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DEPARTMENT OF ENERGY

10 CFR Part 430

[EERE–2017–BT–STD–0062]

RIN 1904–AE84

Energy Conservation Program for Appliance Standards: Procedures for Evaluating Statutory Factors for Use in New or Revised Energy Conservation Standards

AGENCY: Office of Energy Efficiency and Renewable Energy (EERE), Department of Energy.

ACTION: Final rule.

SUMMARY: The Department of Energy is amending its decision-making process for selecting energy conservation standards by specifying that it will conduct a comparative analysis of the relative benefits and burdens of potential energy conservation standard levels in determining whether a specific energy conservation standard level is economically justified.

DATES: The effective date of this rule is October 19, 2020.

ADDRESSES: The docket for this rulemaking, which includes **Federal Register** notices, public meeting attendee lists and transcripts, comments, and other supporting documents/materials, is available for review at *https://www.regulations.gov*. All documents in the docket are listed in the *https://www.regulations.gov* index. However, not all documents listed in the index may be publicly available, such as information that is exempt from public disclosure.

The docket web page can be found at: *https://www.regulations.gov/docket?D=EERE-2017-BT-STD-0062*. The docket web page contains instructions on how to access all documents, including public comments, in the docket.

FOR FURTHER INFORMATION CONTACT: Ms. Francine Pinto, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW, Washington, DC 20585. Telephone: (202) 586–7432. Email: *Francine.Pinto@hq.doe.gov.*

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I. Summary of the Final Rule

With respect to the establishment of Federal energy conservation standards, Federal law requires that any new or amended energy conservation standard for covered products (and certain types of commercial and industrial equipment) be designed to achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A) and 42 U.S.C. 6316(a)) In determining whether an energy conservation standard is economically justified, the United States Department of Energy (''DOE'' or ''the Department'') determines whether the benefits of the standard exceed its burdens by considering the seven factors laid out in 42 U.S.C. 6295(o)(2)(B)(i). In this document, DOE is finalizing the requirement that determinations of economic justification for a specific Trial Standard Level (''TSL''), as assessed using the seven factors, must include a comparison of the benefits and burdens of that TSL against the benefits and burdens of the baseline case (''no new standards'' case) and across all other TSLs. DOE will, in accordance with EPCA, continue to determine whether the benefits of a standard exceed its burdens by, to the greatest extent practicable, considering the seven factors in 42 U.S.C. 6295(o)(2)(B)(i). DOE will then use the results of this analysis in determining whether a standard is economically justified in a ''walk-down'' process. In conducting this analysis, DOE may determine that some TSLs are not economically justified based on comparisons to the baseline, while DOE may determine other TSLs are not economically justified based on comparisons to other TSLs. From the technologically feasible and economically justified TSLs, DOE will select as the energy conservation standard the TSL that represents the maximum improvement in energy efficiency. This process ensures that the selection of an energy conservation standard is made in consideration of the economic factors contained in EPCA.

II. Introduction

A. Authority

Title III, Parts B [1] and C [2] of the Energy Policy and Conservation Act, as amended, (''EPCA'' or ''the Act''), Public Law 94–163 (42 U.S.C. 6291–6317, as codified), established the Energy Conservation Program for consumer products and certain industrial equipment.[3] Under EPCA, DOE's energy conservation program for covered products consists essentially of four parts: (1) Testing; (2) certification and enforcement procedures; (3) establishment of Federal energy conservation standards; and (4) labeling.

In determining whether a standard is economically justified, EPCA also requires DOE, to the greatest extent

[1] For editorial reasons, upon codification in the U.S. Code, Part B was redesignated Part A.

[2] For editorial reasons, upon codification in the U.S. Code, Part C was redesignated Part A–1.

[3] All references to EPCA in this document refer to the statute as amended through America's Water Infrastructure Act of 2018, Public Law 115–270 (Oct. 23, 2018).

practicable, to consider the following seven factors: (1) The economic impact of the standard on the manufacturers and consumers; (2) the savings in operating costs, throughout the estimated average life of the products (*i.e.,* life-cycle costs), compared with any increase in the price of, or in the initial charges for, or operating and maintaining expenses of, the products which are likely to result from the imposition of the standard; (3) the total projected amount of energy savings likely to result directly from the imposition of the standard; (4) any lessening of the utility or the performance of the products likely to result from the imposition of the standard; (5) the impact of any lessening of competition, after consultation with the Department of Justice; (6) the need for national energy and water conservation; and (7) other factors DOE finds relevant. (42 U.S.C. 6295(o)(2)(B)(i))

B. Background

DOE had conducted a formal effort between 1995 and 1996 to improve the process used to develop energy conservation standards for covered appliance products. This effort involved many different stakeholders, including manufacturers, energy-efficiency advocates, trade associations, State agencies, utilities, and other interested parties. The result was the publication of a final rule in the **Federal Register** on July 15, 1996, titled, ''Procedures, Interpretations and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer Products.'' 61 FR 36974. This document was codified at 10 CFR part 430, subpart C, appendix A, and became known colloquially as the ''Process Rule.''

On December 18, 2017, DOE issued a Request for Information (''RFI'') to address potential improvements to the Process Rule, so as to achieve meaningful burden reduction while continuing to discharge the Department's statutory obligations in the development of energy conservation standards and test procedures. 82 FR 59992. Subsequently, on February 13, 2019, DOE published a Notice of Proposed Rulemaking (''NOPR'') to update and modernize the Process Rule. 84 FR 3910 (''February 2019 NOPR''). Among other changes, DOE proposed that in making a determination of economic justification for a specific TSL, it would consider whether an economically rational consumer would choose a product meeting that TSL over products meeting the other TSLs after considering relevant factors, including but not limited to, energy savings, efficacy, product features, and life-cycle costs. *Id.* at 84 FR 3938.

DOE received numerous comments asking for clarification on how this concept would be implemented and what effect it would have on DOE's ''walk-down'' process for selecting standard levels. In response, DOE did not finalize that aspect of the proposal when it issued a final Process Rule. *See* 85 FR 8626 (Feb. 14, 2020). (''2020 Process Final Rule'') Instead, DOE proposed in a supplemental NOPR (''SNOPR'') to separately revise section 7 of the Process Rule, *Policies on Selection of Standards,* to clarify its earlier proposal and explain how this approach would be incorporated into DOE's decision-making process for selecting energy conservation standards. *See* 85 FR 8483 (Feb. 14, 2020) (''February 2020 SNOPR''). More specifically, DOE clarified that its proposed revisions to section 7 would require the agency to conduct a comparative analysis of the relative costs and benefits of all of the proposed TSLs in order to make a reliable determination that the chosen TSL is economically justified. This comparative analysis, DOE explained, would include assessing the incremental changes in costs and benefits for each TSL's benefits and burdens relative to other TSLs and as part of a holistic analysis across all TSLs. *Id.* at 85 FR 8485. DOE also explained that the factors an economically rational consumer would consider in selecting a TSL (*e.g.,* energy savings, efficacy, product features, and life-cycle costs), arise out of EPCA's seven factors for determining economic justification. See 42 U.S.C. 6295(o)(2)(B)(i). As a result, DOE stated that it was not necessary to refer to the concept of an economically rational consumer in determining whether a TSL is economically justified. *Id.*

In response to the February 2020 SNOPR, DOE received written comments from the following parties:

TABLE OF ENTITIES SUBMITTING WRITTEN COMMENT

Commenter	Affiliation
Joint Industry Commenters – Air Conditioning, Heating, & Refrigeration Institute, Association of Home Appliance Manufacturers, and the National Electrical Manufacturers Association.	Industry.
Earthjustice	Energy Efficiency Advocate.
Spire	Utilities.
American Public Gas Association (''APGA'')	Utilities.
Energy Efficiency Advocacy and State Joint Commenters (''Joint Efficiency'')—Appliance Standards Awareness Project, American Council for an Energy-Efficient Economy, California Energy Commission, Consumer Federation of America, Natural Resources Defense Council, Northeast Energy Efficiency Partnerships, Northwest Energy Efficiency Alliance.	State Government, Energy Efficiency Advocate.
California Investor-Owned Utilities (''Cal-IOUs'')—Pacific Gas and Electric Company, San Diego Gas and Electric, and Southern California Edison.	Utilities.
Institute for Policy Integrity at New York University (''IPI'')	Public Policy Advocate.
Mercatus Center at George Mason University (''Mercatus'')	Public Policy Advocate.
Anonymous	Unaffiliated.
Derek McLaughlin	Unaffiliated.
North American Association of Food Equipment Manufacturers (''NAFEM'')	Industry.
Jim McMahon	Unaffiliated.

III. Discussion of Revisions to DOE's Policies on Selecting Standard Levels

A. Use of Consumer Impacts in Determining Economic Justification

Following the SNOPR, DOE received several comments supporting DOE's efforts to account for the impacts of energy conservation standards on consumers through the seven factors in EPCA.[4] For example, APGA noted that DOE's revised approach will incorporate the economic aspects of consumer welfare impacts. (APGA, No. 166 at p. 5)[5] Similarly, NAFEM indicated that it believes that using a comparative approach would be a positive step towards evaluating how customers actually make decisions. (NAFEM, No. 168 at p. 3) Jim McMahon indicated that DOE would be wise to abandon the framework of an economically rational consumer as the seven factors specified in 42 U.S.C. 6295(o)(2)(B)(i) provide the legal and appropriate basis for evaluating economic justification when calibrated to actual markets and their behaviors. (Jim McMahon, No. 169 at p. 1)

B. Comparison of Benefits and Burdens Across All Proposed TSLs

In the February 2020 SNOPR, DOE proposed that determinations of economic justification must include a comparative analysis of the relative costs and benefits of all of the proposed TSLs to make a reliable determination that a specific TSL is economically justified. 85 FR 8486. This analysis includes assessing the incremental changes for each TSL's benefits and burdens relative to other TSLs as part of a holistic analysis across all TSLs.[6] *Id.* Further, in order to show that this comparative analysis of benefits and burdens is consistent with past DOE practices, DOE provided an example of a rulemaking in which economic justification was based, at least in part, on comparisons between TSLs. *Id.* 85 FR 8487 (*noting* DOE's use of a comparative approach when examining TSLs during the dehumidifiers standards rulemaking to minimize disproportionate impacts to small, domestic manufacturers). Finally, DOE noted that it would still ''walk-down'' from the TSL with the highest energy savings when selecting the energy conservation standard level that represents the maximum energy savings that is technologically feasible and economically justified but would now also formalize for consistency and clarity its comparative approach as part of its consideration of economic justification.[7] *Id .*

In response, DOE received comments both in support of and against the use of a comparative analysis that assesses each TSL's benefits and burdens relative to other TSLs. For example, with regard to support for the proposal, the Joint Industry Commenters indicated that the proposal did not present a new approach towards setting standards and it noted a number of examples from the past in which DOE had effectively applied the same holistic process in various rulemakings (Joint Industry Commenters, No. 167 at p. 2). They added that the proposal would build this holistic approach into DOE's routine rulemaking process, which would enable DOE to fully consider the seven factors already required under EPCA and to help ensure that DOE does not review its TSLs in isolation. *Id.* APGA also supported DOE's proposed approach. It noted that the proposal was responsive to APGA's past criticisms of DOE's process for developing energy conservation standards for covered appliance products, which, in APGA's view, did not always result in standards that were economically justified (APGA, No. 166 at pp. 4–5). APGA agreed that the most logical way to determine whether a particular consumer option is economically justified is to compare it to the full range of available consumer choices. As a result, APGA supported requiring determinations of economic justification to consider comparisons of economically relevant factors across TSLs. *Id.* at p. 5.

As for the commenters who opposed the proposal, several expressed concerns that using a comparative analysis for economic justification would not result in the selection of a TSL in accordance with EPCA. For example, the CA–IOUs stated that the purpose of EPCA's seven factors is to select the standard that achieves the maximum improvement in energy efficiency, but that the February 2020 SNOPR proposed to improperly substitute comparison of the relative burdens of each TSL in place of EPCA's expressed aim of approving the ''highest TSL'' for which benefits exceed burdens. (CA–IOUs, No. 173 at pp. 3–4) The CA–IOUs added that if DOE chooses to compare economically justifiable TSLs against one another, this may not only prevent the maximum energy savings for a given standards cycle, but may also hinder cost-effective savings for future code cycles. *Id.* at p. 4. Similarly, the Joint Efficiency Commenters stated that the proposal could result in DOE choosing efficiency levels lower than the maximum levels that are technologically feasible and economically justified. (Joint Efficiency Commenters, No. 171 at p. 2) The Joint Efficiency Commenters added that, contrary to DOE's statement in the February 2020 SNOPR, DOE did not conduct a comparative analysis of economic justification in the dehumidifiers rulemaking. *Id.* at p. 3.

With respect to these concerns, DOE notes that a simple cost-savings determination fails to satisfy the more complex economic justification requirement in EPCA. DOE reiterates that, in accordance with EPCA, it will select the TSL that represents the maximum improvement in energy efficiency that is both technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A)) Contrary to the statement from the CA–IOUs, the purpose of EPCA's seven factors is not to select the standard that achieves the maximum improvement in energy efficiency, no matter how minute an estimated cost savings; it is to aid in assessing economic justification when selecting the standard that represents the maximum improvement in energy efficiency that is technologically feasible and also economically justified. EPCA states that, in determining whether a standard is economically justified, the Secretary must determine whether the ''benefits of the standard exceed its burdens''. (42 U.S.C. 6295(o)(2)(B)(i)) Further, as evidenced by the seven factors listed for consideration, determining whether the benefits of a standard exceed its burdens is not simply a calculation exercise. Rather, EPCA recognizes that economic impacts are broader than those that occur in isolation as may be depicted in

[4] All comments can be found at *https://www.regulations.gov* in Docket No. EERE–2017–BT–STD–0062.

[5] This type of notation identifies the commenter, the docket document number assigned to the comment, and the relevant pages of that document.

[6] Consistent with prior determinations, there may be instances where a potential standard impacts a subset of factors so significantly as to preclude economic justification, irrespective of the other economic factors.

[7] DOE is required under 42 U.S.C. 6295(p)(1) to determine the maximum improvement in energy efficiency or maximum reduction in energy use that is technologically feasible when proposing a new or amended conservation standard and explain the reasons for any deviation in the proposed standard from the maximum technologically feasible improvement. DOE focuses its rulemaking analyses on energy savings as there may not always be a direct correlation between efficiency improvements and energy savings. For example, if the maximum improvement in energy efficiency significantly increases the cost of a covered product, many consumers may choose to repair, instead of replace, their less-efficient covered products. The standard ultimately promulgated by DOE continues to represent the maximum improvement in energy efficiency that is technologically feasible and economically justified. *See* 42 U.S.C. 6295(o)(2).

an average life-cycle cost analysis or manufacturer impact analysis.

The enumeration of the seven factors in the statutory text recognizes the complex and broad assessment necessary in evaluating benefits and burdens of TSLs. As further context, these statutory factors can be framed in a more general economic construct that would shed light on how DOE's analyses in support of energy conservation standards mesh with standard tools for analyzing market impacts associated with regulation. The first of the seven factors states that economic justification should take into consideration the ''economic impact of the standard on the manufacturers and on the consumers of the product subject to such standard.'' In evaluating such effects, comparison of relative burden is necessary to meaningfully evaluate the economic impacts to both manufacturers and consumers. From the economic construct perspective, the most comprehensive measures for evaluating economic impacts on manufacturers and consumers are producer surplus and consumer surplus.[8] Producer surplus is the difference between the amount a producer is paid for a unit of a good and the minimum amount the producer would accept to supply that unit. It is measured by the area between the price and the supply curve for that unit. Consumer surplus is the difference between what a consumer pays for a unit of a good and the maximum amount the consumer would be willing to pay for that unit. It is measured by the area between the price and the demand curve for that unit. These measures or their approximations are often used to illustrate the economic impact of regulations on both manufacturers and consumers.

The next three statutory factors spell out more specific economic effects consumers would experience, such as operating cost savings of covered products, any price increase of the covered products, any increase in maintenance expense of the covered products, the energy and water savings that would accrue to consumers, and any lessening of the utility of the covered product. From an economic construct perspective, these factors can also be viewed as components of consumer surplus. In application, depending on the quantity and quality of data, these factors may be analyzed separately or inter-relatedly as components of consumer surplus, with appropriate weight given in decision-making, as permitted by the statute. Choosing a standard that simply maximizes improvement in energy efficiency, without regard to technological feasibility and economic justification, would not be consistent with the requirements of 42 U.S.C. 6295(o)(2). To holistically evaluate the economic impact on consumers, DOE must simultaneously evaluate and balance these interrelated factors.

The fifth statutory factor recognizes that greater energy savings could be at the expense of consumer choice, and that anti-competitive effects should also be considered. The sixth factor accounts for changes over time in the need for national energy and water conservation. Finally, the seventh factor recognizes that an exclusive list of factors for assessing economic justification could not anticipate (for example) product-specific market conditions, and authorizes the Secretary to consider any other factor that at the time may be relevant to assess the economic justification of a TSL.

Assessing such impacts, for purposes of the statutory determination of economic justification, requires the exercise of agency judgment and discretion, informed by the aforementioned analysis. For instance, not all life-cycle cost savings are directly comparable. From a more holistic analytic perspective, the benefits of life-cycle cost savings that impose net costs to 20% of consumers may on net need to be considered differently than the benefits of life-cycle cost savings that impose net costs to 10% of consumers because the TSL that imposes net cost to 20% of consumers might have better product utility than the TSL that imposes net cost to 10% of consumers. Similarly, not all manufacturer impacts are directly comparable. Manufacturer impacts that disproportionately affect small businesses need to be weighed differently than those that do not. DOE is seeking to resolve this issue by using a comparison across multiple TSLs, which will enable DOE to consider incrementally both some of the distinctive benefits and burdens that are not immediately apparent from simply looking at a single TSL's numbers (*e.g.,* life-cycle costs or changes in industry net present value), as well as those relative changes in numbers in moving from one TSL to another. Thus, DOE is not proposing to unilaterally select an economically justified, technically feasible TSL with less energy savings over another economically justified, technically feasible TSL. Instead, as stated previously, DOE is requiring a comparative analysis of the relative costs and benefits of all proposed TSLs in order to make a reliable determination that a specific TSL is economically justified. This comparative analysis brings into sharper and more transparent focus the balancing contemplated by the statute in assessing economic justification. DOE is clarifying its regulatory text consistent with this approach.

With regard to the comment from the Joint Efficiency Advocates that DOE has not compared the benefits and burdens of TSLs in the past, DOE disagrees. In the dehumidifier example cited in the February 2020 SNOPR, DOE, in discussing why TSL 2 is economically justified, stated that ''TSL 2 will minimize disproportionate impacts to small, domestic dehumidifier manufacturers *relative* to TSL 3 and TSL 4.'' 81 FR 38338, 38388 (June 13, 2016) (emphasis added). This is an explicit, and appropriate, comparison of the burdens (*i.e.,* impacts on small manufacturers) between three TSLs.

Similarly, the Joint Efficiency Advocates' characterization of DOE's reference in the February 2020 SNOPR to a 2015 final rule amending standards for general service fluorescent lamps (''GSFLs'') is mistaken. In that rule, DOE determined that a TSL with positive net benefits was not economically justified because it would have net costs for 22 percent of consumers and would decrease industry net present value by 24 percent. 85 FR 8487. The Joint Efficiency Advocates interpreted this reference to mean that DOE was claiming that it had not selected the maximum energy efficiency level that was economically justified. (Joint Efficiency Advocates, No. 171 at p. 3) That is incorrect. DOE cited this rulemaking to address concerns that a comparative analysis will result in DOE selecting standards that are the most economically justified instead of standards that result in the maximum improvement in energy savings that is technologically feasible and economically justified. 85 FR 8487. DOE explained that it would not just use one criterion (*e.g.,* maximum net benefits) in determining economic justification. *Id.* Using only one criterion would be contrary to the statutory mandate to consider multiple factors for purposes of determining whether a given standard is economically justified. DOE will continue, as it has in the past, to look

[8] Discussions of producer and consumer surplus are provided in economics texts extensively such as Mas-Colell, Andreu & Whinston, Michael D. & Green, Jerry R., 1995. ''Microeconomic Theory,'' OUP Catalogue, Oxford University Press, number 9780195102680; and Kreps, David M., 1990. ''A Course in Microeconomic Theory.'' Princeton University Press. See also OMB's Circular A–4 on conducting regulatory impact analyses, at *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf.*

at the full range of benefits and burdens encompassed by the seven factors listed in 42 U.S.C. 6295(o)(2)(B)(i). DOE cited the GSFL rule as an example of its consideration of industry net present value and the proportion of consumers who bear net costs in determining whether a TSL was economically justified.

Commenters also expressed concerns that a comparative analysis would improperly affect DOE's consideration of the seven factors laid out in 42 U.S.C. 6295(o)(2)(B)(i). For example, IPI stated that the proposed change would allow the Department to irrationally and inconsistently give preference to whichever subset of economic impacts the Department wants to focus on in order to conclude that standards that otherwise achieve net benefits are not economically justified. (IPI, No. 170 at p. 1) Earthjustice stated that the seven factors repeatedly direct DOE to compare a standard level only to the baseline case, by requiring DOE to analyze impacts likely to result from the imposition of the standard. As a result, in Earthjustice's view, EPCA does not authorize the proposed comparative analysis approach to determining economic justification. (Earthjustice, No. 174 at p. 2) The Joint Efficiency Advocates stated that a comparative analysis of the seven factors would not be a simple task and would make it more difficult for DOE to fulfill its obligation to review standards. (Joint Efficiency Advocates, No. 171 at p. 4)

In response, DOE first notes that use of a comparative analysis does not fundamentally change DOE's consideration of the seven factors in 42 U.S.C. 6295(o)(2)(B)(i). DOE will, in accordance with EPCA, continue to determine whether the benefits of a standard exceed its burdens by, to the greatest extent practicable, considering the seven factors in 42 U.S.C. 6295(o)(2)(B)(i). DOE will then use the results of this analysis in determining whether a standard is economically justified. This process, as noted in the GSFL example, has previously resulted in the conclusion that TSLs with positive net benefits fail to satisfy the economically justified criterion. As for IPI's characterization of such a result as ''irrational,'' DOE does not agree that it is ''irrational'' to determine that a TSL that causes a significant number of consumers to experience net costs is not economically justified.

Earthjustice's argument that EPCA precludes a comparative analysis in determining economic justification is based on the assumption that DOE only has two options: (1) select the TSL under analysis as the new energy conservation standard; or (2) decline to adopt a new energy conservation standard (baseline case). This assumption ignores the fact that DOE evaluates several proposed TSLs in each of its rulemakings before selecting one (or none) as the new energy conservation standard. Thus, a TSL not only has impacts relative to the baseline case, but it also has impacts relative to each of the other proposed TSLs. EPCA does not prohibit DOE from considering relative impacts, and a comparative analysis that assesses the incremental changes in the benefits and burdens of each TSL relative to the other TSLs is essential in determining whether a specific TSL is economically justified.

With regard to the Joint Efficiency Advocates' comment that a comparative analysis of the seven factors will increase DOE's analytical workload and make it more difficult to review standards, DOE appreciates the concern, but finds it unwarranted. The vast majority of DOE's analytical work involves evaluating the seven factors for each TSL (*e.g.,* life-cycle costs, manufacturer impacts, total energy savings). The additional step of comparing these values across TSLs is unlikely to pose a significant incremental burden to DOE's analytical workload.

C. Other Issues Raised by Commenters

Commenters raised a number of other issues not directly related to DOE's proposal. Some of these comments concerned issues that were already finalized in the 2020 Process Final Rule and, as a result, are not addressed in this document. Several commenters submitted recommendations for improving DOE's rulemaking analysis. For example, Mercatus offered four broad recommendations for improving DOE's analysis: (1) Base the analysis on revealed preferences unless compelling evidence exists to support alternative assumptions; (2) carefully distinguish between individual and social discount rates; (3) properly account for the opportunity cost of capital; and (4) distinguish between consumption and investment. (Mercatus, No. 172 at pp. 1–6) DOE notes that it has engaged the National Academies of Sciences, Engineering, and Medicine to undertake a peer review of the assumptions, models, and methodologies used by DOE in establishing energy efficiency regulations. *See https://www.nationalacademies.org/our-work/review-of-methods-for-setting-building-and-equipment-performance-standards.* The review committee is aware of this rulemaking and DOE will send them a copy of the final rule so it may be accounted for in their report. DOE encourages the public to submit written comments related to DOE's assumptions, models, and methodologies via email to these National Academies at *bice@nas.edu.* For further information regarding this process, interested persons should contact the National Academies directly at *bice@nas.edu. For information regarding access to materials docketed by the National Academies related to this review, interested persons should contact the Public Access Records Office using the fillable on-line form found at https://www8.nationalacademies.org/pa/managerequest.aspx?key=DEPS-BICE-19-02.*

IV. Procedural Issues and Regulatory Review

A. Review Under Executive Orders 12866 and 13563

This regulatory action is a significant regulatory action under section 3(f) of Executive Order 12866, ''Regulatory Planning and Review,'' 58 FR 51735 (Oct. 4, 1993). Accordingly, this regulatory action was subject to review under the Executive Order by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB).

B. Review Under Executive Orders 13771 and 13777

On January 30, 2017, the President issued Executive Order (E.O.) 13771, ''Reducing Regulation and Controlling Regulatory Costs.'' 82 FR 9339 (Jan. 30, 2017). More specifically, the Order provides that it is essential to manage the costs associated with the governmental imposition of requirements necessitating private expenditures of funds required to comply with Federal regulations. In addition, on February 24, 2017, the President issued E.O. 13777, ''Enforcing the Regulatory Reform Agenda.'' 82 FR 12285 (March 1, 2017). The Order requires the head of each agency to designate an agency official as its Regulatory Reform Officer (RRO). Each RRO is tasked with overseeing the implementation of regulatory reform initiatives and policies to ensure that individual agencies effectively carry out regulatory reforms, consistent with applicable law. Further, E.O. 13777 requires the establishment of a regulatory task force at each agency. The regulatory task force is required to make recommendations to the agency head regarding the repeal, replacement, or modification of existing regulations, consistent with applicable law.

To implement these Executive Orders, the Department, among other actions, issued a request for information (RFI) seeking public comment on how best to achieve meaningful burden reduction while continuing to achieve the Department's regulatory objectives. 82 FR 24582 (May 30, 2017). In response to this RFI, the Department received numerous and extensive comments pertaining to DOE's Process Rule.

This final rule is an amendment of DOE's February 14, 2020, final rule (2020 Process Rule) that revised and updated the Department's ''Process Rule.'' For purposes of Executive Order 13771, the February 14, 2020 final rule was a de-regulatory action for which DOE anticipates that the changes rule will reduce total administrative burdens by between $53.5 million and $59.7 million (undiscounted) for annualized cost savings of between $0.5 million to $0.6 million, discounted at 7%. The important, but incremental, change to the 2020 Process Rule amendments are difficult to quantify beyond the benefits achieved by the Process Rule as a whole. As such, for purposes of Executive Order 13771, this final rule constitutes an ''other'' action.

C. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act of 1996) requires preparation of an initial regulatory flexibility analysis (IRFA) for any rule that by law must be proposed for public comment and a final regulatory flexibility analysis (FRFA) for any such rule that an agency adopts as a final rule, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. A regulatory flexibility analysis examines the impact of the rule on small entities and considers alternative ways of reducing negative effects. Also, as required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the DOE rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel's website at *http://energy.gov/gc/office-general-counsel.*

Because this rule does not directly regulate small entities but only imposes procedural requirements on DOE itself, DOE certifies that this rule will not have a significant economic impact on a substantial number of small entities, and, therefore, no regulatory flexibility analysis is required. *Mid-Tex Elec. Co-Op, Inc.* v. *FERC,* 773 F.2d 327, 341–42 (D.C. Cir. 1985).

D. Review Under the Paperwork Reduction Act of 1995

Manufacturers of covered products/equipment must certify to DOE that their products comply with any applicable energy conservation standards. In certifying compliance, manufacturers must test their products according to the DOE test procedures for such products/equipment, including any amendments adopted for those test procedures, on the date that compliance is required. DOE has established regulations for certification and recordkeeping requirements for all covered consumer products and commercial equipment. 76 FR 12422 (March 7, 2011); 80 FR 5099 (Jan. 30, 2015). The collection-of-information requirement for certification and recordkeeping is subject to review and approval by OMB under the Paperwork Reduction Act (PRA). This requirement has been approved by OMB under OMB control number 1910–1400. Public-reporting burden for certifications is estimated to average 30 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a 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.

Specifically, this rule, addressing clarifications to the Process Rule itself, does not contain any collection of information requirement that would trigger the PRA.

