1 through 1.501(c)(9)–8)) and certain excessive employee remuneration (section 162(m) and the regulations thereunder (26 CFR 1.162–27 and § 1.162–31));

* * * * *

Sunita Lough,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2019–26116 Filed 12–16–19; 4:15 pm]

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