E. Review Under the National Environmental Policy Act of 1969

In this final rule, DOE is revising a portion of its Process Rule, which outlines the procedures that DOE follows in conducting rulemakings for new or amended energy conservation standards and test procedures for covered consumer products and commercial/industrial equipment. DOE has determined that this rule falls into a class of actions that are categorically excluded from review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and DOE's implementing of regulations at 10 CFR part 1021. Specifically, this rule is strictly procedural and is covered by the Categorical Exclusion in 10 CFR part 1021, subpart D, paragraph A6. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

F. Review Under Executive Order 13132

Executive Order 13132, ''Federalism,'' 64 FR 43255 (August 10, 1999), imposes certain requirements on Federal agencies formulating and implementing policies or regulations that preempt State law or that have Federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. DOE has examined this rule and has determined that it 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. It will primarily affect the procedure by which DOE develops proposed rules to revise energy conservation standards and test procedures. EPCA governs and prescribes Federal preemption of State regulations that are the subject of DOE's regulations adopted pursuant to the statute. In such cases, States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297(d)) Therefore, Executive Order 13132 requires no further action.

G. Review Under Executive Order 12988

Regarding the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' 61 FR 4729 (Feb. 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; (3) provide a clear legal standard for affected conduct rather than a general standard; and (4) promote simplification

and burden reduction. Regarding the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that each Executive agency make every reasonable effort to ensure that when it issues a regulation, the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires that Executive agencies review regulations in light of applicable standards in sections 3(a) and 3(b) to determine whether they are met, or whether it is unreasonable to meet one or more of them. DOE has completed the required review and has determined that, to the extent permitted by law, the rule meets the relevant standards of Executive Order 12988.

H. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. (Pub. L. 104–4, sec. 201 (codified at 2 U.S.C. 1531)) For a proposed regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed ''significant intergovernmental mandate,'' and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect them. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. (62 FR 12820) (This policy is also available at *http://www.energy.gov/gc/office-general-counsel* under ''Guidance & Opinions'' (Rulemaking).) DOE examined the rule according to UMRA and its statement of policy and has determined that the rule contains neither an intergovernmental mandate, nor a 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 in any year. Accordingly, no further assessment or analysis is required under UMRA.

I. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This rule will not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

J. Review Under Executive Order 12630

Pursuant to Executive Order 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights,'' 53 FR 8859 (March 18, 1988), DOE has determined that this rule will not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

K. Review Under the Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for Federal agencies to review most disseminations of information to the public under information quality guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed this rule under the OMB and DOE guidelines and has concluded that it is consistent with the applicable policies in those guidelines.

L. Review Under Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OMB a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and either (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

DOE has concluded that the regulatory action in this document, which makes clarifications to the Process Rule that guides the Department in proposing energy conservation standards, is not a significant energy action because it would not have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as a significant energy action by the Administrator of OIRA. Therefore, it is not a significant energy action, and, accordingly, DOE has not prepared a Statement of Energy Effects for this rule.

M. Review Consistent With OMB's Information Quality Bulletin for Peer Review

On December 16, 2004, OMB, in consultation with the Office of Science and Technology Policy (OSTP), issued its Final Information Quality Bulletin for Peer Review (the Bulletin). 70 FR 2664 (Jan. 14, 2005). The Bulletin establishes that certain scientific information shall be peer reviewed by qualified specialists before it is disseminated by the Federal Government, including influential scientific information related to agency regulatory actions. The purpose of the bulletin is to enhance the quality and credibility of the Government's scientific information. Under the Bulletin, the energy conservation standards rulemaking analyses are ''influential scientific information,'' which the Bulletin defines as ''scientific information the agency reasonably can determine will have or does have a clear and substantial impact on important public policies or private sector decisions.'' *Id.* at 70 FR 2667.

In response to OMB's Bulletin, DOE conducted formal in-progress peer reviews of the energy conservation standards development process and analyses and has prepared a Peer Review Report pertaining to the energy conservation standards rulemaking analyses. Generation of this report

involved a rigorous, formal, and documented evaluation using objective criteria and qualified and independent reviewers to make a judgment as to the technical/scientific/business merit, the actual or anticipated results, and the productivity and management effectiveness of programs and/or projects. The ''Energy Conservation Standards Rulemaking Peer Review Report,'' dated February 2007, has been disseminated and is available at the following website: *https://www.energy.gov/eere/buildings/peer-review.* Because available data, models, and technological understanding have changed since 2007, DOE has engaged the National Academies of Sciences, Engineering, and Medicine to undertake a new peer review of its analytical methodologies, as noted above.

N. Congressional Notification

As required by 5 U.S.C. 801, DOE will submit to Congress a report regarding the issuance of this final rule prior to the effective date set forth at the outset of this rulemaking. The report will state that it has been determined that the rule is not a ''major rule'' as defined by 5 U.S.C. 801(2).

V. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this final rule.

List of Subjects in 10 CFR Part 430

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Incorporation by reference, Intergovernmental relations, Small businesses, Test procedures.

Signing Authority

This document of the Department of Energy was signed on July 17, 2020, by Daniel R Simmons, Assistant Secretary for Energy Efficiency, Energy Efficiency and Renewable Energy, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on July 20, 2020.

Treena V. Garrett

Federal Register Liaison Officer, U.S. Department of Energy.

For the reasons stated in the preamble, DOE is amending part 430 of title 10 of the Code of Federal Regulations as set forth below:

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

■ 1. The authority citation for part 430 continues to read as follows:

Authority: 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

■ 2. In appendix A to subpart C of part 430, revise paragraph 7(e) to read as follows:

Appendix A to Subpart C of Part 430—Procedures, Interpretations and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer Products

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7. Policies on Selection of Standards

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(e)(1) *Selection of proposed standard.* Based on the results of the analysis of impacts, DOE will select a standard level to be proposed for public comment in the NOPR. As required under 42 U.S.C. 6295(o)(2)(A), any new or revised standard must be designed to achieve the maximum improvement in energy efficiency that is determined to be both technologically feasible and economically justified.

(2) *Statutory policies.* The fundamental policies concerning the selection of standards include:

(i) A trial standard level will not be proposed or promulgated if the Department determines that it is not both technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A) and 42 U.S.C. (o)(3)(B)) For a trial standard level to be economically justified, the Secretary must determine that the benefits of the standard exceed its burdens by, to the greatest extent practicable, considering the factors listed in 42 U.S.C. 6295(o)(2)(B)(i). In making such a determination, the Secretary shall compare the benefits and burdens of the standard against the benefits and burdens of the baseline case (''no new standards'' case) and all other trial standard levels under consideration. This comparative analysis includes assessing the incremental changes in costs and benefits for each TSL's benefits and burdens relative to other TSLs and as part of a holistic analysis across all TSLs. 42 U.S.C. 6295(o)(2)(B). The Secretary will also consider, consistent with the statute, other economic measures such as life-cycle cost analysis, manufacturer impact analysis, and other relevant measures. A standard level is subject to a rebuttable presumption that it is economically justified if the payback period is three years or less. (42 U.S.C. 6295(o)(2)(B)(iii))

(ii) If the Department determines that interested persons have established by a preponderance of the evidence that a standard level is likely to result in the unavailability in the United States of any covered product/equipment type (or class) with performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as products generally available in the U.S. at the time of the determination, then that standard level will not be proposed. (42 U.S.C. 6295(o)(4))

(iii) If the Department determines that a standard level would not result in significant conservation of energy, that standard level will not be proposed. (42 U.S.C. 6295(o)(3)(B))

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[FR Doc. 2020–15967 Filed 8–18–20; 8:45 am]

BILLING CODE 6450–01–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1026

Truth in Lending (Regulation Z) Annual Threshold Adjustments (Credit Cards, HOEPA, and Qualified Mortgages)

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Final rule; official interpretation.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau) is issuing this final rule amending the regulation text and official interpretations for Regulation Z, which implements the Truth in Lending Act (TILA). The Bureau is required to calculate annually the dollar amounts for several provisions in Regulation Z; this final rule revises, as applicable, the dollar amounts for provisions implementing TILA and amendments to TILA, including under the Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act), the Home Ownership and Equity Protection Act of 1994 (HOEPA), and the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). The Bureau is adjusting these amounts, where appropriate, based on the annual percentage change reflected in the Consumer Price Index (CPI) in effect on June 1, 2020.

DATES: This final rule is effective January 1, 2021.

FOR FURTHER INFORMATION CONTACT: Rachel Ross, Attorney-Advisor; Jaydee DiGiovanni, 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: The Bureau is amending the regulation text and official interpretations for Regulation Z, which implements TILA, to update the dollar amounts of various thresholds that are adjusted annually based on the annual percentage change in the CPI as published by the Bureau of Labor Statistics (BLS). Specifically, for open-end consumer credit plans under TILA, the threshold that triggers requirements to disclose minimum interest charges will remain unchanged at $1.00 in 2021. For open-end consumer credit plans under the CARD Act amendments to TILA, the adjusted dollar amount in 2021 for the safe harbor for a first violation penalty fee will remain unchanged at $29 and the adjusted dollar amount for the safe harbor for a subsequent violation penalty fee will also remain unchanged at $40. For HOEPA loans, the adjusted total loan amount threshold for high-cost mortgages in 2021 will be $22,052. The adjusted points-and-fees dollar trigger for high-cost mortgages in 2021 will be $1,103. For qualified mortgages, which provide creditors with certain protections from liability under the Ability-to-Repay Rule, the maximum thresholds for total points and fees in 2021 will be 3 percent of the total loan amount for a loan greater than or equal to $110,260; $3,308 for a loan amount greater than or equal to $66,156 but less than $110,260; 5 percent of the total loan amount for a loan greater than or equal to $22,052 but less than $66,156; $1,103 for a loan amount greater than or equal to $13,783 but less than $22,052; and 8 percent of the total loan amount for a loan amount less than $13,783.

I. Background

A. Credit Card Annual Adjustments

Minimum Interest Charge Disclosure Thresholds

Sections 1026.6(b)(2)(iii) and 1026.60(b)(3) of Regulation Z implement sections 127(a)(3) and 127(c)(1)(A)(ii)(II) of TILA. Sections 1026.6(b)(2)(iii) and 1026.60(b)(3) require creditors to disclose any minimum interest charge exceeding $1.00 that could be imposed during a billing cycle. These provisions also state that, for open-end consumer credit plans, the minimum interest charge thresholds will be re-calculated annually using the CPI that was in effect on the preceding June 1; the Bureau uses the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI–W) for this adjustment.[1] If the cumulative change in the adjusted minimum value derived from applying the annual CPI–W level to the current amounts in §§ 1026.6(b)(2)(iii) and 1026.60(b)(3) has risen by a whole dollar, the minimum interest charge amounts set forth in the regulation will be increased by $1.00. This adjustment analysis is based on the CPI–W index in effect on June 1, 2020, which was reported by BLS on May 12, 2020,[2] and reflects the percentage change from April 2019 to April 2020. The adjustment analysis accounts for a 0.1 percent increase in the CPI–W from April 2019 to April 2020. This increase in the CPI–W when applied to the current amounts in §§ 1026.6(b)(2)(iii) and 1026.60(b)(3) does not trigger an increase in the minimum interest charge threshold of at least $1.00, and the Bureau is therefore not amending §§ 1026.6(b)(2)(iii) and 1026.60(b)(3).

Safe Harbor Penalty Fees

Section 1026.52(b)(1)(ii)(A) and (B) of Regulation Z implements section 149(e) of TILA, which was added to TILA by the CARD Act.[3] Section 1026.52(b)(1)(ii)(D) provides that the safe harbor provision, which establishes the permissible penalty fee thresholds in § 1026.52(b)(1)(ii)(A) and (B), will be re-calculated annually using the CPI that was in effect on the preceding June 1; the Bureau uses the CPI–W for this adjustment. If the cumulative change in the adjusted value derived from applying the annual CPI–W level to the current amounts in § 1026.52(b)(1)(ii)(A) and (B) has risen by a whole dollar, those amounts will be increased by $1.00. Similarly, if the cumulative change in the adjusted value derived from applying the annual CPI–W level to the current amounts in § 1026.52(b)(1)(ii)(A) and (B) has decreased by a whole dollar, those amounts will be decreased by $1.00. *See* comment 52(b)(1)(ii)–2. The 2021 adjustment analysis is based on the CPI–W index in effect on June 1, 2020, which was reported by BLS on May 12, 2020, and reflects the percentage change from April 2019 to April 2020. The permissible fee thresholds of $29 for a first violation penalty fee and $40 for a subsequent violation will remain unchanged and reflect a 0.1 percent increase in the CPI–W from April 2019 to April 2020 with the resulting thresholds rounded to the nearest $1 increment.

B. HOEPA Annual Threshold Adjustments

Section 1026.32(a)(1)(ii) of Regulation Z implements section 1431 of the Dodd-Frank Act,[4] which amended the HOEPA points-and-fees coverage test. Under § 1026.32(a)(1)(ii)(A) and (B), in assessing whether a transaction is a high-cost mortgage due to points and fees the creditor is charging, the applicable points-and-fees coverage test depends on whether the total loan amount is for $20,000 or more, or for less than $20,000. Section 1026.32(a)(1)(ii) provides that this threshold amount be recalculated annually using the CPI index in effect on the preceding June 1; the Bureau uses the CPI–U for this adjustment.[5] The 2021 adjustment is based on the CPI–U index in effect on June 1, which was reported by BLS on May 12, 2020, and reflects the percentage change from April 2019 to April 2020. The adjustment to $22,052 here reflects a 0.3 percent increase in the CPI–U index from April 2019 to April 2020 and is rounded to the nearest whole dollar amount for ease of compliance.

Under § 1026.32(a)(1)(ii)(B) the HOEPA points-and-fees threshold is $1,000. Section 1026.32(a)(1)(ii)(B) provides that this threshold amount will be recalculated annually using the CPI index in effect on the preceding June 1; the Bureau uses the CPI–U for this adjustment. The 2021 adjustment is based on the CPI–U index in effect on June 1, 2020, which was reported by BLS on May 12, 2020, and reflects the percentage change from April 2019 to April 2020. The adjustment to $1,103 here reflects a 0.3 percent increase in the CPI–U index from April 2019 to April 2020 and is rounded to the nearest whole dollar amount for ease of compliance.

C. Qualified Mortgages Annual Threshold Adjustments

The Bureau's Regulation Z implements sections 1411 and 1412 of the Dodd-Frank Act, which generally require creditors to make a reasonable, good-faith determination of a consumer's ability to repay any consumer credit transaction secured by

[1] The CPI–W is a subset of the Consumer Price Index for All Urban Consumers (CPI–U) index and represents approximately 29 percent of the U.S. population.

[2] BLS publishes Consumer Price Indices monthly, usually in the middle of each calendar month. Thus, the CPI–W reported on May 12, 2020, was the most current as of June 1, 2020.

[3] Credit Card Accountability Responsibility and Disclosure Act of 2009, Public Law 111–24, 123 Stat. 1734 (2009).

[4] Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010).

[5] The CPI–U is based on all urban consumers and represents approximately 93 percent of the U.S. population.

a dwelling and establishes certain protections from liability under this requirement for qualified mortgages. Under § 1026.43(e)(3)(i), a covered transaction is not a qualified mortgage if the transaction's total points and fees exceed: 3 percent of the total loan amount for a loan amount greater than or equal to $100,000; $3,000 for a loan amount greater than or equal to $60,000 but less than $100,000; 5 percent of the total loan amount for loans greater than or equal to $20,000 but less than $60,000; $1,000 for a loan amount greater than or equal to $12,500 but less than $20,000; or 8 percent of the total loan amount for loans less than $12,500. Section 1026.43(e)(3)(ii) provides that the limits and loan amounts in § 1026.43(e)(3)(i) are recalculated annually for inflation using the CPI–U index in effect on the preceding June 1. The 2021 adjustment is based on the CPI–U index in effect on June 1, 2020, which was reported by BLS on May 12, 2020, and reflects the percentage change from April 2019 to April 2020. The adjustment to the 2020 figures [6] being adopted here reflects a 0.3 percent increase in the CPI–U index for this period and is rounded to whole dollars for ease of compliance.

II. Adjustment and Commentary Revision

A. Credit Card Annual Adjustments

Minimum Interest Charge Disclosure Thresholds—§§ 1026.6(b)(2)(iii) and 1026.60(b)(3)

The minimum interest charge amounts for §§ 1026.6(b)(2)(iii) and 1026.60(b)(3) will remain unchanged at $1.00 for the year 2021. Accordingly, the Bureau is not amending these sections of Regulation Z.

Safe Harbor Penalty Fees—§ 1026.52(b)(1)(ii)(A) and (B)

Effective January 1, 2021, the permissible fee threshold amounts did not increase from the amounts for 2020 and remain at $29 for § 1026.52(b)(1)(ii)(A) and $40 for § 1026.52(b)(1)(ii)(B). Accordingly, the Bureau is leaving § 1026.52(b)(1)(ii)(A) and (B) unchanged. The Bureau is amending comment 52(b)(1)(ii)–2.i to preserve a list of the historical thresholds for this provision.

B. HOEPA Annual Threshold Adjustment—Comments 32(a)(1)(ii)–1 and –3

Effective January 1, 2021, for purposes of determining under § 1026.32(a)(1)(ii) the points-and-fees coverage test under HOEPA to which a transaction is subject, the total loan amount threshold is $22,052, and the adjusted points-and-fees dollar trigger under § 1026.32(a)(1)(ii)(B) is $1,103. If the total loan amount for a transaction is $22,052 or more, and the points-and-fees amount exceeds 5 percent of the total loan amount, the transaction is a high-cost mortgage. If the total loan amount for a transaction is less than $22,052, and the points-and-fees amount exceeds the lesser of the adjusted points-and-fees dollar trigger of $1,103 or 8 percent of the total loan amount, the transaction is a high-cost mortgage. The Bureau is amending comments 32(a)(1)(ii)–1 and –3, which list the adjustments for each year, to reflect for 2021 the new points-and-fees dollar trigger and the new loan amount dollar threshold, respectively.

C. Qualified Mortgages Annual Threshold Adjustments

Effective January 1, 2021, a covered transaction is not a qualified mortgage if, pursuant to § 1026.43(e)(3), the transaction's total points and fees exceed 3 percent of the total loan amount for a loan amount greater than or equal to $110,260; $3,308 for a loan amount greater than or equal to $66,156 but less than $110,260; 5 percent of the total loan amount for loans greater than or equal to $22,052 but less than $66,156; $1,103 for a loan amount greater than or equal to $13,783 but less than $22,052; or 8 percent of the total loan amount for loans less than $13,783. The Bureau is amending comment 43(e)(3)(ii)–1, which lists the adjustments for each year, to reflect the new dollar threshold amounts for 2021.

III. Procedural Requirements

A. Administrative Procedure Act

Under the Administrative Procedure Act, 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.[7] Pursuant to this final rule, in Regulation Z, § 1026.52(b)(1)(ii)(A) and (B) in subpart G is amended and comments 32(a)(1)(ii)–1.vii and –3.vii, 43(e)(3)(ii)–1.vii, and 52(b)(1)(ii)–2.i.H in Supplement I are added to update the exemption thresholds. The amendments in this final rule are technical and non-discretionary, as they merely apply the method previously established in Regulation Z for determining adjustments to the thresholds. For these reasons, the Bureau has determined that publishing a notice of proposed rulemaking and providing opportunity for public comment are unnecessary. The amendments therefore are adopted in final form.

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.[8]

C. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995,[9] the Bureau reviewed this final rule. No collections of information pursuant to the Paperwork Reduction Act are contained in the final rule.

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).

E. Signing Authority

The Acting Associate Director for Research, Markets and Regulations, having reviewed and approved this document, is delegating the authority to electronically sign this document to Laura Galban, a Bureau Federal Register Liaison, for purposes of publication in the **Federal Register**.

List of Subjects in 12 CFR Part 1026

Advertising, Appraisal, Appraiser, Banking, Banks, Consumer protection, Credit, Credit unions, Mortgages, National banks, Reporting and recordkeeping requirements, Savings associations, Truth in lending.

Authority and Issuance

For the reasons set forth in the preamble, the Bureau amends Regulation Z, 12 CFR part 1026, as set forth below:

[6] For 2021, a covered transaction is not a qualified mortgage if the transaction's total points and fees exceed 3 percent of the total loan amount for a loan amount greater than or equal to $110,260; $3,308 for a loan amount greater than or equal to $66,156 but less than $110,260; 5 percent of the total loan amount for loans greater than or equal to $22,052 but less than $66,156; $1,103 for a loan amount greater than or equal to $13,783 but less than $22,052; or 8 percent of the total loan amount for loans less than $13,783.

[7] 5 U.S.C. 553(b)(B).

[8] 5 U.S.C. 603(a), 604(a).

[9] 44 U.S.C. 3506; 5 CFR part 1320.

PART 1026—TRUTH IN LENDING (REGULATION Z)

■ 1. The authority citation for part 1026 continues to read as follows:

Authority: 12 U.S.C. 2601, 2603–2605, 2607, 2609, 2617, 3353, 5511, 5512, 5532, 5581; 15 U.S.C. 1601 *ET SEQ.*

■ 2. In Supplement I to Part 1026:
■ a. Under *Section 1026.32—Requirements for High-Cost Mortgages,* revise *Paragraph 32(a)(1)(ii).*
■ b. Under *Section 1026.43—Minimum Standards for Transactions Secured by a Dwelling,* revise *Paragraph 43(e)(3)(ii).*
■ c. Under *Section 1026.52—Limitations on Fees,* revise *52(b)(1)(ii) Safe harbors.*

The revisions read as follows:

SUPPLEMENT I TO PART 1026—OFFICIAL INTERPRETATIONS

* * * * *

Section 1026.32—Requirements for High-Cost Mortgages

* * * * *

Paragraph 32(a)(1)(ii).

1. *Annual adjustment of $1,000 amount.* The $1,000 figure in § 1026.32(a)(1)(ii)(B) is adjusted annually on January 1 by the annual percentage change in the CPI that was in effect on the preceding June 1. The Bureau will publish adjustments after the June figures become available each year.

i. For 2015, $1,020, reflecting a 2 percent increase in the CPI–U from June 2013 to June 2014, rounded to the nearest whole dollar.

ii. For 2016, $1,017, reflecting a 0.2 percent decrease in the CPI–U from June 2014 to June 2015, rounded to the nearest whole dollar.

iii. For 2017, $1,029, reflecting a 1.1 percent increase in the CPI–U from June 2015 to June 2016, rounded to the nearest whole dollar.

iv. For 2018, $1,052, reflecting a 2.2 percent increase in the CPI–U from June 2016 to June 2017, rounded to the nearest whole dollar.

v. For 2019, $1,077, reflecting a 2.5 percent increase in the CPI–U from June 2017 to June 2018, rounded to the nearest whole dollar.

vi. For 2020, $1,099, reflecting a 2 percent increase in the CPI–U from June 2018 to June 2019, rounded to the nearest whole dollar.

vii. For 2021, $1,103, reflecting a 0.3 percent increase in the CPI–U from June 2019 to June 2020, rounded to the nearest whole dollar.

2. *Historical adjustment of $400 amount.* Prior to January 10, 2014, a mortgage loan was covered by § 1026.32 if the total points and fees payable by the consumer at or before loan consummation exceeded the greater of $400 or 8 percent of the total loan amount. The $400 figure was adjusted annually on January 1 by the annual percentage change in the CPI that was in effect on the preceding June 1, as follows:

i. For 1996, $412, reflecting a 3.00 percent increase in the CPI–U from June 1994 to June 1995, rounded to the nearest whole dollar.

ii. For 1997, $424, reflecting a 2.9 percent increase in the CPI–U from June 1995 to June 1996, rounded to the nearest whole dollar.

iii. For 1998, $435, reflecting a 2.5 percent increase in the CPI–U from June 1996 to June 1997, rounded to the nearest whole dollar.

iv. For 1999, $441, reflecting a 1.4 percent increase in the CPI–U from June 1997 to June 1998, rounded to the nearest whole dollar.

v. For 2000, $451, reflecting a 2.3 percent increase in the CPI–U from June 1998 to June 1999, rounded to the nearest whole dollar.

vi. For 2001, $465, reflecting a 3.1 percent increase in the CPI–U from June 1999 to June 2000, rounded to the nearest whole dollar.

vii. For 2002, $480, reflecting a 3.27 percent increase in the CPI–U from June 2000 to June 2001, rounded to the nearest whole dollar.

viii. For 2003, $488, reflecting a 1.64 percent increase in the CPI–U from June 2001 to June 2002, rounded to the nearest whole dollar.

ix. For 2004, $499, reflecting a 2.22 percent increase in the CPI–U from June 2002 to June 2003, rounded to the nearest whole dollar.

x. For 2005, $510, reflecting a 2.29 percent increase in the CPI–U from June 2003 to June 2004, rounded to the nearest whole dollar.

xi. For 2006, $528, reflecting a 3.51 percent increase in the CPI–U from June 2004 to June 2005, rounded to the nearest whole dollar.

xii. For 2007, $547, reflecting a 3.55 percent increase in the CPI–U from June 2005 to June 2006, rounded to the nearest whole dollar.

xiii. For 2008, $561, reflecting a 2.56 percent increase in the CPI–U from June 2006 to June 2007, rounded to the nearest whole dollar.

xiv. For 2009, $583, reflecting a 3.94 percent increase in the CPI–U from June 2007 to June 2008, rounded to the nearest whole dollar.

xv. For 2010, $579, reflecting a 0.74 percent decrease in the CPI–U from June 2008 to June 2009, rounded to the nearest whole dollar.

xvi. For 2011, $592, reflecting a 2.2 percent increase in the CPI–U from June 2009 to June 2010, rounded to the nearest whole dollar.

xvii. For 2012, $611, reflecting a 3.2 percent increase in the CPI–U from June 2010 to June 2011, rounded to the nearest whole dollar.

xviii. For 2013, $625, reflecting a 2.3 percent increase in the CPI–U from June 2011 to June 2012, rounded to the nearest whole dollar.

xix. For 2014, $632, reflecting a 1.1 percent increase in the CPI–U from June 2012 to June 2013, rounded to the nearest whole dollar.

3. *Applicable threshold.* For purposes of § 1026.32(a)(1)(ii), a creditor must determine the applicable points and fees threshold based on the face amount of the note (or, in the case of an open-end credit plan, the credit limit for the plan when the account is opened). However, the creditor must apply the allowable points and fees percentage to the ''total loan amount,'' as defined in § 1026.32(b)(4). For closed-end credit transactions, the total loan amount may be different than the face amount of the note. The $20,000 amount in § 1026.32(a)(1)(ii)(A) and (B) is adjusted annually on January 1 by the annual percentage change in the CPI that was in effect on the preceding June 1.

i. For 2015, $20,391, reflecting a 2 percent increase in the CPI–U from June 2013 to June 2014, rounded to the nearest whole dollar.

ii. For 2016, $20,350, reflecting a .2 percent decrease in the CPI–U from June 2014 to June 2015, rounded to the nearest whole dollar.

iii. For 2017, $20,579, reflecting a 1.1 percent increase in the CPI–U from June 2015 to June 2016, rounded to the nearest whole dollar.

iv. For 2018, $21,032, reflecting a 2.2 percent increase in the CPI–U from June 2016 to June 2017, rounded to the nearest whole dollar.

v. For 2019, $21,549, reflecting a 2.5 percent increase in the CPI–U from June 2017 to June 2018, rounded to the nearest whole dollar.

vi. For 2020, $21,980, reflecting a 2 percent increase in the CPI–U from June 2018 to June 2019, rounded to the nearest whole dollar.

vii. For 2021, $22,052 reflecting a 0.3 percent increase in the CPI–U from June 2019 to June 2020, rounded to the nearest whole dollar.

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Section 1026.43—Minimum Standards for Transactions Secured by a Dwelling

* * * * *

Paragraph 43(e)(3)(ii).

1. *Annual adjustment for inflation.* The dollar amounts, including the loan amounts, in § 1026.43(e)(3)(i) will be

adjusted annually on January 1 by the annual percentage change in the CPI–U that was in effect on the preceding June 1. The Bureau will publish adjustments after the June figures become available each year.

i. For 2015, reflecting a 2 percent increase in the CPI–U that was reported on the preceding June 1, a covered transaction is not a qualified mortgage unless the transactions total points and fees do not exceed;

A. For a loan amount greater than or equal to $101,953: 3 percent of the total loan amount;

B. For a loan amount greater than or equal to $61,172 but less than $101,953: $3,059;

C. For a loan amount greater than or equal to $20,391 but less than $61,172: 5 percent of the total loan amount;

D. For a loan amount greater than or equal to $12,744 but less than $20,391; $1,020;

E. For a loan amount less than $12,744: 8 percent of the total loan amount.

ii. For 2016, reflecting a 0.2 percent decrease in the CPI–U that was reported on the preceding June 1, a covered transaction is not a qualified mortgage unless the transactions total points and fees do not exceed;

A. For a loan amount greater than or equal to $101,749: 3 percent of the total loan amount;

B. For a loan amount greater than or equal to $61,050 but less than $101,749: $3,052;

C. For a loan amount greater than or equal to $20,350 but less than $61,050: 5 percent of the total loan amount;

D. For a loan amount greater than or equal to $12,719 but less than $20,350; $1,017;

E. For a loan amount less than $12,719: 8 percent of the total loan amount.

iii. For 2017, reflecting a 1.1 percent increase in the CPI–U that was reported on the preceding June 1, a covered transaction is not a qualified mortgage unless the transactions total points and fees do not exceed:

A. For a loan amount greater than or equal to $102,894: 3 percent of the total loan amount;

B. For a loan amount greater than or equal to $61,737 but less than $102,894: $3,087;

C. For a loan amount greater than or equal to $20,579 but less than $61,737: 5 percent of the total loan amount;

D. For a loan amount greater than or equal to $12,862 but less than $20,579: $1,029;

E. For a loan amount less than $12,862: 8 percent of the total loan amount.

iv. For 2018, reflecting a 2.2 percent increase in the CPI–U that was reported on the preceding June 1, a covered transaction is not a qualified mortgage unless the transaction's total points and fees do not exceed:

A. For a loan amount greater than or equal to $105,158: 3 percent of the total loan amount;

B. For a loan amount greater than or equal to $63,095 but less than $105,158: $3,155;

C. For a loan amount greater than or equal to $21,032 but less than $63,095: 5 percent of the total loan amount;

D. For a loan amount greater than or equal to $13,145 but less than $21,032: $1,052;

E. For a loan amount less than $13,145: 8 percent of the total loan amount.

v. For 2019, reflecting a 2.5 percent increase in the CPI–U that was reported on the preceding June 1, a covered transaction is not a qualified mortgage unless the transaction's total points and fees do not exceed:

A. For a loan amount greater than or equal to $107,747: 3 percent of the total loan amount;

B. For a loan amount greater than or equal to $64,648 but less than $107,747: $3,232;

C. For a loan amount greater than or equal to $21,549 but less than $64,648: 5 percent of the total loan amount;

D. For a loan amount greater than or equal to $13,468 but less than $21,549: $1,077;

E. For a loan amount less than $13,468: 8 percent of the total loan amount.

vi. For 2020, reflecting a 2 percent increase in the CPI–U that was reported on the preceding June 1, a covered transaction is not a qualified mortgage unless the transaction's total points and fees do not exceed:

A. For a loan amount greater than or equal to $109,898: 3 percent of the total loan amount;

B. For a loan amount greater than or equal to $65,939 but less than $109,898: $3,297;

C. For a loan amount greater than or equal to $21,980 but less than $65,939: 5 percent of the total loan amount;

D. For a loan amount greater than or equal to $13,737 but less than $21,980: $1,099;

E. For a loan amount less than $13,737: 8 percent of the total loan amount.

vii. For 2021, reflecting a 0.3 percent increase in the CPI–U that was reported on the preceding June 1, a covered transaction is not a qualified mortgage unless the transaction's total points and fees do not exceed:

A. For a loan amount greater than or equal to $110,260: 3 percent of the total loan amount;

B. For a loan amount greater than or equal to $66,156 but less than $110,260: $3,308;

C. For a loan amount greater than or equal to $22,052 but less than $66,156: 5 percent of the total loan amount;

D. For a loan amount greater than or equal to $13,783 but less than $22,052: $1,103;

E. For a loan amount less than $13,783: 8 percent of the total loan amount.

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Section 1026.52—Limitations on Fees

* * * * *

52(b)(1)(ii) Safe harbors

1. Multiple violations of same type. i. *Same billing cycle or next six billing cycles.* A card issuer cannot impose a fee for a violation pursuant to § 1026.52(b)(1)(ii)(B) unless a fee has previously been imposed for the same type of violation pursuant to § 1026.52(b)(1)(ii)(A). Once a fee has been imposed for a violation pursuant to § 1026.52(b)(1)(ii)(A), the card issuer may impose a fee pursuant to § 1026.52(b)(1)(ii)(B) for any subsequent violation of the same type until that type of violation has not occurred for a period of six consecutive complete billing cycles. A fee has been imposed for purposes of § 1026.52(b)(1)(ii) even if the card issuer waives or rebates all or part of the fee.

A. *Late payments.* For purposes of § 1026.52(b)(1)(ii), a late payment occurs during the billing cycle in which the payment may first be treated as late consistent with the requirements of this part and the terms or other requirements of the account.

B. *Returned payments.* For purposes of § 1026.52(b)(1)(ii), a returned payment occurs during the billing cycle in which the payment is returned to the card issuer.

C. *Transactions that exceed the credit limit.* For purposes of § 1026.52(b)(1)(ii), a transaction that exceeds the credit limit for an account occurs during the billing cycle in which the transaction occurs or is authorized by the card issuer.

D. *Declined access checks.* For purposes of § 1026.52(b)(1)(ii), a check that accesses a credit card account is declined during the billing cycle in which the card issuer declines payment on the check.

ii. Relationship to §§ 1026.52(b)(2)(ii) and 1026.56(j)(1). If multiple violations are based on the same event or transaction such that § 1026.52(b)(2)(ii) prohibits the card issuer from imposing

more than one fee, the event or transaction constitutes a single violation for purposes of § 1026.52(b)(1)(ii). Furthermore, consistent with § 1026.56(j)(1)(i), no more than one violation for exceeding an account's credit limit can occur during a single billing cycle for purposes of § 1026.52(b)(1)(ii). However, § 1026.52(b)(2)(ii) does not prohibit a card issuer from imposing fees for exceeding the credit limit in consecutive billing cycles based on the same over-the-limit transaction to the extent permitted by § 1026.56(j)(1). In these circumstances, the second and third over-the-limit fees permitted by § 1026.56(j)(1) may be imposed pursuant to § 1026.52(b)(1)(ii)(B). *See* comment 52(b)(2)(ii)–1.

iii. Examples. The following examples illustrate the application of § 1026.52(b)(1)(ii)(A) and (b)(1)(ii)(B) with respect to credit card accounts under an open-end (not home-secured) consumer credit plan that are not charge card accounts. For purposes of these examples, assume that the billing cycles for the account begin on the first day of the month and end on the last day of the month and that the payment due date for the account is the twenty-fifth day of the month.

A. Violations of same type (late payments). A required minimum periodic payment of $50 is due on March 25. On March 26, a late payment has occurred because no payment has been received. Accordingly, consistent with § 1026.52(b)(1)(ii)(A), the card issuer imposes a $25 late payment fee on March 26. In order for the card issuer to impose a $35 late payment fee pursuant to § 1026.52(b)(1)(ii)(B), a second late payment must occur during the April, May, June, July, August, or September billing cycles.

1. The card issuer does not receive any payment during the March billing cycle. A required minimum periodic payment of $100 is due on April 25. On April 20, the card issuer receives a $50 payment. No further payment is received during the April billing cycle. Accordingly, consistent with § 1026.52(b)(1)(ii)(B), the card issuer may impose a $35 late payment fee on April 26. Furthermore, the card issuer may impose a $35 late payment fee for any late payment that occurs during the May, June, July, August, September, or October billing cycles.

2. Same facts as in paragraph A above. On March 30, the card issuer receives a $50 payment and the required minimum periodic payments for the April, May, June, July, August, and September billing cycles are received on or before the payment due date. A required minimum periodic payment of $60 is due on October 25. On October 26, a late payment has occurred because the required minimum periodic payment due on October 25 has not been received. However, because this late payment did not occur during the six billing cycles following the March billing cycle, § 1026.52(b)(1)(ii) only permits the card issuer to impose a late payment fee of $25.

B. *Violations of different types (late payment and over the credit limit).* The credit limit for an account is $1,000. Consistent with § 1026.56, the consumer has affirmatively consented to the payment of transactions that exceed the credit limit. A required minimum periodic payment of $30 is due on August 25. On August 26, a late payment has occurred because no payment has been received. Accordingly, consistent with § 1026.52(b)(1)(ii)(A), the card issuer imposes a $25 late payment fee on August 26. On August 30, the card issuer receives a $30 payment. On September 10, a transaction causes the account balance to increase to $1,150, which exceeds the account's $1,000 credit limit. On September 11, a second transaction increases the account balance to $1,350. On September 23, the card issuer receives the $50 required minimum periodic payment due on September 25, which reduces the account balance to $1,300. On September 30, the card issuer imposes a $25 over-the-limit fee, consistent with § 1026.52(b)(1)(ii)(A). On October 26, a late payment has occurred because the $60 required minimum periodic payment due on October 25 has not been received. Accordingly, consistent with § 1026.52(b)(1)(ii)(B), the card issuer imposes a $35 late payment fee on October 26.

C. *Violations of different types (late payment and returned payment).* A required minimum periodic payment of $50 is due on July 25. On July 26, a late payment has occurred because no payment has been received. Accordingly, consistent with § 1026.52(b)(1)(ii)(A), the card issuer imposes a $25 late payment fee on July 26. On July 30, the card issuer receives a $50 payment. A required minimum periodic payment of $50 is due on August 25. On August 24, a $50 payment is received. On August 27, the $50 payment is returned to the card issuer for insufficient funds. In these circumstances, § 1026.52(b)(2)(ii) permits the card issuer to impose either a late payment fee or a returned payment fee but not both because the late payment and the returned payment result from the same event or transaction. Accordingly, for purposes of § 1026.52(b)(1)(ii), the event or transaction constitutes a single violation. However, if the card issuer imposes a late payment fee, § 1026.52(b)(1)(ii)(B) permits the issuer to impose a fee of $35 because the late payment occurred during the six billing cycles following the July billing cycle. In contrast, if the card issuer imposes a returned payment fee, the amount of the fee may be no more than $25 pursuant to § 1026.52(b)(1)(ii)(A).

2. *Adjustments based on Consumer Price Index.* For purposes of § 1026.52(b)(1)(ii)(A) and (b)(1)(ii)(B), the Bureau shall calculate each year price level adjusted amounts using the Consumer Price Index in effect on June 1 of that year. When the cumulative change in the adjusted minimum value derived from applying the annual Consumer Price level to the current amounts in § 1026.52(b)(1)(ii)(A) and (b)(1)(ii)(B) has risen by a whole dollar, those amounts will be increased by $1.00. Similarly, when the cumulative change in the adjusted minimum value derived from applying the annual Consumer Price level to the current amounts in § 1026.52(b)(1)(ii)(A) and (b)(1)(ii)(B) has decreased by a whole dollar, those amounts will be decreased by $1.00. The Bureau will publish adjustments to the amounts in § 1026.52(b)(1)(ii)(A) and (b)(1)(ii)(B).

i. *Historical thresholds.* A. Card issuers were permitted to impose a fee for violating the terms of an agreement if the fee did not exceed $25 under § 1026.52(b)(1)(ii)(A) and $35 under § 1026.52(b)(1)(ii)(B), through December 31, 2013.

B. Card issuers were permitted to impose a fee for violating the terms of an agreement if the fee did not exceed $26 under § 1026.52(b)(1)(ii)(A) and $37 under § 1026.52(b)(1)(ii)(B), through December 31, 2014.

C. Card issuers were permitted to impose a fee for violating the terms of an agreement if the fee did not exceed $27 under § 1026.52(b)(1)(ii)(A) and $38 under § 1026.52(b)(1)(ii)(B), through December 31, 2015.

D. Card issuers were permitted to impose a fee for violating the terms of an agreement if the fee did not exceed $27 under § 1026.52(b)(1)(ii)(A), through December 31, 2016. Card issuers were permitted to impose a fee for violating the terms of an agreement if the fee did not exceed $37 under § 1026.52(b)(1)(ii)(B), through June 26, 2016, and $38 under § 1026.52(b)(1)(ii)(B) from June 27, 2016 through December 31, 2016.

E. Card issuers were permitted to impose a fee for violating the terms of

an agreement if the fee did not exceed $27 under § 1026.52(b)(1)(ii)(A) and $38 under § 1026.52(b)(1)(ii)(B), through December 31, 2017.

F. Card issuers were permitted to impose a fee for violating the terms of an agreement if the fee did not exceed $27 under § 1026.52(b)(1)(ii)(A) and $38 under § 1026.52(b)(1)(ii)(B), through December 31, 2018.

G. Card issuers were permitted to impose a fee for violating the terms of an agreement if the fee did not exceed $28 under § 1026.52(b)(1)(ii)(A) and $39 under § 1026.52(b)(1)(ii)(B), through December 31, 2019.

H. Card issuers were permitted to impose a fee for violating the terms of an agreement if the fee did not exceed $29 under § 1026.52(b)(1)(ii)(A) and $40 under § 1026.52(b)(1)(ii)(B), through December 31, 2020.

3. *Delinquent balance for charge card accounts.* Section 1026.52(b)(1)(ii)(C) provides that, when a charge card issuer that requires payment of outstanding balances in full at the end of each billing cycle has not received the required payment for two or more consecutive billing cycles, the card issuer may impose a late payment fee that does not exceed three percent of the delinquent balance. For purposes of § 1026.52(b)(1)(ii)(C), the delinquent balance is any previously billed amount that remains unpaid at the time the late payment fee is imposed pursuant to § 1026.52(b)(1)(ii)(C). Consistent with § 1026.52(b)(2)(ii), a charge card issuer that imposes a fee pursuant to § 1026.52(b)(1)(ii)(C) with respect to a late payment may not impose a fee pursuant to § 1026.52(b)(1)(ii)(B) with respect to the same late payment. The following examples illustrate the application of § 1026.52(b)(1)(ii)(C):

i. Assume that a charge card issuer requires payment of outstanding balances in full at the end of each billing cycle and that the billing cycles for the account begin on the first day of the month and end on the last day of the month. At the end of the June billing cycle, the account has a balance of $1,000. On July 5, the card issuer provides a periodic statement disclosing the $1,000 balance consistent with § 1026.7. During the July billing cycle, the account is used for $300 in transactions, increasing the balance to $1,300. At the end of the July billing cycle, no payment has been received and the card issuer imposes a $25 late payment fee consistent with § 1026.52(b)(1)(ii)(A). On August 5, the card issuer provides a periodic statement disclosing the $1,325 balance consistent with § 1026.7. During the August billing cycle, the account is used for $200 in transactions, increasing the balance to $1,525. At the end of the August billing cycle, no payment has been received. Consistent with § 1026.52(b)(1)(ii)(C), the card issuer may impose a late payment fee of $40, which is 3% of the $1,325 balance that was due at the end of the August billing cycle. Section 1026.52(b)(1)(ii)(C) does not permit the card issuer to include the $200 in transactions that occurred during the August billing cycle.

ii. Same facts as above except that, on August 25, a $100 payment is received. Consistent with § 1026.52(b)(1)(ii)(C), the card issuer may impose a late payment fee of $37, which is 3% of the unpaid portion of the $1,325 balance that was due at the end of the August billing cycle ($1,225).

iii. Same facts as in paragraph A above except that, on August 25, a $200 payment is received. Consistent with § 1026.52(b)(1)(ii)(C), the card issuer may impose a late payment fee of $34, which is 3% of the unpaid portion of the $1,325 balance that was due at the end of the August billing cycle ($1,125). In the alternative, the card issuer may impose a late payment fee of $35 consistent with § 1026.52(b)(1)(ii)(B). However, § 1026.52(b)(2)(ii) prohibits the card issuer from imposing both fees.

* * * * *

Dated: July 17, 2020.

Laura Galban,

Federal Register Liaison, Bureau of Consumer Financial Protection.

[FR Doc. 2020–15900 Filed 8–18–20; 8:45 am]

BILLING CODE 4810–AM–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 882 and 895

[Docket No. FDA–2016–N–1111]

Medical Devices; Petition for an Administrative Stay of Action: Electrical Stimulation Devices for Self-Injurious or Aggressive Behavior

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule; notification of administrative stay.

SUMMARY: The Food and Drug Administration (FDA or Agency) is providing notice of a stay of the effectiveness of provisions for devices in use on specific individuals who have or would need to obtain a physician-directed transition plan as of the date of publication on March 6, 2020, of the final regulation banning electrical stimulation devices (ESDs) for self-injurious or aggressive behavior. FDA is publishing this notification in response to petitions for an administrative stay of action in accordance with regulatory requirements.

DATES: FDA is administratively staying temporarily the final regulation published on March 6, 2020 (85 FR 13312), for those devices in use on specific individuals as described in **SUPPLEMENTARY INFORMATION**. FDA will publish a document in the **Federal Register** lifting the stay or taking further action as needed.

ADDRESSES: For access to the docket, 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, between 9 a.m. and 4 p.m., Monday through Friday. Publicly available submissions may be seen in the docket.

FOR FURTHER INFORMATION CONTACT: Rebecca Nipper, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 1540, Silver Spring, MD 20993–0002, 301–796–6527, *rebecca.nipper@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: In the **Federal Register** of March 6, 2020 (85 FR 13312), FDA issued a final regulation banning electrical stimulation devices (ESDs) for self-injurious behavior (SIB) or aggressive behavior (AB). This final regulation provided two operational dates. The ban is in effect for all devices as of April 6, 2020, 30 days after the date of publication. However, for devices in use on specific individuals as of the date of publication and subject to a physician-directed transition plan, compliance is required on September 2, 2020, 180 days after the date of publication of the final rule.

FDA received two requests under 21 CFR 10.35 to immediately and indefinitely stay these dates for the final regulation banning ESDs for SIB or AB. The first petition, dated March 20, 2020, is from Eckert Seamans Cherin & Mellot, LLC on behalf of their client, the Judge Rotenberg Educational Center, Inc. (JRC) (see Docket No. FDA–2020–P–1166). As described below, FDA temporarily granted this petition (JRC petition) in part on March 27, 2020. The second petition, dated March 24, 2020, is from Todd & Weld, LLP on behalf of their clients the parents and guardians of certain patients at JRC, as well as the patients themselves, and the JRC Parents and Friends Association, Inc. (see

Docket No. FDA–2020–P–1181). This petition (Parent petition) was routed for review and response after FDA's March 27, 2020, letter granting JRC's request for a stay in part. Although filed by different parties, the Parent petition requested the same action as the JRC petition and did not necessitate a different response or change in the stay FDA granted in response to the JRC petition. Both petitions request a stay based on all four criteria for a mandatory stay or, alternatively, based on being ''in the public interest and in the interest of justice'' for a discretionary stay (§ 10.35 (21 CFR 10.35(e))). Because the petitions request the same action for substantially similar reasons, FDA has determined that its March 27, 2020, response to the JRC petition is equally applicable to the Parent petition. FDA notes that both sets of petitioners filed legal challenges to the ban in the U.S. Court of Appeals for the D.C. Circuit, which challenges have now been consolidated before that court.

By a letter dated March 27, 2020, FDA responded to the JRC petition granting in part a discretionary temporary stay. As the letter states, it is in the public health interest and interest of justice to stay the compliance date for devices subject to the ban that are currently in use on specific individuals who would need to obtain a physician-directed transition plan to cease use of such devices. The stay is in the public interest and interest of justice because of the ongoing national emergency caused by ''severe acute respiratory syndrome coronavirus 2'' (SARS–CoV–2) and the disease it causes ''Coronavirus Disease 2019 (COVID–19).'' Specifically, the creation or implementation of a physician-directed transition plan has the potential to increase the risk of transmission or exposure to COVID–19, and it may divert healthcare delivery resources from other uses during the pandemic.

The stay is intended to remain in effect for the duration of the public health emergency related to COVID–19 declared by HHS, including any renewals made by the Secretary in accordance with section 319(a)(2) of the PHS Act (42 U.S.C. 247d(a)(2)). Once the public health emergency ends, FDA will substantively respond to the petitions, and issue another notification in the **Federal Register**, if necessary, in accordance with § 10.35. If the public health emergency ends while the consolidated legal challenge in the D.C. Circuit is still pending, the stay will continue in effect until: (1) FDA substantively responds to the petitions and (2) if FDA does not grant the petitions, the parties have had adequate time and reasonable opportunity to obtain a ruling from the D.C. Circuit regarding a stay of FDA's response to the petitions.

FDA's partial stay is limited to those devices currently in use on specific individuals who have or would need to obtain a physician-directed transition plan to cease use of such devices in order to comply with the final regulation banning ESDs. For all other devices, the ban became effective on, and required compliance by, April 6, 2020.

Dated: July 27, 2020.

Lowell J. Schiller,

Principal Associate Commissioner for Policy.

[FR Doc. 2020–16595 Filed 8–17–20; 4:15 pm]

BILLING CODE 4164–01–P

DEPARTMENT OF JUSTICE

Office of the Attorney General

28 CFR Part 50

[Docket No. OAG 165; AG Order No. 4769–2020]

Prohibition on the Issuance of Improper Guidance Documents Within the Justice Department

AGENCY: Office of the Attorney General, Department of Justice.

ACTION: Interim final rule; request for comments.

SUMMARY: This rule codifies in the regulations of the Department of Justice (''Department'') the Memorandum for All Components from Attorney General Jefferson B. Sessions III titled, ''Prohibition on Improper Guidance Documents'' (Nov. 16, 2017), consistent with Executive Order 13891, ''Promoting the Rule of Law Through Improved Agency Guidance Documents'' (Oct. 9, 2019).

DATES: *Effective date:* This rule is effective August 19, 2020. *Comments:* Comments are due on or before September 18, 2020.

ADDRESSES: To ensure proper handling of comments, please reference Docket No. OAG 165 on all electronic and written correspondence. The Department encourages the electronic submission of all comments through *https://www.regulations.gov* using the electronic comment form provided on that site. For easy reference, an electronic copy of this document is also available at that website. It is not necessary to submit paper comments that duplicate the electronic submission, as all comments submitted to *https://www.regulations.gov* will be posted for public review and are part of the official docket record. However, should you wish to submit written comments through regular or express mail, they should be sent to: Robert Hinchman, Senior Counsel, Office of Legal Policy, U.S. Department of Justice, Room 4252 RFK Building, 950 Pennsylvania Avenue NW, Washington, DC 20530. Comments received by mail will be considered timely if they are postmarked on or before September 18, 2020. The electronic Federal eRulemaking portal will accept comments until midnight Eastern Time at the end of that day.

FOR FURTHER INFORMATION CONTACT: Robert Hinchman, Senior Counsel, Office of Legal Policy, U.S. Department of Justice, Room 4252 RFK Building, 950 Pennsylvania Avenue NW, Washington, DC 20530, telephone (202) 514–8059 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Posting of Public Comments

Please note that all comments received are considered part of the public record and made available for public inspection online at *https://www.regulations.gov.* Information made available for public inspection includes personal identifying information (such as your name, address, etc.) voluntarily submitted by the commenter.

If you wish to submit personal identifying information (such as your name, address, etc.) as part of your comment, but do not wish it to be posted online, you must include the phrase ''PERSONAL IDENTIFYING INFORMATION'' in the first paragraph of your comment. You must also locate all the personal identifying information that you do not want posted online in the first paragraph of your comment and identify what information you want the agency to redact. Personal identifying information identified and located as set forth above will be placed in the agency's public docket file, but not posted online.

If you wish to submit confidential business information as part of your comment but do not wish it to be posted online, you must include the phrase ''CONFIDENTIAL BUSINESS INFORMATION'' in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, the agency may choose not to post that comment (or to post that comment only partially) on *https://*

www.regulations.gov. Confidential business information identified and located as set forth above will not be placed in the public docket file, nor will it be posted online.

If you wish to inspect the agency's public docket file in person by appointment, please see the **FOR FURTHER INFORMATION CONTACT** paragraph.

II. Discussion

A. Attorney General Memorandum of November 16, 2017

In a memorandum to all components of the Department dated November 16, 2017, then-Attorney General Jefferson B. Sessions III reiterated the duty of the Department ''to uphold the laws of the United States and to ensure the fair and impartial administration of justice.'' Memorandum for All Components, ''Prohibition on Improper Guidance Documents,'' Nov. 16, 2017, *available at https://www.justice.gov/opa/press-release/file/1012271/download* (''Attorney General's memorandum''). The Attorney General's memorandum further stated that ''when the Department engages in regulatory activity, it should model the lawful exercise of regulatory power.'' *Id.*

In particular, the Attorney General's memorandum explained that, ''[i]n promulgating regulations, the Department must abide by constitutional principles and follow the rules imposed by Congress and the President. These principles and rules include the fundamental requirement that agencies regulate only within the authority delegated to them by Congress. They also include the Administrative Procedure Act's requirement to use, in most cases, notice-and-comment rulemaking when purporting to create rights or obligations binding on members of the public or the agency. Not only is notice-and-comment rulemaking generally required by law, but it has the benefit of availing agencies of more complete information about a proposed rule's effects than the agency could ascertain on its own, and therefore results in better decision making by regulators.'' *Id.*

The Attorney General's memorandum further explained that, ''[n]ot every agency action is required to undergo notice-and-comment rulemaking. For example, agencies may use guidance and similar documents to educate regulated parties through plain-language restatements of existing legal requirements or provide non-binding advice on technical issues through examples or practices to guide the application or interpretation of statutes and regulations. But guidance may not be used as a substitute for rulemaking and may not be used to impose new requirements on entities outside the Executive Branch. Nor should guidance create binding standards by which the Department will determine compliance with existing regulatory or statutory requirements.'' *Id.*

The Attorney General's memorandum acknowledged that ''the Department has in the past published guidance documents—or similar instruments of future effect by other names, such as letters to regulated entities—that effectively bind private parties without undergoing the rulemaking process.'' *Id.* However, it stated that, going forward, ''[t]he Department will no longer engage in this practice.'' *Id.* Effective immediately, the Attorney General directed Department components not to ''issue guidance documents that purport to create rights or obligations binding on persons or entities outside the Executive Branch (including state, local, and tribal governments).'' *Id.*

The Attorney General's memorandum also directed that, to avoid circumventing the rulemaking process, Department components must adhere to a set of defined principles when issuing guidance documents. *Id.* Subsequently, these principles were included in the Justice Manual at section 1–19.000. *See* Justice Manual, sec. 1–19.000, ''Limitation on Issuance of Guidance Documents,'' *available at https://www.justice.gov/jm/justice-manual.*

B. Executive Order 13891 of October 9, 2019

On October 9, 2019, President Donald J. Trump issued Executive Order 13891, ''Promoting the Rule of Law Through Improved Agency Guidance Documents.'' Executive Branch agencies must follow the requirements and provisions prescribed therein to ensure that Americans are subject to only those binding rules imposed through duly enacted statutes or through regulations lawfully promulgated under them and that Americans have fair notice of their obligations.

Among its other provisions, Executive Order 13891 set forth a definition of ''guidance document'' and provided robust limitations and protections regarding Executive Branch agencies' issuance of guidance documents.

C. This Interim Rule

This rule codifies in the Statements of Policy portion of the Department's regulations, 28 CFR part 50, the principles set forth in both the Attorney General's memorandum, and section 1–19.000 of the Justice Manual, consistent with Executive Order 13891. The scope of this rulemaking is limited. The Department anticipates publishing a rulemaking in the future to implement the requirements and provisions of Executive Order 13891 that are not covered by this rulemaking.

III. Regulatory Certifications

A. Administrative Procedure Act

This rule relates to a matter of agency management or personnel and is a rule of agency organization, procedure, or practice. As such, this rule is exempt from the usual requirements of prior notice and comment and a 30-day delay in effective date. *See* 5 U.S.C. 553(a)(2), (b)(A), (d). However, the Department is, in its discretion, seeking public comment on this rulemaking.

B. Regulatory Flexibility Act

This rule will not have an impact on small entities because it pertains to personnel and administrative matters affecting the Department. A Regulatory Flexibility Analysis was not required for this final rule because the Department was not required to publish a general notice of proposed rulemaking for this matter. *See* 5 U.S.C. 601(2), 604(a).

C. Executive Orders 12866, 13563, and 13771 (Regulatory Planning and Review)

This rule has been drafted and reviewed in accordance with Executive Order 12866, ''Regulatory Planning and Review,'' section 1(b), The Principles of Regulation, and Executive Order 13563, ''Improving Regulation and Regulatory Review,'' section 1(b), General Principles of Regulation.

This rule is ''limited to agency organization, management, or personnel matters'' and thus is not a ''rule'' for purposes of review by the Office of Management and Budget (OMB), a determination in which OMB has concurred. *See* Executive Order 12866, sec. 3(d)(3). Accordingly this rule has not been formally reviewed by OMB.

This rule is not subject to the requirements of Executive Order 13771, ''Reducing Regulation and Controlling Regulatory Costs,'' because it is not a significant regulatory action under Executive Order 12866.

D. Executive Order 12988 (Civil Justice Reform)

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, ''Civil Justice Reform.''

E. Executive Order 13132 (Federalism)

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. Therefore, in accordance with Executive Order 13132, ''Federalism,'' the Department has determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted for inflation) in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1501 *et seq.*

G. Congressional Review Act

This rule is not a major rule as defined by section 804 of the Congressional Review Act, 5 U.S.C. 804. This action pertains to agency management or personnel, and agency organization, procedure, or practice, and does not substantially affect the rights or obligations of non-agency parties. Accordingly, it is not a ''rule'' as that term is used by the Congressional Review Act, 5 U.S.C. 804(3)(B), (C), and the reporting requirement of 5 U.S.C. 801 does not apply.

H. Paperwork Reduction Act of 1995

This rule does not impose any new reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3521.

List of Subjects in 28 CFR Part 50

Administrative practice and procedure.

Accordingly, for the reasons set forth in the preamble, part 50 of chapter I of title 28 of the Code of Federal Regulations is amended as follows:

PART 50—STATEMENTS OF POLICY

■ 1. The authority citation for part 50 continues to read as follows:

Authority: 5 U.S.C. 301; 18 U.S.C. 1162; 28 U.S.C. 509, 510, 516, and 519; 42 U.S.C. 1921 *et seq.,* 1973c; and Pub. L. 107–273, 116 Stat. 1758, 1824.

■ 2. Section 50.26 is added to read as follows:

§ 50.26 Limitation on issuance of guidance documents.

(a) *General principles.* (1) The term ''guidance document'' means an agency statement of general applicability, intended to have future effect on the behavior of regulated parties, that sets forth

(i) A policy on a statutory, regulatory, or technical issue, or

(ii) An interpretation of a statute or regulation.

(2) The term ''guidance document'' does not include the following:

(i) Rules promulgated pursuant to notice and comment under section 553 of title 5, United States Code, or similar statutory provisions;

(ii) Rules exempt from rulemaking requirements under section 553(a) of title 5, United States Code;

(iii) Rules of agency organization, procedure, or practice;

(iv) Decisions of agency adjudications under section 554 of title 5, United States Code, or similar statutory provisions;

(v) Internal guidance directed to the issuing agency or other agencies that is not intended to have substantial future effect on the behavior of regulated parties;

(vi) Internal Executive Branch legal advice or legal opinions addressed to Executive Branch officials, *see* E.O. 13891 of October 9, 2019, sec. 2(b); or

(vii) Documents informing the public of the agency's enforcement priorities or factors the agency considers in exercising its prosecutorial discretion.

(3) An agency guidance document may not be used as a substitute for regulation and may not be used to impose new standards of conduct on persons outside the Executive Branch except as expressly authorized by law or as expressly incorporated into a contract.

(4) In accordance with the principles set forth in paragraphs (a)(1) through (3) of this section, except where expressly authorized by law or as expressly incorporated into a contract, Department components may not issue guidance documents that purport to create rights or obligations binding on persons or entities outside the Executive Branch (including state, local, and tribal governments). Likewise, except where expressly authorized by law or as expressly incorporated into a contract, Department components may not issue guidance documents that create binding standards by which the Department will determine compliance with existing regulatory or statutory requirements.

(b) *Compliance procedures.* To ensure compliance with this section, when issuing guidance documents, Department components must, except where expressly authorized by law or as expressly incorporated into a contract:

(1) Identify the documents as guidance, disclaim any force or effect of law, and avoid language suggesting that the public has obligations that go beyond those set forth in the applicable statutes and regulations;

(2) Clearly state that the documents do not bind the public, except as authorized by law or as incorporated into a contract;

(3) Avoid using the documents for the purpose of coercing persons or entities outside of the Executive Branch into taking any action or refraining from any action beyond what is required by the terms of the applicable statute or regulation;

(4) Avoid using mandatory language such as ''shall,'' ''must,'' ''required,'' or ''requirement'' to direct parties outside the Executive Branch to take or refrain from taking action except when restating—with citations to statutes, regulations, or binding judicial precedent—clear mandates contained in the statute, regulation, or binding judicial precedent; and

(5) Clearly state that noncompliance with voluntary standards will not, in itself, result in any enforcement action.

Dated: July 24, 2020.

William P. Barr,

Attorney General.

[FR Doc. 2020–16473 Filed 8–18–20; 8:45 am]

BILLING CODE 4410–BB–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R01–OAR–2020–0223; FRL–10012–75–Region 1]

Air Plan Approval; Connecticut; Infrastructure State Implementation Plan Requirements for the 2015 Ozone Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving most of the elements of a State Implementation Plan (SIP) revision submitted by the State of Connecticut that addresses the infrastructure requirements of the Clean Air Act (CAA or Act), excluding the interstate transport provisions, for the 2015 ozone National Ambient Air Quality Standards (NAAQS). We are conditionally approving several elements of Connecticut's SIP revision regarding air quality modeling requirements.

The infrastructure requirements are designed to ensure that the structural

components of each state's air-quality management program, including provisions prohibiting emissions that will have certain adverse air-quality effects in other states, are adequate to meet the state's responsibilities under the CAA. This action is being taken in accordance with the Clean Air Act.

DATES: This rule is effective on September 18, 2020.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R01–OAR–2020–0223. All documents in the docket are listed on the *https://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *i.e.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available at *https://www.regulations.gov* or at the U.S. Environmental Protection Agency, EPA Region 1 Regional Office, Air and Radiation Division, 5 Post Office Square—Suite 100, Boston, MA. EPA requests that if at all possible, you contact the contact listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding legal holidays and facility closures due to COVID–19.

FOR FURTHER INFORMATION CONTACT: Alison C. Simcox, Air Quality Branch, U.S. Environmental Protection Agency, EPA Region 1, 5 Post Office Square—Suite 100, (Mail code 05–2), Boston, MA 02109–3912, tel. (617) 918–1684, email *simcox.alison@epa.gov.*

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

Table of Contents

I. Background and Purpose
II. Final Action
III. Statutory and Executive Order Reviews

I. Background and Purpose

On May 29, 2020, EPA published a Notice of Proposed Rulemaking (NPRM) to approve a Connecticut SIP revision addressing the infrastructure requirements of the Clean Air Act (CAA or Act)—excluding the interstate transport provisions—for the 2015 ozone National Ambient Air Quality Standards (NAAQS). Connecticut submitted the formal SIP revision on September 7, 2018. The rationale for EPA's proposed action is given in the NPRM and will not be restated here. EPA received no public comments on the NPRM.

II. Final Action

EPA is approving most of the elements of Connecticut's September 7, 2018, infrastructure SIP submission for the 2015 ozone NAAQS)—excluding section 110(a)(2)(D)(i)(I) (*i.e.,* the Good Neighbor'' or ''transport'' provisions)—as a revision to the Connecticut SIP.

In addition, EPA is conditionally approving section 110(a)(2)(K) (Air quality modeling and data) as well as the PSD-related requirements of section 110(a)(2)(D)(i)(II), 110(a)(2)(C), and 110(a)(2)(J). The State must submit to EPA by August 19, 2021 the necessary revisions to RCSA section 22a–174–3a(i) needed to fully approve these elements.

If the State fails to do so, this approval will become a disapproval on that date. EPA will notify the State by letter that this action has occurred. At that time, this commitment will no longer be a part of the approved Connecticut SIP. EPA subsequently will publish a notice in the notice section of the **Federal Register** notifying the public that the conditional approval automatically converted to a disapproval. If the State meets its commitment, within the applicable time frame, the conditionally approved submission will remain a part of the SIP until EPA takes final action approving or disapproving the necessary SIP revision. If EPA disapproves the new submittal, the conditionally approved sections 110(a)(2)(K) and the PSD-related requirements of sections 110(a)(2)(D)(i)(II), 110(a)(2)(C), and 110(a)(2)(J) will also be disapproved at that time. If EPA approves the submittal, sections 110(a)(2)(K) and the PSD-related requirements of section 110(a)(2)(D)(i)(II), 110(a)(2)(C), and 110(a)(2)(J) will be fully approved in their entirety and replace the conditionally approved elements in the SIP.

If the conditional approval is converted to a disapproval, such action will trigger EPA's authority to impose sanctions under section 110(m) of the CAA at the time EPA issues the final disapproval or on the date the State fails to meet its commitment. In the latter case, EPA will notify the State by letter that the conditional approval has been converted to a disapproval and that EPA's sanctions authority has been triggered. In addition, the final disapproval triggers the Federal implementation plan (FIP) requirement under section 110(c).

III. 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, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

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

In addition, the SIP is not approved to apply on any Indian reservation land

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

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 19, 2020. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

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

Dated: July 20, 2020.

Dennis Deziel,

Regional Administrator, EPA Region 1.

For the reasons stated in the preamble, the EPA amends Part 52 of chapter I, title 40 of the Code of Federal Regulations as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart H—Connecticut

■ 2. Section 52.370 is amended by adding paragraph (c) (123) to read as follows:

§ 52.370 Identification of plan

* * * * *

(c) * * *

(123) Revisions to the State Implementation Plan submitted by the Connecticut Department of Energy and Environmental Protection on September 7, 2018.

(i) [Reserved]

(ii) Additional materials.

(A) The Connecticut Department of Energy and Environmental Protection document, ''Connecticut State Implementation Plan—Clean Air Act Section 110(a) Infrastructure Elements for the 2015 Ozone National Ambient Air Quality Standards,'' Final, September 7, 2018.

(B) [Reserved]

■ 3. Section 52.386 is amended by adding paragraph (e) to read as follows:

§ 52.386 Section 110(a)(2) infrastructure requirements.

* * * * *

(e) The Connecticut Department of Energy and Environmental Protection submitted an infrastructure SIP for the 2015 ozone NAAQS on September 7, 2018. This infrastructure SIP is approved, with the exception of section 110(a)(2)(D)(i)(I), which will be addressed in a future rulemaking, and sections 110(a)(2)(K) and the PSD-related requirements of sections 110(a)(2)(D)(i)(II), 110(a)(2)(C), and 110(a)(2)(J), which are conditionally approved.

[FR Doc. 2020–16010 Filed 8–18–20; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2019–0031; FRL–10011–75-Region 5]

Air Plan Approval; Illinois; Plan Elements for the Chicago Nonattainment Area for the 2008 Ozone Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving a revision to the Illinois State Implementation Plan (SIP) to meet the base year emissions inventory and motor vehicle inspection and maintenance (I/M) requirements of the Clean Air Act (CAA) for the Illinois portion of the Chicago-Naperville, Illinois-Indiana-Wisconsin area (Chicago area) for the 2008 ozone national ambient air quality standard (NAAQS or standard). EPA is approving the State's submission as a SIP revision pursuant to section 110 and part D of the CAA and EPA's regulations because it satisfies the emissions inventory and I/M requirements for areas classified as moderate nonattainment for the 2008 ozone NAAQS. Final approval of the Illinois SIP as meeting the I/M requirements of the CAA for the 2008 ozone NAAQS permanently stops the Federal Implementation Plan (FIP) clock for that element, which was triggered by EPA's December 11, 2017 finding that Illinois failed to submit certain required SIP elements for the 2008 ozone NAAQS. EPA proposed to approve this action on April 23, 2020 and received no adverse comments on the emissions inventory and I/M SIP elements.

DATES: This final rule is effective on September 18, 2020.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R05–OAR–2019–0031. All documents in the docket are listed on the *www.regulations.gov* website. Although listed in the index, some information is not publicly available, *i.e.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available either through *www.regulations.gov* or at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays and facility closures due to COVID 19. We recommend that you telephone Kathleen D'Agostino, Environmental Scientist, at (312) 886–1767 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Kathleen D'Agostino, Environmental Scientist, Attainment Planning and Maintenance Section, Air Programs Branch (AR–18J), U.S. Environmental

Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–1767, *dagostino.kathleen@epa.gov.*

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

I. Background Information

On April 23, 2020 (85 FR 22693), EPA proposed to approve revisions to the Illinois SIP to meet the base year emissions inventory, motor vehicle I/M, reasonable further progress (RFP), and RFP contingency measures requirements of the CAA for the Illinois portion of the Chicago area for the 2008 ozone NAAQS. EPA also proposed to approve the 2017 transportation conformity motor vehicle emissions budgets (MVEBs) for the Illinois portion of the Chicago area for the 2008 ozone NAAQS. An explanation of the CAA requirements, a detailed analysis of the revisions, and EPA's reasons for proposing approval were provided in the notice of proposed rulemaking and will not be restated here. The public comment period for this proposed rule ended on May 26, 2020. EPA received no comments on the emissions inventory and I/M portions of the proposal. Therefore, we are finalizing our action on those plan elements as proposed. EPA received adverse comments on the portions of the proposal relating to the RFP plan, RFP contingency measures, and the related MVEBs. EPA will be addressing these plan elements and the associated comments in a separate action.

II. Final Action

EPA is approving revisions to the Illinois SIP pursuant to section 110 and part D of the CAA and EPA's regulations because the Illinois Environmental Protection Agency's (IEPA's) January 10, 2019, SIP plan submission satisfies the emissions inventory and I/M requirements of the CAA for the Illinois portion of the Chicago area for the 2008 ozone NAAQS. Final approval of these portions of IEPA's January 10, 2019 SIP revision permanently stops the FIP clock triggered by the December 11, 2017 finding with respect to a basic I/M program. Final approval of these portions of IEPA's submittal will not affect the FIP clocks triggered by the December 11, 2017 finding for the following SIP elements: RFP, contingency measures for volatile organic compounds (VOC) and oxides of nitrogen (NO_X), an attainment demonstration, Reasonably Available Control Technology (RACT) non-control techniques guidelines for major stationary sources of VOC, and RACT for major stationary sources of NO_X.

III. Statutory and Executive Order Reviews

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

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

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

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

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 19, 2020. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Volatile organic compounds.

Dated: July 22, 2020.

Kurt Thiede,

Regional Administrator, Region 5.

For the reasons stated in the preamble, the EPA amends 40 CFR part 52 as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

■ 2. In § 52.720, the table in paragraph (e) is amended:

■ a. Under ''Emission Inventories'' by:
■ i. Revising the entry for ''Emission inventory—2011 (2008 8-hour ozone)'' to remove the ''Chicago area'';
■ ii. Adding a second entry for ''Emission inventory—2011 (2008 8-hour ozone)'' for the ''Chicago area'';
■ b. Under ''Moderate Area & Above Ozone Requirements'' by adding an entry for ''I/M certification (8-hour, 2008 ozone)'' following the entry for ''15 percent rate-of-progress and 3 percent contingency plans''.

The revisions and additions read as follows:

§ 52.720 Identification of plan.

* * * * *

(e) * * *

EPA—APPROVED ILLINOIS NONREGULATORY AND QUASI—REGULATORY PROVISIONS

Name of SIP provision	Applicable geographic or nonattainment area	State submittal date	EPA approval date	Comments
*	*	*	*	*
Emission inventory—2011 (2008 8-hour ozone).	St. Louis area	9/3/2014	3/7/2016, 81 FR 11671	
Emission inventory—2011 (2008 8-hour ozone).	Chicago area	1/10/2019	8/19/2020, [Insert **Federal Register** citation].	
*	*	*	*	*
I/M certification (8-hour, 2008 ozone).	Chicago area	1/10/2019	8/19/2020, [Insert **Federal Register** citation].	
*	*	*	*	*

* * * * *

[FR Doc. 2020–16246 Filed 8–18–20; 8:45 am]

BILLING CODE 6560–50–P

GENERAL SERVICES ADMINISTRATION

48 CFR Parts 501 and 570

[GSAR Case 2020–G530; Docket No. GSA–GSAR–2020–0012; Sequence No. 1]

RIN 3090–AK28

General Services Administration Acquisition Regulation; Update of GSA Forms References

AGENCY: Office of Acquisition Policy, General Services Administration (GSA).

ACTION: Direct final rule with request for comments.

SUMMARY: This direct final rule amends the General Services Administration Acquisition Regulation (GSAR) to address any references to outdated forms, and updates charts with current forms in use.

DATES: This final rule is effective on October 19, 2020 without further notice unless adverse comments are received by September 18, 2020. If GSA receives adverse comments, we will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect.

ADDRESSES: Submit comments in response to GSAR Case 2020–G530 via the Federal eRulemaking portal at *Regulations*.gov by searching for ''GSAR Case 2020–G530''. Select the link ''Comment Now'' that corresponds with GSAR Case 2020–G530. Follow the instructions provided at the ''Comment Now'' screen. Please include your name, company name (if any), and ''GSAR Case 2020–G530'' on your attached document.

Instructions: Please submit comments only and cite GSAR Case 2020–G530 in all correspondence related to this case. Comments received generally will be posted without change to *https://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *https://www.regulations.gov* approximately two to three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: Mr. Liam Skinner, GSA Acquisition Policy Division, at *gsarpolicy@gsa.gov,* for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov.* Please cite GSAR Case 2020–G530.

SUPPLEMENTARY INFORMATION:

I. Background

The General Services Administration (GSA) is issuing a final rule amending the General Services Administration Acquisition Regulation (GSAR) at Part 501, General Services Administration Acquisition Regulation System; and Part 570, Acquiring Leasehold Interests in Real Property.

These amendments update the GSAR with the current forms used and remove any reference to forms no longer used.

II. Authority for This Rulemaking

Title 40 of the United States Code (U.S.C.) Section 121 authorizes GSA to issue regulations, including the GSAR, to control the relationship between GSA and contractors.

III. Discussion and Analysis

Within Part 501, the GSA is amending GSAR 501.106, which includes a chart for any references within the GSAR that have a corresponding OMB Control Number required for information collection. GSA Forms 72A and 618D are currently listed within the chart, however both are now obsolete and have no reference within the GSAR. This case removes the references to these forms and their corresponding OMB Control Number. Also, this chart does not include GSA Form 1217, which is currently used and referenced within the GSAR. This case will add GSA Form 1217 and its corresponding OMB Control Number into the chart found at 501.106.

The amendment to Part 570 occurs at 570.802, which includes the use of GSA Forms during the lease process. The amendment is removing the paragraph which references GSA Form 276, which is no longer used by Public Buildings Service Leasing.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 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). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

This final rule is not subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

VI. Regulatory Flexibility Act

The Regulation Flexibility Act does not apply to this rule, because this final rule does not constitute a significant GSAR revision, and 41 U.S.C. 1707 does not require publication for public comment.

VII. Paperwork Reduction Act

Although the final rule involves forms which reference OMB control numbers, there are no changes which involve a new OMB control number. Therefore, this final rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 501 and 570

Government procurement.

Jeffrey A. Koses,

Senior Procurement Executive, Office of Acquisition Policy, Office of Governmentwide Policy, General Services Administration.

Therefore, GSA amends 48 CFR parts 501 and 570 as set forth below:

■ 1. The authority citation for 48 CFR parts 501 and 570 continues to read as follows:

Authority: 40 U.S.C. 121(c).

PART 501—GENERAL SERVICES ADMINISTRATION ACQUISITION REGULATION SYSTEM

■ 2. Amend section 501.106 by—

■ a. Removing from the table, GSAR references ''GSA–72–A'' and ''GSA–618–D'' and their corresponding OMB control numbers ''3090–0121'' and ''1215–0149''; and

■ b. Adding to the table, in numerical order, GSAR reference ''GSA–1217'' to read as follows:

501.106 OMB approval under the Paperwork Reduction Act.

GSAR reference	OMB control No.
* * * * *	
GSA–1217	3090–0086
* * * * *	

PART 570—ACQUIRING LEASEHOLD INTERESTS IN REAL PROPERTY

570.802 [Amended]

3. Amend section 570.802 by removing paragraph (b) and redesignating paragraphs (c) and (d) as paragraphs (b) and (c).

[FR Doc. 2020–16093 Filed 8–18–20; 8:45 am]

BILLING CODE 6820–61–P

GENERAL SERVICES ADMINISTRATION

48 CFR Part(s) 516 and 552

[GSAR Case 2020–G526; Docket No. GSA–GSAR–2020–0013; Sequence No. 1]

RIN 3090–AK27

General Services Administration Acquisition Regulation; Task-Order and Delivery-Order Ombudsman Update

AGENCY: Office of Acquisition Policy, General Services Administration (GSA).

ACTION: Direct final rule with request for comments.

SUMMARY: This direct final rule amends the General Services Administration Acquisition Regulation (GSAR) to remove text duplicative to the Federal Acquisition Regulation (FAR) regarding the Task-Order and Delivery-Order Ombudsman.

DATES: This final rule is effective on October 19, 2020 without further notice unless adverse comments are received by September 18, 2020. If GSA receives adverse comments, we will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect.

ADDRESSES: Submit comments in response to GSAR Case 2020–G526 to: *Regulations.gov: https://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by searching for ''GSAR Case 2020–G526''. Select the link ''Comment Now'' that corresponds with GSAR Case 2020–G526. Follow the instructions provided at the ''Comment Now'' screen. Please include your name, company name (if any), and ''GSAR Case 2020–G526'' on your attached document.

Instructions: Please submit comments only and cite GSAR Case 2020–G526 in all correspondence related to this case. Comments received generally will be posted without change to *https://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *https://www.regulations.gov* approximately two-to-three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: Mr. Tanner Slaughter, GSA Acquisition Policy Division, at *gsarpolicy@gsa.gov,* for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202–501–4755. Please cite GSAR Case 2020–G526.

SUPPLEMENTARY INFORMATION:

I. Background

Federal Acquisition Circular 2019–04 made changes to FAR 16.505(b)(8), 16.506(j), and 52.216–32. These changes provided for making available to contractors under multiple-award indefinite-delivery indefinite-quantity (IDIQ) contracts the name and contact information of the contracting agency's Task-Order and Delivery-Order Ombudsman. This information is being made available pursuant to 41 U.S.C. 4106(g), which provides that all contractors awarded this type of contract shall be provided a fair opportunity to be considered for each award of an order against the contract. The Ombudsman at each agency reviews complaints raised by contractors on this type of contract and ensures that each contractor has a fair opportunity to compete for task and delivery orders.

These changes to the FAR rendered text at GSAR 516.506, 552.216–74, and 552.216–76 duplicative. Because the GSAR serves as a supplement to the FAR, it is appropriate to remove text from the GSAR when such text has become duplicative of FAR text.

II. Authority for This Rulemaking

Title 40 of the United States Code (U.S.C.) Section 121 authorizes GSA to issue regulations, including the GSAR, to control the relationship between GSA and contractors. The GSAR supplements the FAR. By eliminating GSAR text that is duplicative of FAR text, GSA is acting in keeping with the GSAR's purpose as a supplementary acquisition regulation.

III. Discussion and Analysis

GSA is amending the GSAR at parts 516, Types of Contracts, and 552,

Solicitation Provisions and Contract Clauses, to remove language made duplicative by changes to the FAR published at 84 FR 38836. Part 516 includes language prescribing the use of Task-Order and Delivery-Order Ombudsman clauses, which is removed to avoid duplication of language in FAR part 16. Part 552 includes the Task-Order and Delivery-Order Ombudsman clauses prescribed in part 516, which are removed to avoid duplication of clauses in FAR part 52.

IV. Executive Order 12866 and 13563

Executive Orders (E.O.s) 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). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

This final rule was not subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12886.

VI. Regulatory Flexibility Act

GSA does not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*

VII. Paperwork Reduction Act

The final rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 516 and 552

Government procurement.

Jeffrey A. Koses,

Senior Procurement Executive, Office of Acquisition Policy, Office of Governmentwide Policy, General Services Administration.

Therefore, GSA amends 48 CFR parts 516 and 552 as set forth below:

Authority: 40 U.S.C. 121(c).

PART 516—TYPES OF CONTRACTS

516.506 [Amended]

■ 1. Amend section 516.506 by—

■ a. Removing from paragraph (a), ''authorizes FAS'' and adding ''authorizes the Federal Acquisition Service (FAS)'' in its place.

■ b. Removing paragraphs (b) and (d); and

■ c. Redesignating paragraphs (c) and (e) as paragraphs (b) and (c) respectively.

PART 552—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

552.216–73 [Amended]

■ 2. Revise section 552.216–73 by—

■ a. Removing from the introductory text ''As prescribed in 516.506(c)'' and adding ''As prescribed in 516.506(b)'' in its place.

■ b. Removing from the introductory text of Alternate I, ''As prescribed in 516.506(c)'' and adding ''As prescribed in 516.506(b)'' in its place.

552.216–74 [Removed]

■ 3. Remove and reserve section 552.216–74.

552.216–75 [Amended]

■ 4. Revise section 552.216–75 by removing from the introductory text ''As prescribed in 516.506(d)'' and adding ''As prescribed in 516.506(c)'' in its place.

552.216–76 [Removed]

■ 5. Remove and reserve subsection 552.216–76.

[FR Doc. 2020–16115 Filed 8–18–20; 8:45 am]

BILLING CODE 6820–61–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 229

[Docket No. 110131070–2626–02; RTID 0648–XA306]

Pacific Island Pelagic Fisheries; False Killer Whale Take Reduction Plan; Reopening of the Southern Exclusion Zone to the Hawaii Deep-Set Longline Fishery

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

ACTION: Temporary rule.

SUMMARY: In accordance with the Marine Mammal Protection Act of 1972, and the False Killer Whale Take Reduction Plan, NMFS hereby reopens the Southern Exclusion Zone to deep-set longline fishing for all vessels registered under the Hawaii longline limited access program. At least one of the Southern Exclusion Zone reopening criteria defined in the False Killer Whale Take Reduction Plan regulations has been met.

DATES: Effective August 25, 2020.

FOR FURTHER INFORMATION CONTACT: Diana Kramer, NMFS Pacific Islands Region, (808) 725–5167, *Diana.Kramer@noaa.gov;* or Kristy Long, NMFS Office of Protected Resources, (301) 427–8402, *Kristy.Long@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The False Killer Whale Take Reduction Plan (Plan) was implemented on December 31, 2012, pursuant to section 118(f) of the Marine Mammal Protection Act (MMPA) to reduce the level of incidental mortality and serious injury (M/SI) of the Hawaii pelagic and Hawaii insular stocks of false killer whales in the Hawaii longline fisheries (77 FR 71260; November 29, 2012). The Plan, based on consensus recommendations from the False Killer Whale Take Reduction Team, was implemented by regulations, which created the Southern Exclusion Zone (SEZ) (50 CFR 229.37(d)(2)) that would be closed to deep-set longline fishing if a certain number (trigger) of false killer whale M/SI were observed in the deep-set fishery in the United States Exclusive Economic Zone (EEZ). As described in the Plan regulations, the SEZ is bounded on the east at 154°30′ W longitude, on the west at 165° W longitude, on the north by the boundaries of the Main Hawaiian Islands Longline Fishing Prohibited Area and Papahanaumokuakea Marine National Monument, and on the south by the EEZ boundary (see Figure 1). The trigger is the larger of either two observed M/SI of false killer whales within the EEZ around Hawaii, or the smallest number of observed M/SI of false killer whales that, when extrapolated based on the percentage observer coverage for that year, exceeds the stock's potential biological removal (PBR) level. The final 2017 Stock Assessment reports a PBR of 9.3 pelagic false killer whales per year. With 20 percent observer coverage in 2018 and 2019, the trigger remained at two observed M/SI (*i.e.,* two observed M/SI expands to 10, which exceeds the PBR of 9.3).

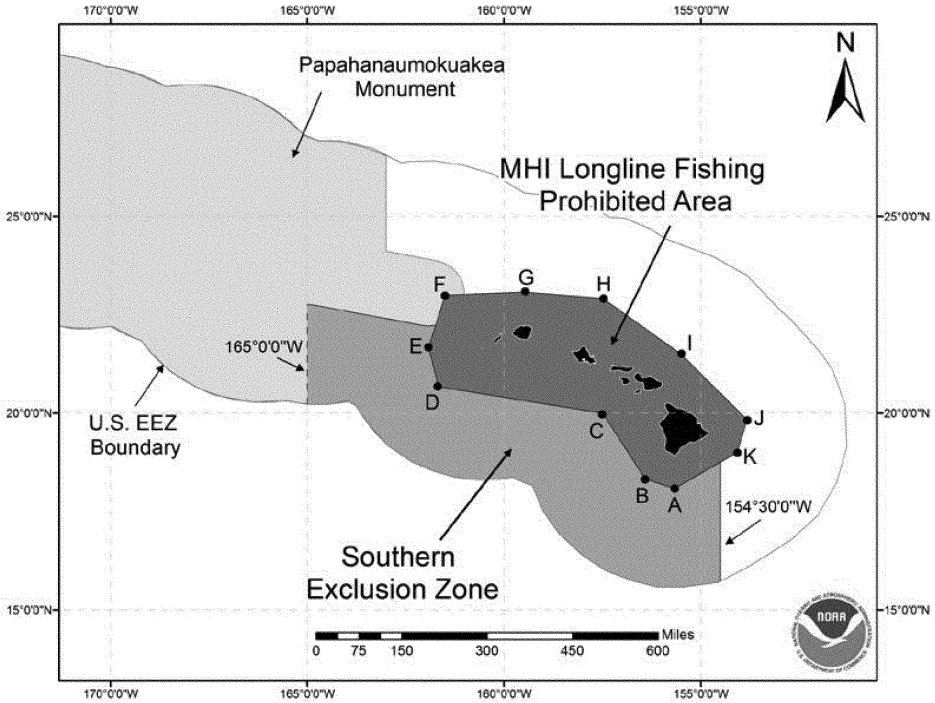

Figure 1. Southern Exclusion Zone

The SEZ was closed to deep-set longline fishing on July 24, 2018, following four false killer whale interactions in the Hawaii deep-set longline fishery that occurred inside the EEZ around Hawaii during that calendar year. NMFS-certified fishery observers documented a total of four false killer whales hooked and released injured during deep-set trips in the U.S. EEZ, one each on February 8, May 23, May 24, and June 3, 2018. NMFS followed the procedures outlined in the final rule and criteria in the NMFS process for distinguishing serious from non-serious injuries of marine mammals (NMFS Policy Directive PD 02–238, NMFS Instruction 02–238, and NMFS Instruction 02–238–01) to evaluate these injuries, and determined that all four were serious injuries, which met the trigger for closing the SEZ (83 FR 33848; July 18, 2018). The SEZ was reopened to deep-set longline fishing on January 1, 2019 per the Plan regulations (50 CFR 229.37(e)(3)).

The SEZ was then closed to deep-set longline fishing for a second consecutive calendar year on February 22, 2019, after the SEZ trigger was met for 2019. NMFS-certified fishery observers documented two false killer whales hooked during deep-set trips in the U.S. EEZ, one each on January 10 and January 15, 2019. One of these interactions resulted in a mortality and the other animal was released injured. Following the procedures outlined in the final rule and criteria in the NMFS process for distinguishing serious from non-serious injuries of marine mammals the injury of the animal that was released was determined to be a serious injury. Therefore, the SEZ trigger had been met, and NMFS closed the SEZ to deep-set longline fishing as required to comply with the Plan (84 FR 5356; February 21, 2019).

Criteria for Reopening the SEZ

Because the number of observed false killer whale M/SI in the EEZ around Hawaii in 2019 met the established trigger in the subsequent calendar year following a previous SEZ closure (2018), the SEZ remains closed until one or more of the following criteria are met, as described in the Plan regulations (50 CFR 229.37(e)(7)): (i) The Assistant Administrator determines, upon consideration of the False Killer Whale Take Reduction Team's recommendations and evaluation of all relevant circumstances, that reopening of the SEZ is warranted; (ii) in the 2 year period immediately following the date of the SEZ closure, the deep-set longline fishery has zero observed false killer whale incidental mortalities and serious injuries within the remaining open areas of the EEZ around Hawaii; (iii) in the 2 year period immediately following the date of the closure, the deep-set longline fishery has reduced its total rate of false killer whale incidental mortality and serious injury (including the EEZ around Hawaii, the high seas, and the EEZ around Johnston Atoll (but not Palmyra Atoll) by an amount equal to or greater than the rate that would be required to reduce false killer whale incidental M/SI within the EEZ around Hawaii to below the Hawaii Pelagic false killer whale stock's PBR level; or (iv) the average estimated level of false killer whale incidental M/SI in the deep-set longline fishery within the remaining open areas of the EEZ around Hawaii for up to the 5 most recent years is below the PBR level for the Hawaii Pelagic stock of false killer whales at that time.

Basis for Determination To Reopen the SEZ

To determine if reopening of the SEZ is warranted, NMFS evaluated all criteria and determined that criterion (iv) has been satisfied based on best available science. In June 2020, NMFS published NOAA Administrative Report H–20–06, ''Oleson, E.M. 2020. Abundance, potential biological removal, and bycatch estimates for the Hawaii pelagic stock of false killer whales for 2015–2019.'' This report provided updated abundance and M/SI information for the Hawaii pelagic stock of false killer whales. The current abundance estimate for the Hawaii pelagic stock of false killer whales presented in this report is 2,086 (Coefficient of Variation (CV) = 0.35) individuals in the Hawaii EEZ. The

minimum population abundance (Nmin), used for computation of PBR, is calculated as 1,567 animals. The PBR for this stock within the EEZ is calculated to be 16 pelagic false killer whales. Under the Marine Mammal Protection Act Guidelines for Assessing Marine Mammal Stocks (NMFS 2012), the 5-year (2015–2019) average M/SI rate of pelagic false killer whales within the Hawaii EEZ incidental to the Hawaii longline deep-set fishery is 9.8 whales per year. Based on this information, NMFS has determined that criterion (iv) of the Plan is met, with the 5-year average estimated false killer whale M/SI incidental to the deep-set longline fishery (9.8 whales) below PBR level for the Hawaii Pelagic stock of false killer whales (16 whales). Consequently, in compliance with 50 CFR 229.37(e)(8) NMFS is reopening the SEZ to Hawaii deep-set longline fishing.

Information on the Plan is available on the internet at the following address: *https://www.fisheries.noaa.gov/pacific-islands/marine-mammal-protection/pacific-islands-region-false-killer-whale-take-reduction-team.* NOAA Administrative Report H–20–06 is available on the internet at the following address: *https://doi.org/10.25923/wmg3-ps37,* and NOAA Technical Memorandum NMFS–PIFSC–104 is available on the internet at the following address: *https://doi.org/10.25923/2jjg-p807.* Copies of reference materials may also be obtained from the NMFS Pacific Islands Regional Office, Protected Resources Division, 1845 Wasp Blvd., Building 176, Honolulu, HI 96818.

This document serves as advance notification to fishermen, the fishing industry, and the general public that the SEZ will be opened to deep-set longline fishing starting on August 25, 2020.

Classification

There is good cause to waive prior notice and an opportunity for public comment on this action pursuant to 5 U.S.C. 553(b)(B). Prior notice and comment is unnecessary because the take reduction plan final rule (77 FR 71259, November 29, 2012) that implements the procedure reopening the SEZ (codified at 50 CFR 229.37(e)) has already been subject to an extensive public process, including the opportunity for prior notice and comment. All that remains is to notify the public that the SEZ reopening criteria defined in the Plan regulations have been met and the SEZ will be opened to deep-set longline fishing.

This action is required by 50 CFR 229.37(e)(7), and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 1361 *et seq.*

Dated: August 14, 2020.

Samuel D. Rauch, III,

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

[FR Doc. 2020–18308 Filed 8–18–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 665

[Docket No. 200805–0205; RTID 0648–XP010]

Pacific Island Fisheries; 2020 U.S. Territorial Longline Bigeye Tuna Catch Limits

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

ACTION: Final specifications.

SUMMARY: NMFS specifies a 2020 limit of 2,000 metric tons (t) of longline-caught bigeye tuna for each U.S. Pacific territory (American Samoa, Guam, and the Commonwealth of the Northern Mariana Islands (CNMI)). NMFS will allow each territory to allocate up to 1,500 t each year to U.S. longline fishing vessels in a specified fishing agreement that meets established criteria, but the overall allocation limit among all territories may not exceed 3,000 t. As an accountability measure, NMFS will monitor, attribute, and restrict (if necessary) catches of longline-caught bigeye tuna, including catches made under a specified fishing agreement. These catch limits and accountability measures support the long-term sustainability of fishery resources of the U.S. Pacific Islands.

DATES: The final specifications are effective August 17, 2020, through December 31, 2020. The deadline to submit a specified fishing agreement pursuant to 50 CFR 665.819(b)(3) for review is December 17, 2020.

ADDRESSES: Copies of the Fishery Ecosystem Plan for Pelagic Fisheries of the Western Pacific (Pelagic FEP) are available from the Western Pacific Fishery Management Council (Council), 1164 Bishop St., Suite 1400, Honolulu, HI 96813, tel 808–522–8220, fax 808–522–8226, or *www.wpcouncil.org.*

NMFS prepared environmental analyses that describe the potential impacts on the human environment that would result from the action. Copies of those analyses, which include a supplemental environmental assessment (SEA) and a finding of no significant impact (FONSI), are available from *http://www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2020-0078,* or from Michael D. Tosatto, Regional Administrator, NMFS Pacific Islands Region (PIR), 1845 Wasp Blvd., Bldg. 176, Honolulu, HI 96818.

FOR FURTHER INFORMATION CONTACT: Lynn Rassel, NMFS PIRO Sustainable Fisheries, 808–725–5184.

SUPPLEMENTARY INFORMATION: NMFS is specifying a 2020 catch limit of 2,000 t of longline-caught bigeye tuna for each U.S. Pacific territory. NMFS is also authorizing each U.S. Pacific territory to allocate up to 1,500 t of its 2,000 t bigeye tuna limit, not to exceed a 3,000 t total annual allocation limit among all the territories, to U.S. longline fishing vessels that are permitted to fish under the Pelagic FEP. Those vessels must be identified in a specified fishing agreement with the applicable territory. NMFS will monitor catches of longline-caught bigeye tuna by the longline fisheries of each U.S Pacific territory, including catches made by U.S. longline vessels operating under specified fishing agreements. The criteria that a specified fishing agreement must meet, and the process for attributing longline-caught bigeye tuna, will follow the procedures in 50 CFR 665.819. When NMFS projects that a territorial catch or allocation limit will be reached, NMFS will, as an accountability measure, prohibit the catch and retention of longline-caught bigeye tuna by vessels in the applicable territory (if the territorial catch limit is projected to be reached), and/or vessels in a specified fishing agreement (if the allocation limit is projected to be reached).

You may find additional background information on this action in the preamble to the proposed specifications published on July 9, 2020 (85 FR 41223).

Comments and Responses

On July 9, 2020, NMFS published the proposed specifications and request for public comments (85 FR 41223); the comment period closed on July 24, 2020. NMFS received comments from three submitters, and responds below. We made no changes to the final specifications in response to comments on the proposed specifications.

NMFS also received comments suggesting minor housekeeping corrections and clarifications when finalizing the SEA, which we made in the final SEA.

In addition, in light of the decision in *Territory of American Samoa* v. *NMFS,*

et al. (16–cv–95, D. Haw), NMFS specifically invited public comments on the effect of the proposed action on cultural fishing in American Samoa. NMFS received no comments addressing American Samoa cultural fishing.

Comment 1: Commercial fishing should be banned and only subsistence fishing should be allowed.

Response: Seafood is an important source of protein for many people, and commercial fishing provides fish for people who do not have the ability to fish for themselves. The proposed action allows for the sustainable harvest of bigeye tuna, consistent with the Pelagic FEP, the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), and other applicable laws. The commercial Hawaii longline fishery is an important supplier of high-quality seafood that supports local seafood demand. Local commercial fisheries also provide jobs and revenue for fishermen, seafood markets, and supporting industries. This action also reduces the dependence on foreign fishing, which may be less stringently monitored or regulated than U.S. fisheries.

Comment 2: The Hawaii Longline Association (HLA) generally supports this action, noting the importance of annual bigeye tuna specifications in providing additional bigeye tuna for the Hawaii longline fishery, and the support for fisheries development in the territories. While the HLA does not think a total annual allocation cap of 3,000 t is necessary because the bigeye tuna stock is healthy and in consideration of various international actions and agreements among Western and Central Pacific Fisheries Commission (WCPFC) members, the HLA supports the action.

Response: NMFS is satisfied that the annual bigeye catch and allocation specifications are important for the management of sustainable fisheries and that the specified fishing agreements provide important fisheries development project funding. NMFS notes that the increased allocation considers the needs of fishing communities by adding flexibility while continuing to support the long-term sustainability of fishery resources of the U.S. Pacific Islands. Utilizing the best scientific information available, NMFS has determined that these catch and allocation limits are consistent with WCPFC objectives. NMFS acknowledges that the WCPFC has not adopted bigeye limits for the U.S. territories and that the Council has recommended amending the Pelagic FEP and Federal regulations to remove the requirement to specify catch limits for the territories before specifying allocation limits. However, a plan amendment and proposed regulations to implement this Council recommendation have yet to be developed.

Classification

Pursuant to section 304(b)(3) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this final rule is consistent with the Pelagic FEP, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment.

Because this rule relieves a possible restriction, the exception in 5 U.S.C. 553(d)(1) applies so that it is not subject to the 30-day delayed effectiveness provision of the Administrative Procedure Act. This rule allows U.S. vessels identified in a valid specified fishing agreement to continue fishing in the Western and Central Pacific Ocean (WCPO) even if NMFS closes the longline fishery for bigeye tuna. Consistent with Conservation and Management Measure 2018–01 adopted by the WCPFC at its December 2018 meeting, the bigeye tuna catch limit applicable to U.S. longline fisheries in the WCPO in 2019–2020 is 3,554 t. When NMFS projects that the limit will be reached, NMFS must close the fishery for bigeye tuna in the WCPO. Regulations at 50 CFR 665.819 require NMFS to begin attributing longline caught bigeye tuna to the U.S. territory to which a fishing agreement applies either seven days before the date NMFS projects that the fishery will reach the WCPO U.S bigeye tuna limit, or upon the effective date of the agreement, whichever is later. Based on longline catch records to date, NMFS projects the current 3,554 t limit of WCPO bigeye tuna will be reached in September 2020. This projected date is subject to change, and the projected date throughout 2020 has often been earlier in the year as the fishing year has progressed. If the effectiveness of this final rule is delayed past the date that the WCPO bigeye tuna limit is reached, NMFS would be required to publish a temporary rule that restricts the retention of WCPO bigeye tuna in the Hawaii-based longline fishery until this final rule is effective. After the effective date, NMFS would remove the restrictions for U.S. vessels identified in a valid specified fishing agreement with a U.S. territory. Implementing this rule immediately allows the fishery to continue fishing without the uncertainty or disruption of a potential closure.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that the proposed rule would not have a significant economic impact on a substantial number of small entities. NMFS published the factual basis for the certification in the proposed rule, and we do not repeat it here. NMFS received no comments on this certification; as a result, a final regulatory flexibility analysis is not required, and none has been prepared.

This final rule is exempt from review under Executive Order 12866.

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

Dated: August 5, 2020.

Donna S. Wieting,

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

[FR Doc. 2020–17464 Filed 8–17–20; 11:15 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 85, No. 161
Wednesday, August 19, 2020

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.

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 702

[NCUA–2020–0074]

RIN 3133–AF03

Transition to the Current Expected Credit Loss Methodology

AGENCY: National Credit Union Administration (NCUA).

ACTION: Proposed rule.

SUMMARY: The NCUA Board (Board) is seeking comment on a proposed rule to address changes to the U.S. generally accepted accounting principles (GAAP). Specifically, the proposed rule would provide that, for purposes of determining a federally insured credit union's (FICU's) net worth classification under the prompt corrective action (PCA) regulations, the Board will phase-in the day-one adverse effects on regulatory capital that may result from the adoption of the current expected credit losses (CECL) accounting methodology. Consistent with regulations issued by the other federal banking agencies, the proposed rule would temporarily mitigate the adverse PCA consequences of the day-one capital adjustments, while requiring that FICUs account for CECL for other purposes, such as Call Reports. The proposed rule would also provide that FICUs with less than $10 million in assets are no longer required to determine their charges for loan losses in accordance with GAAP. The Board's regulations would provide that these FICUs may instead use any reasonable reserve methodology (incurred loss), provided that it adequately covers known and probable loan losses.

DATES: Comments must be received on or before October 19, 2020.

ADDRESSES: You may submit comments, by any of the following methods (Please send comments by one method only):

- *Federal eRulemaking Portal: http://www.regulations.gov.* The docket number for this proposed rule is NCUA–2020–0074 and is available at *https://www.regulations.gov/.* Follow the instructions for submitting comments.
- *Fax:* (703) 518–6319. Include ''[Your name] Comments on ''Transition to the Current Expected Credit Loss Methodology'' in the transmittal.
- *Mail:* Address to Gerard Poliquin, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428.
- *Hand Delivery/Courier:* Same as mail address.

Public inspection: All public comments are available on the Federal eRulemaking Portal at: *http://www.regulations.gov* as submitted, except as may not be possible for technical reasons. Public comments will not be edited to remove any identifying or contact information. Due to social distancing measures in effect, the usual opportunity to inspect paper copies of comments in the NCUA's law library is not currently available. After social distancing measures are relaxed, visitors may make an appointment to review paper copies by calling (703) 518–6540 or emailing *OGCMail@ncua.gov.*

FOR FURTHER INFORMATION CONTACT: *Policy and Accounting:* Alison L. Clark, Chief Accountant, Office of Examinations and Insurance, at (703) 518–6360; *Legal:* Ariel Pereira, Staff Attorney, Office of General Counsel, at (703) 548–2778; or by mail at National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314.

SUPPLEMENTARY INFORMATION:

I. Background
  A. The NCUA's Minimum Capital Standards
  B. Current Expected Loss (CECL) Methodology
  C. February 14, 2019, and March 31, 2020, Banking Agency Rules on CECL Implementation
  D. Proposed Rule Overview
II. Legal Authority
  A. The Board's Rulemaking Authority, Generally
  B. CECL Transition
  C. Small FICU Charges for Loan Losses
  D. Alternatives to GAAP
III. Proposed Rule
  A. Proposed New Subpart G to Part 702
  B. Eligibility for the Transition Provisions
  C. NCUA Implementation of the Transition Provisions
  D. Mechanics of the CECL Transition Provisions
  E. Example of Transition Schedule
  F. Statutory Limit on Amount of Net Worth Ratio Change
  G. NCUA Oversight
  H. Small FICU Determinations of Charges for Loan Losses
IV. Regulatory Procedures
  A. Regulatory Flexibility Act
  B. Paperwork Reduction Act
  C. Executive Order 13132 on Federalism
  D. Assessment of Federal Regulations and Policies on Families

I. Background

A. The NCUA's Minimum Capital Standards

The NCUA's primary mission is to ensure the safety and soundness of FICUs. The NCUA performs this function by examining and supervising federally chartered credit unions, participating in the examination and supervision of federally insured, state-chartered credit unions in coordination with state regulators, and insuring members' accounts at all FICUs. In its role as the administrator of the National Credit Union Share Insurance Fund (NCUSIF), the NCUA is responsible for the regulation and supervision of 5,196 FICUs with 121.3 million members and $1.63 trillion in assets across all states and U.S. territories.[1]

On August 7, 1998, Congress enacted the Credit Union Membership Access Act.[2] Section 301 of the statute added a new section 216 to the Federal Credit Union Act (FCU Act).[3] Section 216 directed the Board to adopt by regulation a system of PCA to restore the net worth of FICUs. For FICUs, other than those that meet the statutory definition of a ''new'' FICU, section 216 requires a framework of mandatory supervisory actions indexed to five statutory net worth categories, ranging from ''well capitalized'' to ''critically undercapitalized.'' The mandatory actions and conditions triggering conservatorship and liquidation are expressly prescribed by statute.[4] To supplement the mandatory actions, section 216 charged the NCUA with developing discretionary actions which are ''comparable'' to the ''discretionary safeguards'' available under section 38

[1] Based on credit union data as of March 31, 2020. *See* National Credit Union Administration, *2020 Annual Performance Plan,* 1 (January 2020), *https://www.ncua.gov/files/agenda-items/AG20200123Item1b.pdf*

[2] Public Law 105–219, 112 Stat. 913 (1998).

[3] The FCU Act is codified at 12 U.S.C. 1751 *et al.* Section 216 of the act is codified at 12 U.S.C. 1790d.

[4] 12 U.S.C. 1790d(e), (f), (g), (i); 12 U.S.C. 1786(h)(1)(F), 1787(a)(3)(A).

of the Federal Deposit Insurance Act—the statute that applies PCA to other federally insured depository institutions.[5]

For FICUs that section 216 defines as ''new''—those that have been in operation less than ten years and have $10 million or less in assets—the statute directed the NCUA to develop an alternative system of PCA to apply instead of the system of PCA for all other FICUs.[6] Although section 216 does not prescribe specific attributes for this component of PCA, it instructed the NCUA to recognize that ''new'' FICUs initially have no net worth, need reasonable time to accumulate net worth, and need incentives to become ''adequately capitalized'' by the time they reach either ten years in operation or exceed $10 million in assets (*i.e.,* no longer meet the definition of ''new'').[7]

The NCUA implemented the regulatory PCA system mandated by section 216 through a final rule published on February 18, 2000.[8] The NCUA's PCA regulations are codified in 12 CFR part 702, ''Capital Adequacy.'' As required by section 216, the NCUA regulations provide that a FICU's capitalization classification is determined by calculating its ''net worth ratio,'' which is defined as being the ratio of the FICU's net worth to its total assets.[9] Both section 216 and part 702 define ''net worth'' as including the retained earnings balance of the FICU as determined under GAAP. Net worth also includes certain loans to, and accounts in, a FICU established pursuant to section 208 of the FCU Act.[10] For low-income designated credit unions, net worth also includes secondary capital accounts that are uninsured and subordinate to all other claims, including claims of creditors, shareholders, and the NCUSIF.[11] The regulations provide that a FICU's total assets may be measured by either its (1) average quarterly balance; (2) average monthly balance; (3) average daily balance; or (4) quarter-end balance.[12]

With respect to the alternate PCA system for ''new'' FICUs, the Board has implemented these requirements in subpart C of the part 702 regulations. In general, the regulations adopt relaxed net worth ratios for new FICUs. However, the PCA system for new FICUs mirrors in most important respects the system for all other FICUs. For example, the regulations index the capital classification of new FICUs to the same five net worth categories used for other FICUs. Further, the definitions of ''net worth,'' ''total assets,'' and ''net worth ratio'' also apply to new FICUs.

B. Current Expected Credit Loss (CECL) Methodology

In response to the global economic crisis of 2007–2009, several observers expressed concern that GAAP restricted the ability of institutions to record credit losses that were expected, but that did not yet meet the ''probable'' threshold under the current incurred loss methodology. Credit loss reserves help mitigate the overstatement of income on loans and other assets by accounting for future losses. In response, in June 2016, the Financial Accounting Standards Board (FASB) issued Accounting Standards Update (ASU) No. 2016–13, which revises the accounting for credit losses under GAAP.[13]

The new accounting standard applies to all banks, savings associations, credit unions,[14] and financial institution holding companies, regardless of size, that file regulatory reports for which the reporting requirements conform to GAAP. Adoption of CECL is expected to result in greater transparency of expected losses at an earlier date during the life of a loan. ASU No. 2016–13 emphasizes that CECL does not change the economics of lending, but only the timing of when losses are recorded. As ASU No. 2016–23 states:

In other words, the same loss ultimately will be recorded, regardless of the accounting requirements. What changes is an accounting threshold for the recognition of credit losses, which affects only the timing of when to record credit losses, not the ultimate amount realized on the financial assets.[15]

CECL differs from the incurred loss methodology in several key respects. Most significantly for purposes of this proposed rule, CECL requires the recognition of lifetime expected credit losses for financial assets measured at amortized cost, not just those credit losses that have been incurred as of the reporting date. CECL also requires the incorporation of reasonable and supportable forecasts in developing an estimate of lifetime expected credit losses, while maintaining the current requirement for consideration of past events and current conditions. Furthermore, the probable threshold for recognition of allowances in accordance with the incurred loss methodology is removed under CECL. Taken together, estimating expected credit losses over the life of an asset under CECL, including consideration of reasonable and supportable forecasts but without applying the probable threshold that exists under the incurred loss methodology, results in earlier recognition of credit losses.[16]

FASB established a staggered effective date for CECL. In doing so, it has recognized two classes of institutions subject to CECL: (1) Public business entities (PBEs) that meet the definition of a U.S. Securities and Exchange (SEC) filer, excluding entities eligible to be smaller reporting companies (SRCs) as defined by the SEC, and (2) all other entities, which includes FICUs. The effective date for SEC-filers (other than SRCs) is fiscal years beginning after December 15, 2019. All other entities (including all FICUs) are required to commence implementation of the standard for fiscal years beginning after December 15, 2022.[17] All entities subject to CECL, however, may voluntarily elect to adopt CECL earlier than the specified implementation date, commencing as early as fiscal years beginning after December 15, 2018,

[5] 12 U.S.C. 1790d(b)(1)(A). Section 38 of the FDI Act, 12 U.S.C. 1831o, was added by section 131 of the Federal Deposit Insurance Corporation Improvement Act, Public Law 102–242, 105 Stat. 2236 (1991).

[6] 12 U.S.C. 1790d(b)(2)(A).

[7] 12 U.S.C. 1790d(b)(2)(B).

[8] 65 FR 8560 (February 18, 2000).

[9] 12 U.S.C. 1790d(o)(3); 12 CFR 702.2(g).

[10] 12 U.S.C. 1790d(o)(2)(B); 12 CFR 702.2(f)(4). Section 208 of the FCU Act (12 U.S.C. 1788) regards special assistance to avoid liquidation.

[11] 12 U.S.C. 1790d(o)(2)(C); 12 CFR 702.2(f)(2).

[12] 12 CFR 702.2(k).

[13] FASB ASU No. 2016–13, *Financial Instruments—Credit Losses (Topic 326), Measurement of Credit Losses on Financial Instruments,* June 2016, available at: *https://www.fasb.org/jsp/FASB/Document_C/DocumentPage&cid=1176168232528.*

[14] CECL applies to all credit unions, irrespective of whether the credit union is federally insured or whether it is chartered federally or under state law.

[15] *Supra* note 13, at 244.

[16] See *Frequently Asked Questions on the New Accounting Standard on Financial Instruments—Credit Losses,* issued by the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the National Credit Union Administration, and the Office of the Comptroller of the Currency on April 3, 2019, for a more comprehensive discussion of the changes made by CECL to existing GAAP standards. The document is available at: *https://www.ncua.gov/files/letters-credit-unions/financial-instruments-credit-losses-faqs.pdf*

[17] FASB originally established the following three categories of entities subject to CECL: (1) PBE SEC filers; (2) PBEs that are not SEC filers; and (3) non-PBEs (including FICUs). The original implementation date for non-PBEs was December 15, 2020. FASB subsequently delayed the implementation date for non-PBEs until December 15, 2021. (*https://www.fasb.org/jsp/FASB/Document_C/DocumentPage?cid=1176168232528&acceptedDisclaimer=true*) FASB issued a second update consolidating the entities subject to CECL into two categories (SEC filers (not including SRCs) and all other entities) and further extending the implementation dates as described above. (*https://www.fasb.org/jsp/FASB/Document_C/DocumentPage?cid=1176173775344&acceptedDisclaimer=true*).

including interim periods within those fiscal years.[18]

Upon adoption of CECL, an institution will record a cumulative-effect adjustment to retained earnings (known as ''the day-one adjustment''). The day-one adjustment will be equal to the difference, if any, between the amount of credit loss allowances required under the incurred loss methodology and the amount of credit loss allowances required under CECL. A critical consideration for institutions subject to the new accounting rules will be the impact of CECL on capital. Institutions could experience a sharp increase in expected credit losses on the effective date as a result of the day-one adjustment, which could lower their capital classification under relevant statutory and regulatory authorities (such, as for example, under the Board's PCA regulations for credit unions).

C. February 14, 2019, and March 31, 2020, Banking Agency Rules on CECL Implementation

On February 14, 2019,[19] the Office of Comptroller of the Currency, the Federal Reserve Board, and the Federal Deposit Insurance Corporation (the ''other banking agencies'') issued a final rule to temporarily mitigate the impacts of CECL implementation on institutions subject to their supervision (''banking organizations''). The final rule provides banking organizations with the option to phase-in over a three-year period the adverse effects to capital ratios that may result from the day-one adjustment. The rule uses the term ''electing banking organizations'' to refer to banking organizations that opt to use the phase-in. When calculating regulatory capital ratios during the first year of an electing banking organization's adoption of CECL, the organization must phase-in 25 percent of the transitional amounts. The electing banking organization will phase-in an additional 25 percent of the transitional amounts over each of the next two years. At the beginning of the fourth year, the banking organization will have completely reflected in regulatory capital the day-one effects of CECL.[20] Regardless of its election to use the phase-in, a banking organization will be required to account for CECL for other purposes, such as Call Reports.[21]

On March 31, 2020, [22] the other banking agencies issued an interim final rule, effective upon publication, further delaying full CECL implementation requirements to allow banking organizations to better focus on supporting lending to creditworthy households and businesses in light of recent strains on the U.S. economy as a result of COVID–19, while also maintaining the quality of regulatory capital. The March 31, 2020, interim final rule provides banking organizations that adopt CECL during the 2020 calendar year with the option to delay for two years the estimated impact of CECL on regulatory capital, followed by a three-year transition period to phase out the aggregate amount of the capital benefit provided during the initial two-year delay (*i.e.,* a five-year transition, in total). The interim final rule does not replace the three-year transition option in the February 14, 2019, final rule, which remains available to any banking organization at the time that it adopts CECL. Banking organizations that have already adopted CECL have the option to elect the three-year transition option contained in the February 14, 2019, final rule or the five-year transition contained in the March 31, 2020, interim final rule.

Further, as noted above, the CECL effective date is for fiscal years beginning after December 15, 2022, including interim periods within those fiscal years for smaller reporting companies and nonpublic business entities (private companies) (a category that includes FICUs). Unless banking organizations falling into these two categories are early adopters of CECL in 2020, they will only receive the benefit of the three-year transition provided in the February 14, 2019, final rule. This places these banking organizations in a similar position to FICUs eligible for the three-year transition provided under this proposed rule.

D. Proposed Rule Overview

Consistent with the other banking agencies' February 14, 2019, final rule, the NCUA Board is issuing this proposed rule to mitigate the adverse effects on a FICU's net worth category that may result from the day-one adjustment.[23] Specifically, the proposed rule would provide that, for purposes of the PCA regulations, the Board will phase-in the day-one effects on a FICU's net worth ratio over a three-year period (12 quarters). The phase-in would only be applied to those FICUs that adopt the CECL methodology on or after December 15, 2022. FICUs that elect to adopt CECL earlier than the deadline established by FASB would not be eligible for the phase-in. Further, unlike banking organizations subject to the rule issued by the other banking agencies, eligible FICUs would not have the choice of opting into (or out of) the phase-in. Rather, the Board will apply the phase-in for all FICUs that meet the prescribed eligibility criteria.

FICUs would continue to calculate their net worth in accordance with GAAP as generally required by section 216, and would also continue to be required to account for CECL for all other purposes, such as Call Reports. Further, under the proposed rule, FICUs with less than $10 million in assets would no longer be required to determine their charges for loan losses in accordance with GAAP. This provision would eliminate the adverse PCA consequences for smaller FICUs resulting from CECL. The Board's regulations would allow these FICUs to instead make charges for loan losses in accordance with any reasonable reserve methodology (incurred loss), provided that it adequately covers known and probable loan losses. Accordingly, FICUs in this asset-size category that choose to use the incurred loss methodology would not be subject to the phase-in described in this proposed rule.[24] The Board also notes that, despite the language of the proposed rule, state-chartered, federally insured

[18] *Supra* note 13, at 5. Section 4014 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act (Pub. L. 116–136) suspended mandatory compliance with CECL between March 27, 2020 (the date of enactment of the CARES Act) and the earlier of: (1) the date on which the national emergency concerning the novel coronavirus disease (COVID–19) outbreak declared by the President on March 13, 2020, under the National Emergencies Act (50 U.S.C. 1601 *et seq.*) terminates; or (2) December 31, 2020. This provision is not applicable to virtually any FICU because, as noted, they are not required to begin compliance with CECL until December 15, 2022, and a very small number have adopted it earlier voluntarily.

[19] 84 FR 4222 (February 14, 2019).

[20] *Id.* at 4227–4228.

[21] *Id.* at 4230. *See also* the other banking agencies' **Federal Register** notice soliciting comment on the revisions to the Call Reports under the Paperwork Reduction Act of 1995 (42 U.S.C. 3501–3521) published at 83 FR 49160 (Sept. 28, 2018).

[22] 62 FR 17723 (March 31, 2020).

[23] The Senate Committee Report to the Financial Services and General Government Appropriations Act, 2020 (Division C of the Consolidated Appropriations Act, 2020; Pub. L. 116–93, approved December 20, 2019), directs the Department of the Treasury, in consultation with the other banking agencies and the NCUA to ''conduct a study on the need, if any, for changes to regulatory capital requirements necessitated by CECL'' (Senate Report 116–111, at page 11). The Board will take the results of this study into consideration as this rulemaking progresses.

[24] The GAAP exemption for smaller FICUs does not perfectly overlap with the statutory definition of a ''new'' FICU. As discussed above, section 216 defines ''new'' FICUs, in part, as those with total assets of ''$10 million or less,'' while the GAAP exception under section 202 applies to FICUs with total assets of ''less than $10 million.'' Accordingly, new FICUs with $10 million in total assets are subject to GAAP; however, the majority of FICUs that have existed for ten years or less have less than $10 million in total assets and will therefore be exempt from GAAP pursuant to section 202 and this proposed rule.

credit unions subject to State laws and regulations may be required to comply with GAAP or other accounting standards under applicable State requirements.

Section III of this preamble discusses the provisions of the proposed rule in greater detail.

II. Legal Authority

A. The Board's Rulemaking Authority, Generally.

The Board is issuing this proposed rule pursuant to its authority under the FCU Act. The FCU Act grants the Board a broad mandate to issue regulations governing both federal credit unions and all FICUs. For example, section 120 of the FCU Act is a general grant of regulatory authority and authorizes the Board to prescribe rules and regulations for the administration of the act.[25] Other provisions of the act, such as section 216, confer specific rulemaking authority to address prescribed issues or circumstances.[26] This proposed rule is being issued under both the general rulemaking authority conferred by section 120 of the FCU Act and also, as discussed below, the more specific grant of authority under section 216.

B. CECL Transition

Section 216 authorizes the NCUA Board to issue regulations adjusting the net worth ratio requirements for FICUs if the other ''banking agencies increase or decrease the required minimum level for the leverage limit'' pursuant to section 38 of the Federal Deposit Insurance Act.[27] The quoted statutory language establishes two conditions for Board rulemaking under this provision: (1) The other banking agencies must revise the leverage limit; and (2) the revision must be pursuant to section 38 of the Federal Deposit Insurance Act. In addition, section 216 also requires that the Board determine—in consultation with the other banking agencies—''the reason for the increase or decrease in the required minimum level for the leverage limit also justifies adjustment to the net worth ratios.'' [28] In accordance with the consultation requirements, the NCUA has briefed relevant staff of the other banking agencies of the contents and purposes of this proposed rule.

With regards to the two factors identified in the quoted statutory language, the other banking agencies specify in the preamble to their February 14, 2019, final rule, that they are issuing the regulatory changes under the authority of section 38 of the Federal Deposit Insurance Act.[29] The 2019 final rule, however, does not directly raise or lower the leverage limit,[30] or any other of the capital ratios applicable to banking organizations. For example, the leverage limit (defined as the ratio of tier 1 capital to average total consolidated assets) remains unchanged at 4 percent. Nevertheless, the stated intent of the other banking agencies was to effectively modify the capital ratios for purposes of PCA oversight. As the preamble to the final rule provides:

> For purposes of determining whether an electing banking organization is in compliance with its regulatory capital requirements (including capital buffer and prompt corrective action (PCA) requirements), the agencies will use the electing banking organization's regulatory capital ratios as adjusted by the CECL transition provision.[31]

The regulatory text of the final rule also provides that the transition provision requires an electing banking organization to make certain adjustments ''in its calculation of regulatory capital ratios.'' [32] Other regulatory text discusses adjustments to specific capital ratios under the transition provision. For example, the regulation provides that an electing banking organization will ''[i]ncrease average total consolidated assets as reported on the Call Report *for purposes of the leverage ratio.*'' [33]

The quoted preamble language and regulatory text make clear that, while the other banking agencies did not expressly revise the numeric capital thresholds, they issued the February 14, 2019, final rule for purposes of effectively adjusting the leverage limit and other capital ratios that would be used for PCA oversight. Accordingly, the NCUA has determined that both conditions set forth in section 216 have been satisfied for purposes of issuing this proposed rule.[34]

The Board is following the lead of the other banking agencies and issuing this proposed rule to phase-in the possible adverse consequences on a FICU's PCA classification resulting from the day-one adjustment. The rule would not revise the definition of net worth, which as discussed above is statutorily prescribed. FICUs would continue to calculate their net worth and net worth ratios in accordance with existing statutory and regulatory requirements. It is true, however, that the effect of the phase-in could be to effectively, albeit temporarily, increase a FICU's net worth. However, any such deemed increases would be consistent with the authority conferred to the NCUA under section 216 to adjust its PCA determinations in conformity to similar action by the other banking agencies. The effects of the proposed phase-in on a FICU's net worth calculations are consistent with section 216 and closely modeled on the CECL transition provisions issued by the other banking agencies. Specifically, the proposed rule is narrowly tailored to temporarily mitigating the impacts of CECL adoption on the PCA classification of a FICUs net worth. Further, this proposed rule does not adjust the numeric net worth ratios under the NCUA's PCA system. The sole purpose of the proposed phase-in is to aid FICUs to adjust to the new GAAP standards in a uniform manner and without disrupting their ability to serve their members.

The Board notes that while section 216 defines ''net worth''—the numerator for determining the net worth ratio—it does not define the term ''total assets,'' which comprises the denominator of the equation. The definition of the term is left to the regulatory discretion of the Board. The Board has elected to exercise this discretion and defined ''total assets'' in part 702. Specifically, the regulations provide that a FICU's total assets may be measured by either its (1) average quarterly balance; (2) average monthly balance; (3) average daily balance; or (4) quarter-end balance.[35] As an alternative to the phase-in that would be provided by this proposed rule, the Board could have elected to revise the

[25] 12 U.S.C. 1766(a).

[26] Other provisions of the FCU Act providing the Board with specific rulemaking authority include section 207 (12 U.S.C. 1787), which is a specific grant of authority over share insurance coverage, conservatorships, and liquidations. Section 209 (12 U.S.C. 1789) grants the Board plenary regulatory authority to issue rules and regulations necessary or appropriate to carry out its role as share insurer for all FICUs.

[27] 12 U.S.C. 1790d(c)(2)(A).

[28] 12 U.S.C. 1790d(c)(2)(B).

[29] *See* the Paperwork Reduction Act statement at 84 FR 4231–42333, which provides: ''This information collection [contained in this rule] is authorized by section 38(o) of the Federal Deposit Insurance Act (12 U.S.C. 1831o(c)). . . .'' *See also* footnote 35 of the Federal Reserve Board's Regulatory Flexibility Act statement on page 4234.

[30] Termed the ''leverage ratio'' in the banking agencies' regulations governing capital adequacy standards. *See,* 12 CFR 12 CFR 3.10 (OCC), 217.10 (FRB), and 324.10 (FDIC).

[31] *Supra* note 19, at 4229.

[32] 12 CFR 3.301(c)(1) (OCC), 217.301(c)(1) (FRB), and 324.301(c)(1) (FDIC).

[33] 12 CFR 3.301(c)(1)(iv) (OCC), 217.301(c)(1)(iv) (FRB), and 324.301(c)(1)(iv) (FDIC) (emphasis added).

[34] The Board also finds that the other banking agencies' March 31, 2020, interim final rule on this subject does not affect this analysis because it affects only those banking organizations that have adopted CECL as of 2020 and does not alter the three-year phase-in for other banking organizations that are covered in the same category of FASB's standards.

[35] 12 CFR 702.2(k).

definition of ''total assets'' in a manner enabling FICUs to effect the CECL day-one adjustments without undue adverse consequences. The Board opted for the proposed phase-in given its simplicity and ease of administration. Nonetheless, the Board acknowledges that an alternative legal basis exists for rulemaking to mitigate the consequences of CECL implementation.

B. Small FICU Charges for Loan Losses

Section 202 of the FCU Act requires that, in general, ''applicable reports and statements required to be filed with the Board shall be uniform and consistent with'' GAAP.[36] The statute, however, also provides an exception to GAAP compliance for FICUs with total assets of ''less than $10,000,000, unless prescribed by the Board or an appropriate State credit union supervisor.''[37]

The Board's regulations in § 702.402 require that charges for loan losses be made in accordance with GAAP and does not distinguish based on the asset size of FICUs. In effect, § 702.402 exercises the Board's discretion under section 202 of the FCU Act to override the exception for smaller FICUs by prescribing regulations. For reasons discussed more fully below, the Board has elected to once again exercise its statutory discretion under section 202 of the FCU Act. The Board's regulations will no longer require that FICUs with total assets less than $10 million make charges for loan losses in accordance with GAAP. Instead the regulations will allow these FICUs to make such charges under any reasonable reserve methodology (incurred loss) provided it adequately covers known and probable loan losses. The transition provisions described above apply to FICUs adopting CECL. Accordingly, smaller FICUs that elect to use a non-GAAP measure are not eligible for the phase-in. The Board also notes that, despite the language of the proposed rule, section 202 makes clear that state-chartered, federally insured credit unions subject to State laws and regulations may be required to comply with GAAP or other accounting standards under applicable State requirements.

C. Alternatives to GAAP

The Board also notes that section 202 of the FCU Act could also potentially, as an alternative to the provisions discussed above, authorize the Board to provide a transition of the day-one effects of CECL implementation. This provision authorizes the Board to prescribe an accounting principle for application to any FICU if the Board determines that the application of a GAAP principle is not appropriate. Because the Board has clear authority to effect the transition to CECL under section 216, it is not necessary to rely on section 202. As the statute provides, the alternative principle would need to be as stringent as the GAAP principle it replaces, which would bear further study to determine whether a phase-in of CECL would be deemed no less stringent than CECL. Furthermore, the Board might need to engage in a fuller analysis of the appropriateness of CECL as applied to all insured credit unions with $10 million or greater in assets, which would likely be time-consuming as compared to the more direct, across-the-board approach proposed above. The transition analyzed and proposed above would provide relief to all insured credit unions subject to CECL beginning with fiscal years commencing after December 15, 2022, in a streamlined, prompt fashion.

III. Proposed Rule

A. Proposed New Subpart G to Part 702

The NCUA proposes to add a new subpart G to part 702, captioned ''CECL Transition Provisions,'' which would apply to FICUs that meet the eligibility criteria specified in the proposed rule. Notwithstanding the CECL transition provisions, all other aspects of part 702 would continue to apply.

B. Eligibility for the Transition Provisions

As discussed above, the proposed rule is designed to facilitate a FICU's transition to CECL without disrupting its ability to serve its members as a result of a PCA re-classification. An early-adopter FICU is presumed to have undertaken the necessary analysis to determine the impact of the day-one adjustment and to have made its early adoption decision accordingly. As a result, the Board does not believe that the phase-in is either necessary or appropriate for such FICUs. FICUs that have not adopted CECL prior to the December 15, 2022, implementation date established by FASB are eligible for the phase-in. The NCUA will use the phase-in to determine the FICU's net worth category under § 702.102 or § 702.202 (for FICUs statutorily defined as ''new''). To be eligible for the transition provision, the FICU must record a reduction in retained earnings due to the adoption of CECL.

C. NCUA Implementation of the Transition Provisions

Eligible FICUs would not have the option of electing whether to opt-into (or out of) the transition provisions. Although this differs from the other banking agencies' rule, it is consistent with the goal of this rulemaking to mitigate disruptions caused by CECL adoption. As noted, eligibility for the transition provision is limited to those FICUs for which the phase-in is truly necessary–that is, they will experience a reduction in retained earnings as a result of CECL. The Board believes that requiring these FICUs to affirmatively opt-into the transition provisions would constitute an unnecessary administrative exercise to confirm their already obvious need for the phase-in. Moreover, some FICUs eligible for the phase-in may inadvertently fail to make the election in the Call Report, thereby reducing the benefit of the transition provision. Automatic implementation of the phase-in by the NCUA will help to ensure its uniform application and that its benefits are provided to the greatest possible number of eligible FICUs.

The final rule issued by the other banking agencies relies on banking organizations to calculate the phase-in amounts. In contrast, the NCUA will make the required phase-in calculations. As above, the Board has determined that this will help ensure the uniform implementation of the phase-in, as well as facilitate the accurate calculation of the transition amounts.

D. Mechanics of the CECL Transition Provisions

To calculate the transitional amount under the CECL transition provision, the NCUA would compare the differences in a FICU's retained earnings between: (1) The FICU's closing balance sheet amount for the fiscal year-end immediately prior to its adoption of CECL (pre-CECL amount); and (2) the FICU's balance sheet amount as of the beginning of the fiscal year in which the FICU adopts CECL (post-CECL amount). The difference in retained earnings constitutes the transitional amount that would be phased-in to the net worth ratio calculation over the proposed transition period, which would be the three-year period (twelve quarters) beginning the first day of the fiscal year in which the FICU adopts CECL. Specifically, a FICU's CECL transitional amount would be the difference between the pre-CECL and post-CECL amounts of retained earnings.

Under the proposed rule, the NCUA would phase-in the FICU's CECL transitional amount. The NCUA would

[36] 12 U.S.C. 1782(b)(6)(C)(i).

[37] 12 U.S.C. 1782(b)(6)(C)(iii).

also phase-in the CECL transitional amount to the FICU's total assets for purposes of the net worth ratio. Both the FICU's retained earnings and total assets would be deemed increased by the CECL transitional amount. The CECL transitional amount would be phased-in over the transition period on a straight line basis automatically as part of the Call Report.

As noted, FICUs are currently required to commence implementation of the standard for fiscal years beginning after December 15, 2022. In determining the net worth ratio of a FICU, the NCUA would deem retained earnings and total assets as reported on the Call Report to be increased by 100 percent of the FICU's CECL transitional amount during the first three quarters of calendar year 2023. The FICU may use this period to build capital and to make resulting material adjustments to its CECL transitional amount until December 30, 2023. The NCUA would base its subsequent calculations regarding the phase-in based on the CECL transitional amount reported by the FICU as of December 31, 2023 (the due date for the fourth quarterly report of calendar year 2023), and further adjustments to the amount are not permitted.

Beginning with the fourth quarterly Call Report of calendar 2023, the NCUA would deem retained earnings and total assets to be increased by 67 percent of the FICU's CECL transitional amount. This percentage would be decreased to 33 percent beginning with the fourth quarterly Call Report in calendar year 2024. Commencing with the fourth quarterly Call Report in calendar year 2025, the FICU's net worth ratio will completely reflect the day-one effects of CECL. All other items remaining equal, this computation will result in a gradual phase-in of the CECL day-one effects.

E. Example of Transition Schedule

As an example of the proposed phase-in, consider a hypothetical FICU that has a calendar fiscal year. On the closing balance sheet date immediately prior to adopting CECL, the FICU has $10 million in retained earnings and $1 million of Allowance for Loan and Lease Losses (ALLL) (*i.e.,* credit loss). On the opening balance sheet date of January 1, 2023, immediately after adopting CECL, the FICU determined it needs $1.2 million of allowance for credit losses. The FICU would recognize the adoption of CECL by recording a reduction in beginning retained earnings of $200,000. For each of the first three quarterly reporting periods in 2023, the NCUA would deem both the FICU's retained earnings and total assets to be increased by the full $200,000. Commencing with the fourth quarterly Call Report submitted in 2023 the FICU's retained earnings and total assets would be deemed increased by $134,000 ($200,000 × 67 percent), for purposes of calculating the FICU's net worth ratio. The $134,000 increase would remain constant for the first three quarters in 2024. Starting with the fourth quarterly Call Report in 2024, retained earnings and total assets would be deemed increased by $66,000 ($200,000 × 33 percent). Using the same mathematical equation, the $66,000 increase would remain constant for the first three quarters in 2025. Upon the FICU's submission of its fourth quarterly report in 2025, there would be zero increase in retained earnings and total assets, thus the FICU's net worth ratio will completely reflect the day-one effects of CECL.

Table 1 presents the example above in tabular format:

TABLE 1—EXAMPLE OF A CECL TRANSITION PROVISION SCHEDULE

In thousands	Transitional amount	Transitional amounts applicable during each quarter of the transition period (12 quarters total)			
		Quarters 1–3	Quarters 4–7	Quarters 8–11	Quarter 12
		First three quarters of 2023	Four quarters at 67% (4th quarter of 2023 and first three quarters of 2024)	Four quarters at 33% (4th quarter of 2024 and first three quarters of 2025)	Full recognition of day-one adjustment (commencing 4th quarter of 2025)
Increase retained earnings and total assets by the CECL transitional amount	$200	$200	$134	$66	0

F. Statutory Limit on Amount of Net Worth Ratio Change

Section 216 limits any change to the net worth ratio thresholds for each of the five net worth categories to ''an amount that is equal to not more than the difference between the required minimum level most recently established by the Federal banking agencies and 4 percent of total assets (with respect to institutions regulated by those agencies).'' [38] The limitation is not applicable to this proposed rule because, as noted above, the Board is following the lead of the other banking agencies and not modifying any specific net worth ratio threshold amount. Therefore, applying this element would be impracticable and would frustrate the purpose of the statutory provision. While the effect of the proposed regulatory amendments will be to adjust the calculation of the net worth ratios and, in some instances, the resultant net worth classifications, the actual numeric threshold amounts will remain the same. For example, a FICU will continue to be ''well capitalized'' if its net worth ratio is 7 percent or higher and it meets any applicable risk-based net worth requirement.

G. NCUA Oversight

For purposes of determining whether a FICU is in compliance with its PCA requirements, the NCUA will use the FICU's net worth ratio as adjusted by the CECL transition provision. Through the supervisory process, the NCUA will continue to examine credit loss estimates and allowance balances regardless of whether the FICU is subject to the CECL transition provision. In addition, the NCUA may examine whether FICUs will have adequate amounts of capital at the expiration of their CECL transition provision period.

H. Small FICU Determination of Charges for Loan Losses

As discussed, section 202 of the FCU Act provides an exception for FICUs with less than $10 million in total assets to the general requirements that reports and statements filed with the Board

[38] 12 U.S.C. 1790d(c)(2)(A).

comply with GAAP. As also noted above, the Board's regulations in § 702.402 require that charges for loan losses be made in accordance with GAAP and does not distinguish between the asset size of FICUs. The Board, however, is aware that compliance with GAAP may be burdensome for smaller FICUs. This difficulty is likely to be exacerbated with the adoption of CECL. Accordingly, the proposed rule provides that FICUs with total assets of less than $10 million may make charges for loan losses either in accordance with GAAP or with any reasonable reserve methodology (incurred loss) provided it adequately covers known and probable loan losses. This provision would eliminate the adverse PCA consequences for smaller FICUs resulting from CECL, and those FICUs would not be subject to the phase-in procedure detailed in this proposed rule. The Board does note, however, that pursuant to section 202 state-chartered, federally insured credit unions subject to State laws and regulations may be required to comply with GAAP or other accounting standards under applicable State requirements.

IV. Regulatory Procedures

A. Regulatory Flexibility Act

The Regulatory Flexibility Act requires the NCUA to prepare an analysis to describe any significant economic impact a regulation may have on a substantial number of small entities.[39] For purposes of this analysis, the NCUA considers small credit unions to be those having under $100 million in assets.[40] The Board fully considered the potential economic impacts of the proposed phase-in on small credit unions during the development of the proposed rule. For example, the proposed rule would, to the extents authorized by statute, completely exempt some of the smallest FICUs (*i.e.,* those with total assets less than $10 million) from the adverse effects of CECL. Accordingly, NCUA certifies that it would not have a significant economic impact on a substantial number of small credit unions.

B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) applies to rulemakings in which an agency by rule creates a new paperwork burden on regulated entities or increases an existing burden.[41] For purposes of the PRA, a paperwork burden may take the form of a reporting, disclosure or recordkeeping requirement, each referred to as an information collection. The proposed changes to part 702 may revise existing information collection requirements to the Call Report. Should changes be made to the Call Report, they will be addressed in a separate **Federal Register** notice. The revisions to the Call Report will be submitted for approval by the Office of Information and Regulatory Affairs at the Office of Management and Budget prior to their effective date.

C. Executive Order 13132, on Federalism

Executive Order 13132[42] encourages independent regulatory agencies to consider the impact of their actions on state and local interests. The NCUA, an independent regulatory agency, as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order to adhere to fundamental federalism principles. The proposed rule would 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. The Board has therefore determined that this rule does not constitute a policy that has federalism implications for purposes of the executive order.

D. Assessment of Federal Regulations and Policies on Families

The NCUA has determined that this proposed rule would not affect family well-being within the meaning of Section 654 of the Treasury and General Government Appropriations Act, 1999.[43]

List of Subjects in 12 CFR Part 702

Credit unions, Investments, Reporting and recordkeeping requirements.

By the National Credit Union Administration Board, this 30th day of July, 2020.

Gerard Poliquin,

Secretary of the Board.

For the reasons discussed above, the NCUA proposes to amend part 702 as follows:

PART 702—CAPITAL ADEQUACY

■ 1. The authority citation for part 702 continues to read as follows:

Authority: 12 U.S.C. 1766(a), 1790d.

■ 2. Revise § 702.402(d)(1) to read as follows:

§ 702.402 Full and Fair disclosure of financial condition.

* * * * *

(d) * * *

(1)(i) Federally insured credit unions with total assets of $10 million or greater shall make charges for loan losses in accordance with generally accepted accounting principles (GAAP);

(ii) Federally insured credit unions with total assets of less than $10 million shall make charges for loan losses in accordance either with either:

(A) Any reasonable reserve methodology (incurred loss) provided it adequately covers known and probable loan losses; or

(B) In the case of Federally-insured, State-chartered credit unions, any other applicable standard under State law or regulation;

* * * * *

■ 3. Add subpart G to read as follows:

Subpart G—CECL Transition Provisions

Sec.

702.701 Authority, purpose, and scope.
702.702 Definitions.
702.704 CECL transition provisions.

§ 702.701 Authority, purpose, and scope.

(a) *Authority.* This subpart is issued by the National Credit Union Administration Board pursuant to section 216 of the Federal Credit Union Act, 12 U.S.C. 1790d, as added by section 301 of the Credit Union Membership Access Act, Pub. L. 105–219, 112 Stat. 913 (1998).

(b) *Purpose.* This subpart provides for the phase in of the adverse effects on the regulatory capital of federally insured credit unions that may result from the adoption of the current expected credit losses (CECL) accounting methodology.

(c) *Scope.* The transition provisions of this subpart apply to federally insured credit unions, whether federally or state-chartered, including credit unions defined as ''new'' pursuant to section 1790d(b)(2) with total assets of at least $10 million.

§ 702.702 Definitions.

In addition to the definitions set forth in § 702.2, the following definitions apply to this subpart:

Current Expected Credit Losses (CECL) means the current expected credit losses methodology under GAAP.

CECL transitional amount means the decrease of a credit union's retained earnings resulting from its adoption of CECL, as determined pursuant to § 702.703(b).

Transition period means the 12-quarter reporting period beginning with

[39] 5 U.S.C. 603(a).

[40] 80 FR 57512 (Sept. 24, 2015).

[41] 44 U.S.C. 3501–3520.

[42] Executive Order 13132 on Federalism, was signed by former President Clinton on August 4, 1999, and subsequently published in the **Federal Register** on August 10, 1999 (64 FR 43255).

[43] Public Law 105–277, 112 Stat. 2681 (1998).

the quarterly Call Report for the quarter ending March 31, 2023 and ending with the quarterly Call Report for the quarter ending December 31, 2025.

§ 702.703 CECL transition provisions.

(a) *Eligibility*—The NCUA shall use the transition provisions of this subpart in determining a credit union's net worth category under this part, as applicable, if:

(1) The credit union has not adopted CECL before December 15, 2022; and

(2) The credit union records a reduction in retained earnings due to the adoption of CECL.

(b) *Determination of CECL transition amount.* (1) For purposes of calculating the first three quarters of the transition period, as described in paragraph (c)(1) of this section, the CECL transitional amount is equal to the difference between the credit union's retained earnings on December 15, 2022, and the credit union's retained earnings on January 1, 2023.

(2) For purposes of calculating the fourth through twelfth quarters of the transition period, as described in paragraphs (c)(2) and (3) of this section, the CECL transitional amount is equal to the difference between the credit union's retained earnings on December 31, 2023, and the credit union's retained earnings on December 30, 2024.

(c) *Calculation of CECL transition provision.* In determining the net worth category of a credit union as provided in paragraph (a) of this section, the NCUA shall:

(1) Increase retained earnings and total assets as reported on the Call Report for purposes of the net worth ratio by 100 percent of its CECL transitional amount during the first three quarters of the transition period (first three reporting quarters of 2023);

(2) Increase retained earnings and total assets as reported on the Call Report for purposes of the net worth ratio by sixty-seven percent of its CECL transitional amount during the second four quarters of the transition period (fourth reporting quarter of 2023 and first three reporting quarters of 2024); and

(3) Increase retained earnings and total assets as reported on the Call Report for purposes of the net worth ratio by thirty-three percent of its CECL transitional amount during the final four quarters of the transition period (fourth reporting quarter of 2024 and first three reporting quarters of 2025).

[FR Doc. 2020–16987 Filed 8–18–20; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–0778; Product Identifier 2020–NM–097–AD]

RIN 2120–AA64

Airworthiness Directives; Dassault Aviation Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to supersede Airworthiness Directive (AD) 2019–23–05, which applies to all Dassault Aviation Model MYSTERE–FALCON 900 airplanes. AD 2019–23–05 requires revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations. Since the FAA issued AD 2019–23–05, the agency has determined that new or more restrictive airworthiness limitations are necessary. This proposed AD would require revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations, as specified in a European Union Aviation Safety Agency (EASA) AD, which will be incorporated by reference. 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 October 5, 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:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For EASA material that will be incorporated by reference (IBR) in this AD, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; phone: +49 221 8999 000; 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.* For Dassault service information identified in this proposed AD, contact Dassault Falcon Jet Corporation, Teterboro Airport, P.O. Box 2000, South Hackensack, NJ 07606; phone: 201–440–6700; internet: *http://www.dassaultfalcon.com.* You may view this IBR material at the FAA, Airworthiness Products Section, Operational Safety 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–2020–0778.

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–2020–0778; 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, 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: Tom Rodriguez, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3226; email: *tom.rodriguez@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–2020–0778; Product Identifier 2020–NM–097–AD'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this NPRM based on those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments that are received, 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 FAA receives about this NPRM.

Confidential Business Information

Confidential Business Information (CBI) is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to the person identified in the **FOR FURTHER INFORMATION CONTACT** section. Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Discussion

The FAA issued AD 2019–23–05, Amendment 39–19799 (84 FR 67169, December 9, 2019) (''AD 2019–23–05''), for all Dassault Aviation Model MYSTERE–FALCON 900 airplanes. AD 2019–23–05 requires revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations. The FAA issued AD 2019–23–05 to address reduced structural integrity of the airplane. AD 2019–23–05 specifies that accomplishing paragraph (g) or (i) of that AD terminates the requirements of paragraph (g)(1) of AD 2010–26–05, Amendment 39–16544 (75 FR 79952, December 21, 2010), for Dassault Aviation Model MYSTERE–FALCON 900 airplanes.

Actions Since AD 2019–23–05 Was Issued

Since the FAA issued AD 2019–23–05, the FAA has determined that new or more restrictive airworthiness limitations are necessary.

The EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2020–0115, dated May 20, 2020 (''EASA AD 2020–0115'') (also referred to as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for all Dassault Aviation Model MYSTERE–FALCON 900 airplanes.

This proposed AD was prompted by a determination that new or more restrictive airworthiness limitations are necessary. The FAA is proposing this AD to address reduced structural integrity of the airplane. See the MCAI for additional background information.

Related IBR Material Under 1 CFR Part 51

EASA AD 2020–0115, dated May 20, 2020, describes new or more restrictive airworthiness limitations for airplane structures and safe life limits.

This proposed AD would also require Chapter 5–40, Airworthiness Limitations, Revision 24, dated September 2018, of the Dassault Aviation Falcon 900 Maintenance Manual, which the Director of the Federal Register approved for incorporation by reference as of January 13, 2020 (84 FR 67169, December 9, 2019).

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.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to 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 has evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Proposed AD Requirements

This proposed AD would retain the requirements of AD 2019–23–05. This proposed AD would also require revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations, which are specified in EASA AD 2020–0115 described previously, as incorporated by reference. Any differences with EASA AD 2020–0115 are identified as exceptions in the regulatory text of this AD.

This proposed AD would require revisions to certain operator maintenance documents to include new actions (*e.g.,* inspections). Compliance with these actions [and CDCCLs] is required by 14 CFR 91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by this proposed AD, the operator may not be able to accomplish the actions described in the revisions. In this situation, to comply with 14 CFR 91.403(c), the operator must request approval for an alternative method of compliance according to paragraph (m)(1) of this proposed AD.

Explanation of Required Compliance Information

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA initially worked with Airbus and EASA to develop a process to use certain EASA ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has since coordinated with other manufacturers and civil aviation authorities (CAAs) to use this process. As a result, EASA AD 2020–0115 will be incorporated by reference in the FAA final rule. This proposed AD would, therefore, require compliance with EASA AD 2020–0115 in its entirety, through that incorporation, except for any differences identified as exceptions in the regulatory text of this proposed AD. Using common terms that are the same as the heading of a particular section in the EASA AD does not mean that operators need comply only with that section. For example, where the AD requirement refers to ''all required actions and compliance times,'' compliance with this AD requirement is not limited to the section titled ''Required Action(s) and Compliance Time(s)'' in the EASA AD.

Service information specified in EASA AD 2020–0115 that is required for compliance with EASA AD 2020–0115 will be available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0778 after the FAA final rule is published.

Airworthiness Limitation ADs Using the New Process

The FAA's process of incorporating by reference MCAI ADs as the primary source of information for compliance with corresponding FAA ADs has been limited to certain MCAI ADs (primarily those with service bulletins as the primary source of information for accomplishing the actions required by the FAA AD). However, the FAA is now expanding the process to include MCAI ADs that require a change to airworthiness limitation documents,

such as airworthiness limitation sections.

For these ADs that incorporate by reference an MCAI AD that changes airworthiness limitations, the FAA requirements are unchanged. Operators must revise the existing maintenance or inspection program, as applicable, to incorporate the information specified in the new airworthiness limitation document. The airworthiness limitations must be followed according to 14 CFR 91.403(c) and 91.409(e).

Costs of Compliance

The FAA estimates that this proposed AD affects 105 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

The FAA estimates the total cost per operator for the retained actions from AD 2019–23–05 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 agency 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 proposed 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.

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:

■ a. Removing Airworthiness Directive (AD) 2019–23–05, Amendment 39–19799 (84 FR 67169, December 9, 2019), and

■ b. Adding the following new AD:

Dassault Aviation: Docket No. FAA–2020–0778; Product Identifier 2020–NM–097–AD.

(a) Comments Due Date

The FAA must receive comments by October 5, 2020.

(b) Affected ADs

(1) This AD replaces AD 2019–23–05, Amendment 39–19799 (84 FR 67169, December 9, 2019) (''AD 2019–23–05'').

(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 all Dassault Aviation Model MYSTERE–FALCON 900 airplanes, certificated in any category.

(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 Existing Maintenance or Inspection Program, With No Changes

This paragraph restates the requirements of paragraph (i) of AD 2019–23–05, with no changes. Within 90 days after January 13, 2020 (the effective date of AD 2019–23–05), revise the existing maintenance or inspection program, as applicable, to incorporate the information specified in Chapter 5–40, Airworthiness Limitations, Revision 24, dated September 2018, of the Dassault Aviation Falcon 900 Maintenance Manual. The initial compliance times for doing the tasks are at the times specified in Chapter 5–40, Airworthiness Limitations, Revision 24, dated September 2018, of the Dassault Aviation Falcon 900 Maintenance Manual, or within 90 days after January 13, 2020, whichever occurs later. The term ''LDG'' in the ''First Inspection'' column of any table in the service information specified in this paragraph means total airplane landings. The term ''FH'' in the ''First Inspection'' column of any table in the service information specified in this paragraph means total flight hours. The term ''FC'' in the ''First Inspection'' column of any table in the service information specified in this paragraph means total flight cycles. The term ''M'' in the ''First Inspection'' column of any table in the service information specified in this paragraph means months since the date of issuance of the original airworthiness certificate or the date of issuance of the original export certificate of airworthiness. Accomplishing the maintenance or inspection program revision required by paragraph (i) of this AD terminates the requirements of this paragraph.

(h) Retained Restrictions on Alternative Actions or Intervals, With a New Exception

This paragraph restates the requirements of paragraph (h) of AD 2019–23–05, with a new exception. Except as required by paragraph (i) of this AD, after the existing maintenance or inspection program has been revised as 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 AMOC in accordance with the procedures specified in paragraph (m)(1) of this AD.

(i) New Maintenance or Inspection Program Revision

Except as specified in paragraph (j) of this AD: Comply with all required actions and

compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2020–0115, dated May 20, 2020 (''EASA AD 2020–0115''). Accomplishing the maintenance or inspection program revision required by this paragraph terminates the requirements of paragraph (g) of this AD.

(j) Exceptions to EASA AD 2020–0115

(1) The requirements specified in paragraphs (1) and (2) of EASA AD 2020–0115 do not apply to this AD.

(2) Paragraph (3) of EASA AD 2020–0115 specifies revising ''the approved AMP'' within 12 months after its effective date, but this AD requires revising the existing maintenance or inspection program, as applicable, to incorporate the ''limitations, tasks and associated thresholds and intervals'' specified in paragraph (3) of EASA AD 2020–0115 within 90 days after the effective date of this AD.

(3) The initial compliance time for doing the tasks specified in paragraph (3) of EASA AD 2020–0115 is at the applicable ''associated thresholds'' specified in paragraph (3) of EASA AD 2020–0115, or within 90 days after the effective date of this AD, whichever occurs later.

(4) The provisions specified in paragraphs (4) and (5) of EASA AD 2020–0115 do not apply to this AD.

(5) The ''Remarks'' section of EASA AD 2020–0115 does not apply to this AD.

(k) New Provisions for Alternative Actions or Intervals

After the maintenance or inspection program has been revised as required by paragraph (i) of this AD, no alternative actions (*e.g.,* inspections) or intervals are allowed unless they are approved as specified in the provisions of the ''Ref. Publications'' section of EASA AD 2020–0115.

(l) Terminating Actions for Certain Requirements 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 MYSTERE–FALCON 900 airplanes.

(m) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Large Aircraft Section, International Validation 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 Large Aircraft Section, International Validation Branch, send it to the attention of the person identified in paragraph (n)(4) of this AD. Information may be emailed to: *9-AVS-AIR-730-AMOC@faa.gov.*

(i) 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.

(ii) AMOCs approved previously for AD 2019–23–05 are approved as AMOCs for the corresponding provisions of EASA AD 2020–0115 that are required by paragraph (i) of this AD.

(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, Large Aircraft Section, International Validation Branch, FAA; or EASA; or Dassault Aviation's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(n) Related Information

(1) For information about EASA AD 2020–0115, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; phone: +49 221 8999 000; 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.*

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

(3) You may view this material at the FAA, Airworthiness Products Section, Operational Safety 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–2020–0778.

(4) For more information about this AD, contact Tom Rodriguez, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3226; email: *tom.rodriguez@faa.gov.*

Issued on August 13, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–18026 Filed 8–18–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 9

RIN 2900–AQ53

Servicemembers' Group Life Insurance Traumatic Injury Protection Program Amendments

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to amend its regulations that govern the Servicemembers' Group Life Insurance (SGLI) Traumatic Injury Protection (TSGLI) program, to clarify the eligibility criteria, add definitions, and explain the application and appeals processes, including the submission of supporting evidence and the interaction between the administrative appeals process and a Federal lawsuit on a claim. VA proposes to recodify the definitions in the current regulation that are pertinent to the schedule of losses, revise existing definitions, and add new definitions. VA would add a new regulation to codify the text at the beginning of the schedule of losses, recodify that schedule, and amend the criteria for certain losses in the schedule. This rulemaking also responds to a petition for rulemaking.

DATES: Comments must be received on or before October 19, 2020.

ADDRESSES: Written comments may be submitted through *http://www.Regulations.gov;* by mail or hand-delivery to: Director, Office of Regulation Policy and Management (00REG), Department of Veterans Affairs, 810 Vermont Ave. NW, Room 1064, Washington, DC 20420; or by fax to (202) 273–9026. (This is not a toll-free telephone number.) Comments should indicate that they are submitted in response to ''RIN 2900–AQ53 Servicemembers' Group Life Insurance Traumatic Injury Protection Program Amendments.'' Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1064, between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461–4902 for an appointment. (This is not a toll-free telephone number.) In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at *http://www.Regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Paul Weaver, Department of Veterans Affairs Insurance Center (310/290B), 5000 Wissahickon Avenue, Philadelphia, PA 19144, (215) 842–2000, ext. 4263. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: TSGLI provides up to $100,000 of traumatic injury coverage to all servicemembers enrolled in SGLI. TSGLI provides a financial benefit to seriously injured SGLI insureds to assist them with expenses incurred during long periods of recovery and rehabilitation. Since the program began issuing benefits on December 22, 2005, through June 30, 2019, over $1 billion has been paid to almost 18,500 injured servicemembers. TSGLI is modeled after commercial Accidental Death and Dismemberment

(AD&D) insurance coverage, specifically, the ''dismemberment'' portion of the coverage, although it deviates in some respects from the commercial AD&D model to account for the unique needs of military personnel. 70 FR 75,940 (Dec. 22, 2005). In developing these proposed amendments, VA considered industry practice and AD&D case law, the goals and purpose of the TSGLI authorizing statute, as well as analysis from a TSGLI Year-Ten Review and consultation with medical experts.

I. Year-Ten Review

After ten years of program implementation, VA initiated a comprehensive review of TSGLI regulations to assess proposals for improvements, clarify eligibility standards, identify opportunities for administrative and operational enhancements, and ensure consistency with congressional intent. VA reviewed approximately 1,850 TSGLI claims that had been adjudicated by the uniformed services and consulted with medical experts at 18 military, VA, and private medical facilities, including George Washington University Medical Center, Washington, DC; Navy Medical Center, San Diego, California; San Antonio Military Medical Center, San Antonio, Texas; University of Pennsylvania Hospital, Philadelphia, Pennsylvania; VA Amputation System of Care, VA Medical Center, Richmond, Virginia; VA Medical Center, Bay Pines, Florida; VA Polytrauma Center, Tampa, Florida; Walter Reed National Military Medical Center, Bethesda, Maryland; and Moss Rehabilitation Research Institute, Elkins Park, Pennsylvania (''experts'').

Areas addressed by the review include loss standards, application and appeals processes, forms, program exclusions, and definitions. A copy of the review can be found at *https://www.benefits.va.gov/INSURANCE/docs/TSGLI_YTR.pdf.* This comprehensive program review served as the basis for many aspects of this proposed rulemaking.

While VA was conducting the Year-Ten Review, a petition for rulemaking was submitted to the Secretary of Veterans Affairs on March 16, 2015. The petition is addressed in this notice of proposed rulemaking, which serves as the Secretary's response to the petition.

II. Proposed Amendments to § 9.20

A. New § 9.20(b)—Qualifying Traumatic Events

VA proposes to restructure current § 9.20(b)(1) and to add new qualifying traumatic events.

New paragraph (b)(1)(A)–(C) would incorporate the material in current § 9.20(b)(1) that defines a traumatic event to include damage caused by ''application of external force, violence, chemical, biological, or radiological weapons'' and ''accidental ingestion of a contaminated substance.'' As explained below, VA would add a definition of ''external force'' in new § 9.20(e)(6)(iv) and ''ingestion'' in new § 9.20(e)(6)(v).

New paragraph (b)(1)(D) would add exposure to low environmental temperatures, excessive heat, and documented non-penetrating blast waves as traumatic events based upon evidence showing increased occurrence of traumatic injuries resulting from such exposures. The incidence of heat illnesses in the uniformed services had risen between 2014 and 2018 creating a ''significant and persistent threat to both the health of U.S. military members and the effectiveness of military operations.'' Armed Forces Health Surveillance Branch, *Update: Heat Illness, Active Component, U.S. Armed Forces, 2018,* 26 Med. Surveillance Monthly Rep. 15, 19 (2019). Injury from cold weather increased among military troops by 19.6% in 2017–2018 compared to 2016–2017. Armed Forces Health Surveillance Branch, *Update: Cold Weather Injuries, Active and Reserve Components, U.S. Armed Forces, July 2013–June 2018,* 25 Med. Surveillance Monthly Rep. 10 (2018). Additionally, ''cold injuries have continued to affect hundreds of service members each year because of exposure to cold and wet environments'' and ''[s]uch environmental conditions pose the threat of hypothermia, frostbite, and nonfreezing cold injury such as immersion injury.'' *Id.* Whether in training or in forward operating locations, the risk of exposure to extreme temperatures can result in severe traumatic injuries, including amputations or coma. Finally, many servicemembers develop traumatic brain injury (TBI) from the effects of blast waves. Ralph G. DePalma, M.D., et al., *Blast Injuries,* 352 New Eng. J. of Med. 1335–1342 (2005); David S. Plurad, *Blast Injury,* 176 Mil. Med. 276, 281 (2011).

VA also proposes to state in new paragraph (b)(1)(E) that an insect bite or sting or animal bite would qualify as a traumatic event. We are adding such bites because they involve application of an external force to the body that transmits an allergen or poison into the body. *See Hargett* v. *Jefferson Standard Life Ins. Co.,* 128 S.E.2d 26, 31 (N.C. 1962); *Omberg* v. *U.S. Mut. Ass'n,* 40 S.W. 909, 910 (Ky. Ct. App. 1897).

B. New § 9.20(c)—Qualifying Traumatic Injury

VA proposes to recodify current § 9.20(c)(3) as new § 9.20(c)(4) and to add new paragraph (c)(3), which would state that anaphylaxis caused by a bug bite or sting or animal bite is a traumatic injury. VA is proposing to add anaphylaxis because this harm occurs immediately after such a sting or bite. This would be consistent with case law finding that an allergic reaction is covered under AD&D policies because it is not a disease. *See Escoe* v. *Metro. Life Ins. Co.,* 35 N.Y.S.2d 833, 834 (N.Y. Sup. Ct. 1942) (death from allergy to sulfapyridine given to treat pneumonia was accident, not disease); *Berkowitz* v. *N.Y. Life Ins. Co.,* 10 N.Y.S.2d 106, 111 (N.Y. App. Div. 1939) (''mere predisposing tendency cannot be held as a matter of law to be an infirmity or disease''); *Crisler* v. *Unum Ins. Co. of Am.,* 233 SW3d 658, 663 (Ark. 2006) (allergic reaction to injection of antibiotic was not disease).

C. New § 9.20(d)—Eligibility Requirements

1. New § 9.20(d)(2)—Causation

Section 1980A(c)(1) of title 38, United States Code, states that a qualifying loss must ''result[ ] directly from a traumatic injury . . . and from no other cause.'' VA codified this requirement in current 38 CFR 9.20(d)(2). In addition, current 38 CFR 9.20(e)(4) states that a loss is not covered if it results from a physical or mental illness or disease or mental disorder, ''whether or not caused by a traumatic injury,'' other than the exceptions noted in paragraph (e)(4)(i).

VA proposes to amend current § 9.20(d)(2) to restate the statutory requirement that a scheduled loss must ''result directly from a traumatic injury . . . and from no other cause.'' Some courts have interpreted this phrase in AD&D and Employee Retirement Income Security Act case law to mean that a loss is not covered if a preexisting condition or disease ''substantially contributed'' to the loss. *See, e.g., Dixon* v. *Life Ins. Co. of N. Am.,* 389 F.3d 1179, 1184 (11th Cir. 2004); *Ganapolsky* v. *Boston Mut. Life Ins. Co.,* 138 F.3d 446, 448 (1st Cir. 1998); *House* v. *Life Ins. Co. of N. Am.,* 399 F. Supp. 2d 1254, 1264–65 (N.D. Ala. 2005); *Danz* v. *Life Ins. Co. of N. Am.,* 215 F. Supp. 2d 645, 652 (D. Md. 2002) (citing *Quesinberry* v. *Life Ins. Co. of N. Am.,* 987 F.2d 1017, 1028 (4th Cir. 1993) (*en banc*)). Based upon this case law, we propose to add paragraph (d)(2)(A), which would explain that, under this standard, a scheduled loss does not result directly from a traumatic injury and no other

cause if a pre-existing disease, illness, or condition substantially contributed to the loss. Thus, for example, if a member suffers a qualifying loss such as leg amputation and the member also suffers from a pre-existing condition such as diabetes, the member would not be eligible for TSGLI if the pre-existing diabetes substantially contributed to the amputation of the leg.

We also propose to state in § 9.20(d)(2)(A) that a scheduled loss does not result directly from a traumatic injury and no other cause if a post-service injury substantially contributes to the loss. For example, if a member suffers a leg injury in service and a post-service injury to the same leg, and the member's leg is then amputated, the member would not be eligible for TSGLI if the post-service leg injury substantially contributed to the amputation.

VA also proposes to add new paragraph (d)(2)(B) to clarify that a scheduled loss is a direct result of a traumatic injury if the loss is caused by a diagnostic procedure or a medical or surgical procedure that was used to treat the traumatic injury. *Ins. Co. of N. Am.* v. *Thompson,* 381 F.2d 677, 681 (9th Cir. 1967); 10 Couch on Insurance 3d § 141:78, at 141–113 (1998). For example, if a member is injured in a motor vehicle accident, undergoes surgery to treat a back injury suffered in the accident, and is paralyzed because of the surgery, the scheduled loss would be covered by TSGLI. We would make a corresponding change in new § 9.20(e)(3)(i)(C) to explain that TSGLI would be payable if a scheduled loss is caused by a diagnostic or medical or surgical procedure that was necessary to treat a traumatic injury.

2. New § 9.20(d)(4)—Two-Year Loss Period

Current § 9.20(d)(4) requires a member to suffer a scheduled loss within two years of the traumatic injury. VA proposes to update the citation to the schedule of losses in § 9.20(d)(4) by deleting ''paragraph (e)(7) of this section'' and inserting instead ''§ 9.21(c).''

D. New § 9.20(e)—Scheduled Loss

1. New § 9.20(e)(1)—Definition of Scheduled Loss

VA proposes to update the reference to the schedule in current § 9.20(e)(1) by deleting ''paragraph (e)(7) of this section'' and inserting instead ''§ 9.21(c).'' VA also proposes to add ''from no other cause'' to the definition of scheduled loss to correspond to 38 U.S.C. 1980A(c)(1).

2. New § 9.20(e)(3)—Exclusions

a. New § 9.20(e)(3)(i)(C)—Medical Procedures & Treatment Exclusion

Consistent with new paragraph (d)(2)(B), VA proposes to add the phrase ''unless the diagnostic procedure or medical or surgical treatment is necessary to treat a traumatic injury'' to the end of the paragraph to clarify that a scheduled loss caused by a diagnostic procedure or medical or surgical treatment that is necessary to a traumatic injury would be eligible for a TSGLI payment. This is consistent with AD&D case law. *Thompson,* 381 F.2d at 681.

b. New § 9.20(e)(3)(ii)—Felony Exclusion

Current § 9.20(e)(3)(ii) specifies that TSGLI will not be paid if a member suffers a loss while committing or attempting to commit a felony. VA proposes to amend § 9.20(e)(3)(ii) to clarify that this exclusion applies if a member suffers a loss while committing an act that violated a penal law classifying it as a felony. This approach is consistent with AD&D industry practice. *See Williams* v. *Life Ins. Co. of N. Am.,* 117 F. Supp. 3d 1206, 1216 (W.D. Wash. 2015) (citing *Allstate Ins. Co.* v. *Raynor,* 969 P.2d 510, 516 (Wash. Ct. App. 1999)).

3. New § 9.20(e)(6)—Definitions

We propose to amend current § 9.20(e)(6) by recodifying paragraph (i)–(vi) and (xiii)–(xxix), which are relevant to the schedule of losses, in new § 9.21, adding definitions of the following terms that are relevant to § 9.20, and alphabetizing all the definitions in new paragraph (e)(6). For example, we propose to incorporate the definitions of ''quadriplegia,'' ''paraplegia,'' ''hemiplegia,'' ''uniplegia,'' and ''complete and irreversible paralysis'' in current § 9.20(e)(6)(i)–(v) and the definition of ''permanent'' in new § 9.21(a)(10) into the criteria for quadriplegia, paraplegia, hemiplegia, and uniplegia in new § 9.21(c)(4)–(7). In another example, we propose to incorporate the definitions in current § 9.20(e)(6)(xxi)–(xxix) and the definition of ''permanent'' in new § 9.21(a)(10) into the criteria for genitourinary losses in new § 9.21(c)(19).

a. External Force

VA would define ''external force'' in new § 9.20(e)(6)(iv) to mean a ''sudden or violent impact from a source outside of the body that causes an unexpected impact and is independent of routine body motions such as twisting, lifting, bending, pushing, or pulling.'' This proposed definition is consistent with AD&D practice that excludes such routine body activities as traumatic events. *See e.g., Mutual Life Ins. Co.* v. *Hassing,* 134 F.2d 714, 716 (10th Cir. 1943) (AD&D policy requiring bodily injury effected solely through external, violent, accidental means). For example, a sprained ankle suffered while running would not be considered a traumatic event because the damage was not caused by an external force but rather by stretching or tearing ligaments. *https://www.mayoclinic.org/diseases-conditions/sprained-ankle/symptoms-causes/syc-20353225.* However, a fall that causes a herniated disc would constitute a traumatic event because the damage to the body was caused by hitting the ground, *i.e.,* an external force.

b. Ingestion

VA proposes to define ''ingestion'' in new § 9.20(e)(6)(v) to mean ''to take into the gastrointestinal tract by means of the mouth.'' This definition is consistent with the common meaning of the term. *See United States* v. *Ten Cartons,* 888 F. Supp. 381, 393 (E.D.N.Y. 1995), *aff'd,* 10 F.3d 285 (2d Cir. 1995).

c. Medically Incapacitated

VA proposes to define the term ''medically incapacitated'' in new paragraph (e)(6)(vii) to mean an ''individual who has been determined by a medical professional to be physically or mentally impaired by physical disability, mental illness, mental deficiency, advanced age, chronic use of drugs or alcohol, or other causes that prevent sufficient understanding or capacity to manage his or her own affairs competently.''

E. New § 9.20(f)—TSGLI Application Process

VA proposes to recodify current § 9.20(f), which contains the schedule of losses, in new 38 CFR 9.21(c), recodify current § 9.20(h), which explains the TSGLI application process, as new § 9.20(f), and amend new paragraph (f).

VA proposes to clarify in new § 9.20(f)(1)(i) that a medical professional must complete and sign Part B of the Application for TSGLI Benefits Form in addition to the requirement that a member complete and sign Part A of the Application for TSGLI Benefits Form, *i.e.,* both Part A and Part B must be completed to initiate a claim for TSGLI benefits. VA would also explain that a member must submit evidence substantiating that the member suffered a traumatic injury and resulting loss. This clarification is intended to indicate

that Part A alone is insufficient documentation to support eligibility for TSGLI benefits.

VA would also add a requirement to new § 9.20(f)(1)(ii) that, if a medical professional certifies in Part B of the Application for TSGLI Benefits Form that a member is medically incapacitated, the Form must be signed by a guardian; an agent or attorney acting under a valid Power of Attorney; military trustee as available, in that order. We propose to change ''legally incapacitated'' to ''medically incapacitated'' to make the regulation consistent with 38 U.S.C. 1980A(k)(1) and (2)(B), which provides for appointment of a fiduciary or trustee of a servicemember who is ''medically incapacitated.''

VA would also recodify § 9.20(h)(1)(iii) as § 9.20(f)(1)(iii).

Finally, VA would recodify § 9.20(h)(2) as § 9.20(f)(2) and amend the paragraph by deleting the current citations to the schedule of losses and inserting citations to new § 9.21(c).

F. New § 9.20(g)—Uniformed Service Decision on TSGLI Claim

VA proposes to add a regulation explaining both who decides a TSGLI claim and the decision-making process, which would be codified as new § 9.20(g). Current § 9.20(g), which states that the uniformed service to which a member belongs certifies whether the member was insured under SGLI at the time of the traumatic injury and whether the member sustained a qualifying loss, would be recodified as new § 9.20(g)(1) with non-substantive changes.

Paragraph (g)(2) would state that the uniformed service office may request additional evidence from the member if the record does not contain sufficient evidence to decide the claim.

Paragraph (g)(3) would require the uniformed service office to consider all medical and lay evidence of record, including all evidence provided by the member, and determine its probative value. The probative value of medical evidence may depend upon whether a medical professional examined the servicemember; treated the member on an ongoing basis; provides relevant and objective evidence to support an opinion; or provides an opinion that is consistent with other evidence of record. The probative value of lay evidence may depend upon consistency with a member's service records and other lay and medical evidence of record.

Paragraph (g)(3) would also adopt the benefit of the doubt evidentiary standard for adjudication of TSGLI claims. The Supreme Court has long recognized that the character of the veterans' benefits statutes is strongly and uniquely pro-claimant. *See, e.g., Fishgold* v. *Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946) (liberally construing Selective Training and Service Act of 1940, 54 Stat. 885, 50 U.S.C. App. § 301, ''for the benefit of those who left private life to serve their country in its hour of great need''); *Coffy* v. *Republic Steel Corp.,* 447 U.S. 191, 196 (1980); *Brown* v. *Gardner,* 513 U.S. 115, 118 (1994). Congress itself has recognized and preserved the unique character and structure of the veterans' benefits system. When enacting the Veterans' Judicial Review Act, Public Law 100–687, 102 Stat. 4105 (1988), Congress stated its expectation that VA would ''resolve all issues by giving the claimant the benefit of any reasonable doubt.'' H.R. Rep. No. 100–963, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5794–95.

Although TSGLI entitlement is adjudicated by the uniformed services not VA, we believe that the benefit of the doubt standard should similarly be applied to adjudication of entitlement to TSGLI, which provides benefits to members who were seriously injured while serving the United States and which VA administers on behalf of the uniformed services. 38 U.S.C. 1980A. In addition, the uniformed services apply the benefit of the doubt in determining a member's unfitness for service because of physical disability and when evaluating members for compensable conditions. DoD Instruction 1332.18, App'x 2 to Encl. 3, para. 6.a.(2) and App'x 3 to Encl. 3, para. 7.i. (2014); *see* Army Reg. 635–40, para. 5–6.a. (2017) (benefit of doubt will be resolved in favor of member's fitness for duty under presumption that member desires to be found fit for duty).

The benefit of the doubt would apply only when the positive and negative evidence relating to the member's TSGLI claim are approximately balanced. *E.g., Ortiz* v. *Principi,* 274 F.3d 1361, 1365–66 (Fed. Cir. 2001). If the preponderant evidence weighs against the member's TSGLI claim, the evidence is not approximately balanced, and the benefit of the doubt rule would not resolve the issue in favor of the member because there is no doubt to be resolved. *Id.*

New § 9.20(g)(4) would contain the first sentence of current paragraph (i)(1), which explains that notice of a decision on a TSGLI claim must include notice of appellate rights. VA would also state in new § 9.20(g)(4) that an adverse decision must include a statement of the reasons for the decision and a summary of the evidence considered. *See O'Neill* v. *United States,* No. 11–2584, 2013 WL 6579039 (D. Col. Dec. 13, 2013) (citing *Dickson* v. *Sec'y of Defense,* 68 F.3d 1396 (D.C. Cir. 1995)).

G. New § 9.20(h)—Appeal of TSGLI Decision

VA proposes to recodify the rest of current § 9.20(i), which addresses appeals of TSGLI decisions, as new § 9.20(h) and would amend the regulation as explained below.

New § 9.20(h)(1) would state that each uniformed service has established its own, three-tiered TSGLI appellate process, *i.e.,* reconsideration, followed by a second-level appeal and then a third-level appeal. The paragraph would also make clear that persons appealing an eligibility determination to the uniformed services must utilize the appeal process of the uniformed service that issued the original decision. *See, e.g.,* SECNAV Instruction 1770.4A, Encl. (1), para. 8. (2019) (following reconsideration by TSGLI branch-of-service adjudicator and review by TSGLI Appeals Board, member may appeal to Board for Correction Naval Records). The names of the reviewing offices may differ among the uniformed services, and the proposed rules thus would use the generic terms ''second-level'' and ''third-level'' to describe the common appellate structure. The notice provided by the uniformed services under proposed § 9.20(g)(4) will identify the relevant second-level or third-level office of the uniformed service as appropriate. VA would also include a reference to paragraph (f)(1)(ii) and (iii) in paragraph (h)(1) for the current list of persons other than the member who may submit an appeal.

New paragraph (h)(1)(A) would explain reconsideration, which is the first appellate tier. VA proposes to state in new paragraph (h)(1)(A)(i) that a member, or other person eligible to submit a claim under paragraph (f)(1)(ii) or (iii), initiates reconsideration of an eligibility determination, such as whether the loss occurred within 730 days of the traumatic injury, whether the member was insured under Servicemembers' Group Life Insurance when the traumatic injury was sustained, or whether the injury was self-inflicted or whether a loss of hearing was total and permanent, by filing a written notice of appeal within one year of the eligibility decision with the office of the uniformed service identified in the decision. This amendment would also require that the request for reconsideration identify the issues for which reconsideration is sought. As a result, VA would delete

current paragraph (i)(2), which states that appeal of whether a member was insured under SGLI must be appealed to the Office of Servicemembers' Group Life Insurance. Section 1980A(f) of title 38, United States Code, requires the Department of Defense or Secretary concerned to ''certify'' whether a member was ''insured under [SGLI]'' at the time of injury and ''sustained a qualifying loss.'' We believe that it would be consistent with this statute for the uniformed service to decide appeals of all issues including SGLI coverage.

Proposed paragraph (h)(1)(A)(i) would also state that an appeal of an eligibility determination, such as whether a loss occurred within ''730 days,'' rather than ''365 days'' (as stated in current § 9.20(i)(1)), must be in writing. This change in the number of days would comport with 38 CFR 9.20(d)(4), which states that a scheduled loss must occur within two years of the traumatic injury and corrects an oversight in a 2007 TSGLI rulemaking. 72 FR 10362 (Mar. 8, 2007).

New paragraph (h)(1)(A)(ii) would state that the uniformed service TSGLI office will reconsider the claim, including evidence submitted with the notice of appeal by or on behalf of the member that was not previously part of the record before the uniformed service, and decide the claim.

New paragraph (h)(1)(B) would explain the second tier of appellate review. VA proposes to state in new paragraph (h)(1)(B)(i) that an appeal of a reconsideration decision is initiated by filing, with the second-level appeal office of the uniformed service within one year of the reconsideration decision, a written notice of appeal that identifies the issues being appealed. New paragraph (h)(1)(B)(ii) would state that the second-level appeal office will review the claim, including evidence submitted with the notice of appeal by or on behalf of the member that was not previously part of the record before the uniformed service, and decide the claim.

New paragraph (h)(1)(C) would explain the third tier of appellate review. VA proposes to state in new paragraph (h)(1)(C)(i) that an appeal of a decision by the second-level appeal office is initiated by filing, with the third-level appeal office of the uniformed service within one year of the date of the decision by the second-level appeal office of the uniformed service, a written notice of appeal that identifies the issues being appealed. New paragraph (h)(1)(C)(ii) would state that the third-level appeal office will review the claim, including evidence submitted with the notice of appeal by or on behalf of the member that was not previously part of the record before the uniformed service, and decide the claim.

New paragraph (h)(2) would state that, if a timely notice of appeal seeking reconsideration of the initial decision by the uniformed service or seeking review of the decision by the second-level uniformed service appeal office is not filed, the initial decision by the uniformed service or the decision by the second-level uniformed service appeal office, respectively, shall become final, and the claim will not thereafter be readjudicated or allowed except as explained in new paragraph (h)(3).

VA proposes in new paragraph (h)(3)(i) that, if new and material evidence is submitted with respect to a claim that has been finally disallowed, the uniformed service office will consider the evidence, determine its probative value, and readjudicate the claim. VA would define new and material evidence in paragraph (h)(3)(i) as ''evidence that was not previously part of the record before the uniformed service, is not cumulative or redundant of evidence of record at the time of the prior decision and is likely to have a substantial effect on the outcome.'' *See* 32 CFR 723.9 (defining new and material evidence for purposes of reconsideration of a final decision by Board for Correction of Naval Records); *Jackson* v. *Mabus,* 808 F.3d 933, 936 (D.C. Cir. 2015).

VA proposes to add paragraph (h)(3)(ii), which would state that a finding that the evidence submitted is not new and material may be appealed using the process in paragraph (h)(1).

VA would recodify current paragraph (i)(3) as new § 9.20(h)(4). New § 9.20(h)(4) would restate the sentence in current § 9.20(i)(3). VA also proposes to explain that a member who files suit in U.S. district court after an adverse initial decision on a TSGLI claim by a uniformed service would be precluded from filing an appeal with the uniformed service identified in the decision if the lawsuit is pending before a U.S. district court, U.S. court of appeals, or U.S. Supreme Court or the time for appeal or filing a petition for a writ of certiorari has not expired. Paragraph (h)(4) would also state that, if a member appeals a decision to a U.S. district court after filing an appeal with a uniformed service, the appeal with the uniformed service would be stayed if the lawsuit is pending before a U.S. district court, U.S. court of appeals, or U.S. Supreme Court or the time for appeal or a petition for a writ of certiorari has not expired. This amendment is intended to streamline the TSGLI appellate process and prevent multiple, concurrent reviews of TSGLI appeals.

H. New § 9.20(i)—Payment of TSGLI

VA would recodify current § 9.20(j) as new § 9.20(i). VA would delete the word ''title'' in the text preceding current § 9.20(j)(1) and would amend new paragraph (i)(1) to correspond to proposed § 9.20(f)(1)(ii). New paragraph (i)(1) would state that a member's guardian, agent or attorney acting under a valid Power of Attorney, or trustee will be paid the TSGLI benefit if a medical professional has certified that the member is medically incapacitated in Part B of the Application for TSGLI Benefits Form. As explained above, we have changed ''legally incapacitated'' to ''medically incapacitated'' to make the regulation consistent with 38 U.S.C. 1980A(k)(1) and (2)(B).

I. New § 9.20(j)—Administration of TSGLI Program

VA would recodify current § 9.20(k) as new § 9.20(j).

III. New § 9.21—Schedule of Losses

VA proposes to recodify current §§ 9.21 and 9.22 as new §§ 9.22 and 9.23. VA also proposes add new § 9.21, which would: (1) Recodify certain definitions that are pertinent to the schedule of losses and are currently in § 9.20(e)(6) in new § 9.21(a) and amend certain definitions; (2) move criteria for certain losses from the definitions to the schedule of losses; (3) recodify the text preceding the current schedule as new § 9.21(b); (4) recodify the schedule of losses in current § 9.20(f) as new § 9.21(c); and (5) amend the criteria for certain losses.

A. New § 9.21(a)—Definitions of Terms

VA proposes to recodify definitions in current § 9.20(e)(6) that are relevant to the schedule in new § 9.21(a), amend certain existing definitions pertinent to the schedule, and add new definitions for terms not currently defined. In addition, current 38 CFR 9.20(e)(6)(i)–(iv) and (xiv)–(xxix) are in fact criteria for losses in the schedule rather than definitions. VA would therefore recodify these criteria in the schedule itself in new § 9.21(c) rather than define them in new § 9.21(a). This would also make it easier for adjudicators to decide claims because they could find all relevant criteria in the schedule.

1. Avulsion

In new § 9.21(a)(5), VA would define the term ''avulsion'' for purposes of new § 9.21(c)(16) pertaining to facial reconstruction to mean a forcible

detachment or tearing of bone and/or tissue due to a penetrating injury.

2. Consecutive

In new § 9.21(a)(6), VA would define ''consecutive'' to mean ''to follow in uninterrupted succession.'' This definition is consistent with the well-accepted meaning of the term. *Black's Law Dictionary* 304 (6th ed. 1990) (defining ''consecutive'' as ''[s]uccessive; succeeding one another in regular order; to follow in uninterrupted succession''); *Hill* v. *Tenn. Rural Health Improvement Ass'n,* 882 SW2d 801, 803 (Tenn. Ct. App. 1994).

3. Discontinuity Defect

In new § 9.21(a)(7), VA proposes to define ''discontinuity defect'' pertaining to facial reconstruction under new § 9.21(c)(16) to mean the absence of bone and/or tissue from its normal bodily location, which interrupts the physical consistency of the face and impacts at least one of the following functions: Mastication, swallowing, vision, speech, smell, or taste. The requirement that a discontinuity defect must impact mastication, swallowing, vision, speech, smell, or taste is intended to provide TSGLI benefits to members who cannot perform key facial functions without replacement of the bone or tissue from another part of the body or manufactured bone or tissue.

4. Hospitalization

VA proposes to recodify the definition of ''hospitalization'' in current § 9.20(e)(6)(xiii) at new § 9.21(a)(8) and to amend the definition to mean admission to a ''hospital'' as defined in 42 U.S.C. 1395x(e), which includes both inpatient critical care and inpatient rehabilitation facilities, or a ''skilled nursing facility'' under 42 U.S.C. 1395i–3(a). Experts we consulted indicated that patients with severe physical injuries covered by the schedule of losses are usually treated in a hospital and then an inpatient rehabilitation or skilled nursing care. We therefore intend for the periods of hospitalization required by the schedule to continue if a member is receiving treatment in a hospital or skilled nursing facility.

5. Inability To Carry Out Activities of Daily Living (ADLs)

Congress specified in 38 U.S.C. 1980A(b)(1)(H) that the inability to carry out ADLs resulting from a TBI is a qualifying loss. In this rulemaking, VA proposes to recodify current § 9.20(e)(6)(vi) as new § 9.21(a)(9), amend the definition, and define terms used in the amended definition.

The term ''inability to carry out the activities of daily living'' is defined in 38 U.S.C. 1980A(b)(2)(D) and current 38 CFR 9.20(e)(6)(vi) as the ''inability to independently perform at least'' two of six functions. VA proposes to delete ''independently'' from the definition of ADL because it is subject to varying interpretations and to clarify the term by stating in new § 9.21(a)(9) that the inability to carry out activities of daily living means that a medical professional documents that a member is unable to perform two of the six functions without assistance from another person, even if the member uses accommodating equipment or adaptive behavior while performing the functions. In order to further explain this definition, VA proposes to define the terms ''accommodating equipment,'' ''adaptive behavior,'' and ''assistance from another person'' in new § 9.21(a)(1), (2), and (4), respectively.

VA would define ''accommodating equipment'' in new paragraph (a)(1) to mean tools or supplies that enable a member to perform an ADL without assistance from another person, including, but not limited to, the following: wheelchair; walker or cane; reminder applications; Velcro clothing or slip-on shoes; grabber or reach extender; raised toilet seat; wash basin; shower chair; or shower or tub modifications such as wheelchair access or no-step access, grab-bar, or handle.

VA proposes to define the term ''adaptive behavior'' in new paragraph (a)(2) to mean compensating skills that allow a member to perform an ADL without assistance from another person.

VA proposes to define the term ''assistance from another person'' in new paragraph (a)(4) to mean that a member, even while using accommodating equipment or adaptive behavior, is nonetheless unable to perform an activity of daily living unless a person physically supports the member, is needed to be within arm's reach of the member to provide assistance because the member's ability fluctuates, or provides oral instructions to the member while the member attempts to perform the ADL. A medical professional must document that a member requires assistance from another person, even while the member is using accommodating equipment and/or adaptive behavior, to perform two of the six ADLs.

VA also proposes to define each of the six functions in new § 9.21(a)(9)(A) through (F), as discussed below. These definitions are based primarily on the Katz Index of Independence in Activities of Daily Living, one of the most commonly used tools to assess basic ADLs. Michelle E. Mlinac and Michelle C. Feng, *Assessment of Activities of Daily Living, Self-Care, and Independence,* 31 Archives of Clinical Neuropsychology 506–516 (2016).

a. Bathing

VA proposes to define the term ''bathing'' to mean washing, while in a shower or bathtub or using a sponge bath, at least three of the six following regions of the body in its entirety: Head and neck, back, front torso, pelvis (including the buttocks), arms, or legs. For example, if a member is unable to bathe three or more regions of the body in a tub or shower without assistance from another person, even while the member uses accommodating equipment or adaptive behavior while bathing, the member would be unable to independently bathe. However, if a member is able to bathe all but two parts of the body via a sponge bath without such assistance, accommodating equipment or adaptive behavior, the member would be considered able to bathe.

b. Continence

VA proposes to define the term ''continence'' to mean complete control of bowel and bladder functions or management of a catheter or colostomy bag, if present.

c. Dressing

VA proposes to define the term ''dressing'' to mean obtaining clothes and shoes from a closet or drawers and putting on the clothes and shoes, excluding tying shoelaces or use of belts, buttons, or zippers. If a member can use accommodating equipment to obtain and put on clothes and shoes and does not require assistance from another person, the member would be able to perform this ADL. For example, if a member can use slip-on shoes, clothing without buttons, or clothing with elastic bands and does not require assistance from another person, the member would be able to dress.

d. Eating

VA proposes to define the term ''eating'' to mean moving food from a plate to the mouth or receiving nutrition via a feeding tube or intravenously, and to exclude preparing or cutting food or obtaining liquid nourishment through a straw or cup.

e. Toileting

VA proposes to define the term ''toileting'' to mean getting on and off the toilet, taking clothes off before toileting and putting on clothes after toileting, cleaning organs of excretion

after toileting, or using a bedpan or urinal.

f. Transferring

VA proposes to define the term ''transferring'' to mean moving in and out of a bed or chair.

6. Permanent

VA proposes to define the term ''permanent'' in new § 9.21(a)(10) to mean clinically stable and reasonably certain to continue throughout the lifetime of the member.

7. Therapeutic Trip

VA proposes to define the term ''therapeutic trip'' in new § 9.21(a)(11) as a hospital or facility-approved pass, signed by the member's attending physician, to leave a hospital or facility, as defined in 42 U.S.C. 1395x(e) or 1395i–3(a), respectively, accompanied or unaccompanied by hospital or facility staff, as part of a member's treatment plan and with which the member is able to return without having to be readmitted to the hospital or facility. VA research indicated that such trips are often part of the treatment plan for individuals with traumatic brain injury, allowing the member and treatment team to evaluate how the member handles outside stimuli in his or her home or other environments. Because these therapeutic trips are part of a member's treatment, we intend for any period of hospitalization to include such trips.

B. New § 9.21(b)—Requisite Period of Consecutive Days for Scheduled Losses

VA proposes to recodify the text preceding the schedule of losses in current § 9.20(f) in new § 9.21(b)(1)–(2) and to amend the text.

New § 9.21(b)(3) would explain the calculation of the required periods of consecutive days of losses in new § 9.21(c)(17), (18), (20), and (21). New § 9.21(b)(3)(A) would state that a period of consecutive days of loss that is interrupted by a day or more during which the criteria for the scheduled loss are not satisfied will not be added together with a subsequent period of consecutive days of loss. The counting of consecutive days starts over at the end of any period in which the criteria for a loss are not satisfied. For example, if a member has an ADL loss due to traumatic injury other than traumatic brain injury (OTI) for 31 days, regains the ability to carry out ADLs for two months, and then has a setback and is unable to carry out ADL for another 30 days, these two periods of ADL loss would not be added together to meet the 60-day payment milestone for ADL loss under paragraph (c)(20). Rather, the member would be entitled to an additional TSGLI payment under paragraph (c)(20) only if the second period of ADL loss lasts for 60 consecutive days.

New § 9.21(b)(3)(B) would state that, if a loss with a required time period milestone begins but is not completed within two years of the traumatic injury, the loss would nonetheless qualify for TSGLI if the requisite time period of loss continues uninterrupted and concludes after the end of the two-year period. For example, if a member suffered a TBI on January 1, 2018 and was unable to perform ADLs due to the TBI from December 15, 2019, through January 14, 2020, the member would be eligible for TSGLI for this time period because the period of ADL loss started within the two-year time limit and continued without interruption after the two-year limit.

Section 9.21(b)(3)(B) would also state that, if a member suffers a period of loss that continues uninterrupted immediately after the period of loss that concluded after expiration of the two-year time limit, the member would be entitled to TSGLI for this time period of loss. For example, if the member who suffered ADL loss from December 15, 2019, through January 14, 2020, suffered another loss of ADLs that continued uninterrupted from January 15, 2020, until February 14, 2020, the member would be entitled to a TSGLI benefit for this period of loss as well. However, if the second period of loss of ADLs did not commence until January 20, 2020, TSGLI would not be payable for another period of loss.

K. New § 9.21(c)(1)–(21)—Schedule of Losses

VA proposes to recodify current § 9.20(f)(1)–(21) as new § 9.21(c)(1)–(21), incorporate definitions in current § 9.20(e)(6)(i) through (v) and (xiv) through (xxix) in the paragraphs in new § 9.21(c) to which they pertain because they are in fact criteria rather than definitions for these losses, and amend certain losses as explained below.

1. New § 9.21(c)(2)—Total and Permanent Loss of Hearing

VA proposes to amend the criteria for total and permanent loss of hearing to explain that hearing acuity must be measured using pure tone audiometry (air conduction testing) without use of an amplification device. Pure tone audiometry is a very common and accepted method of testing hearing in the medical field. *See* 38 CFR 4.85(a).

2. New § 9.21(c)(7)—Uniplegia

VA proposes to amend the note in new § 9.21(c)(7) because of the new tiered payment structure for limb reconstruction under new § 9.21(c)(14) and (15). Under the current schedule in § 9.20(f)(7), the TSGLI payment for uniplegia cannot be combined with the payments for limb salvage or amputation of the same limb, because the initial payment for uniplegia, *i.e.,* $50,000, is the same for all three losses and provides financial support for the member during the rehabilitation period. 73 FR 71,926, 71,928 (Nov. 26, 2008). However, as explained below, VA proposes to amend new § 9.21(c)(14) and (15) to provide payments ranging from $25,000 to $50,000 for limb reconstruction, depending upon the number and type of surgeries required. VA therefore proposes to revise the note in new § 9.20(c)(7) to explain that: (1) Payment for uniplegia of the arm or leg cannot be combined with loss for amputation of the same arm under new paragraph (c)(9) or (10) or of the same leg under new paragraph (c)(11) or (12); and (2) the higher TSGLI payment will be made for uniplegia under new paragraph (c)(7) or limb reconstruction under new paragraph (c)(14) or (15) for the same limb.

3. New § 9.21(c)(8)—Burns

Under current § 9.20(e)(6)(xvii) and (f)(8), a TSGLI benefit of $100,000 is payable for ''2nd degree (partial thickness) or worse burns covering at least 20 percent of the body, including the face and head, or 20 percent of the face alone.'' However, the experts we consulted indicated that, even though the American Burn Association standard for referral to a Burn Center is partial thickness burns (or worse) of greater than 10% total body surface area (TBSA), patients with full thickness burns of at least 20% TBSA have more extensive rehabilitation needs and risk of complications than patients with partial thickness burns of at least 20% TBSA that do not require grafting. *http://ameriburn.org/wp-content/uploads/2017/05/acs-resources-burn-chapter-14.pdf.* Additionally, these specialists noted that the location of the burn on the body has a major impact on rehabilitation. For example, burns requiring skin grafts to joints and other body parts involved in ADL significantly lengthen rehabilitation periods.

VA proposes that new § 9.21(c)(8) pertaining to burns would incorporate current medical terminology for severity determinations of burns, specifically using ''partial thickness'' in place of

''2nd degree'' burns and ''full thickness'' in place of ''or worse.'' *http://ameriburn.org/quality-care/mass-casualty/burn-care-and-prevention.* Based upon the experts' advice, VA would also provide tiered payments based upon the varying levels of rehabilitation associated with various types and extent of burns. VA would state at the beginning of new paragraph (c)(8) that the percentage of the body burned may be measured using the Rule of Nines or any means of measurement generally accepted within the medical profession. Also, under new paragraph (c)(8), a member with partial thickness burns covering 20 percent of the face or body, without the need for skin grafting, would be entitled to $50,000. A member suffering partial thickness burns or worse located on the face, hands, feet, genitalia, perineum, ankles, knees, hips, wrists, elbows or shoulders that require skin grafting or full thickness burns covering 20 percent of the face or body would be entitled to $100,000.

VA also proposes to add a note at the end of new paragraph (c)(8) explaining that road rash is an abrasion and not a burn and therefore will be evaluated for loss purposes under new § 9.21(c)(20) or (21). *https://www.merriam-webster.com/dictionary/road%20rash.*

4. New § 9.21(c)(9)—Amputation of a Hand at or Above the Wrist

VA proposes to revise the note at the end of new § 9.21(c)(9) to state that: (1) Payment for amputation of the hand cannot be combined with payment for loss due to uniplegia under new paragraph (c)(7) or amputation at or above the metacarpophalangeal joints under new paragraph (c)(10) for the same hand; and (2) the higher payment will be made for either amputation of the hand under new paragraph (c)(9) or limb reconstruction of the arm under new paragraph (c)(14). As explained above, these proposed amendments are necessitated by the new tiered limb reconstruction standard.

5. New § 9.21(c)(10)—Amputation at or Above the Metacarpophalangeal Joint(s) of Either the Thumb or the Other 4 Fingers of 1 Hand

VA proposes to revise the note at the end of new § 9.21(c)(10) to state that: (1) Payment for amputation of 4 fingers on 1 hand or thumb alone cannot be combined with payment for loss due to uniplegia or amputation of the same hand under new paragraph (c)(7) or (c)(9), respectively; and (2) payment will be made for the higher payment for amputation of 4 fingers on 1 hand or thumb alone under new paragraph (c)(10) or loss due to limb reconstruction of the arm for the same hand/arm under new paragraph (c)(14). These proposed amendments are necessitated by the new tiered limb reconstruction standard.

6. New § 9.21(c)(11)—Amputation of a Foot at or Above the Ankle

VA proposes to amend the note at the end of new § 9.21(c)(11) to state that: (1) Payment for loss under new paragraph (c)(11) cannot be combined with the loss due to uniplegia or amputation of the foot below the ankle under new paragraph (c)(7) or (12), respectively; and (2) payment will be made for the higher payment for amputation of foot under new paragraph (c)(11) or amputation of toes under new paragraph (c)(13) or loss due to limb reconstruction of the leg under new paragraph (c)(15). These proposed amendments are necessitated by the new tiered limb reconstruction standard.

7. New § 9.21(c)(12)—Amputation at or Above the Metatarsophalangeal Joints of all Toes on 1 Foot

VA proposes to revise the note at the end of new § 9.21(c)(12) to state that: (1) Payment for amputation of all toes including the big toe on 1 foot cannot be combined with losses under new paragraph (c)(7) or (11) for the same foot; (2) the higher payment for amputation of all toes including the big toe on 1 foot under new paragraph (c)(12) or loss under new paragraph (c)(13) will be made for the same foot; and (3) the higher payment for amputation of all toes including the big toe on 1 foot under new paragraph (c)(12) or limb reconstruction of the leg under new paragraph (c)(15) will be made for the same foot. These proposed amendments are necessitated by the new tiered limb reconstruction standard.

8. New § 9.21(c)(13)—Amputation at or Above the Metatarsophalangeal Joint(s) of Either the Big Toe, or the Other 4 Toes on 1 Foot

VA proposes to add a note to new § 9.21(c)(13) stating that: (1) The higher payment for amputation of big toe only, or other 4 toes on 1 foot, under new paragraph (c)(13) or uniplegia under new paragraph (c)(7) will be made for the same foot; (2) the higher payment for amputation of big toe only, or other 4 toes on 1 foot, under new paragraph (c)(13) or amputation of the foot at or above the ankle under new paragraph (b)(11) will be made for the same foot; (3) the higher payment for amputation of big toe only, or other 4 toes on 1 foot, under new paragraph (c)(13) or amputation at or above the metatarsophalangeal joints under new paragraph (c)(12) will be made for the same foot; and (4) the higher payment for amputation of big toe only, or other 4 toes on 1 foot, under new paragraph (c)(13) or limb reconstruction of the leg under new paragraph (c)(15) will be made for the same foot. These proposed amendments are necessitated by the new tiered limb reconstruction standard.

9. New § 9.21(c)(14) and (15)—Limb Reconstruction

Current § 9.20(e)(6)(xix) defines the term ''limb salvage'' as ''a series of operations designed to save an arm or leg with all of its associated parts rather than amputate it,'' and also states that a surgeon must certify that the ''option of amputation of the limb(s) was a medically justified alternative to salvage, and the patient chose to pursue salvage.'' However, TSGLI claim adjudicators, medical professionals, and claimants have indicated that the decision to choose salvage over amputation is a choice that is often not clearly indicated in medical records and, therefore, it is difficult to substantiate a claim for this loss.

Also, experts we consulted indicated that surgical teams do not simply attempt to save or salvage a limb but also to reconstruct it to allow for a return to some degree of functionality for the patient. They also stated that the term ''reconstruction'' refers to rebuilding a limb's skin, bone, nerve, and vascular system rather than repairing a limb due to an open or closed fracture. Additionally, they stated that there are four types of injuries that require limb construction and four surgical procedures that constitute limb reconstruction. They stated that not every patient undergoes all four types of surgeries, but that at least one or more would be expected.

Based on this input, VA proposes to change the term ''limb salvage'' to ''limb reconstruction'' in new § 9.21(c)(14) and (15). To qualify for a loss based upon ''limb reconstruction,'' a surgeon would have to document that a member's limb has a: (1) Bony injury requiring bone grafting to re-establish stability and enable mobility of the limb; (2) soft tissue defect that requires grafting/flap reconstruction to reestablish stability and enable mobility of the limb; (3) vascular injury which requires vascular reconstruction to restore blood flow and support bone and soft tissue regeneration; or (4) nerve injury that requires nerve reconstruction to allow for motor and sensory restoration and muscle re-enervation. These criteria

would focus on the critical issue of whether the limb has such significant functional limitations from a traumatic event that a surgeon would be medically justified in offering a member the option of amputating the limb rather than reconstructing it.

VA also proposes to create a tiered standard for loss for reconstruction of an arm or leg based upon the number and types of surgery required in new paragraphs (c)(14) and (15). If a member undergoes one of four surgeries, the member would receive $25,000. If a member has two or more surgeries, the member would be entitled to $50,000.

VA also proposes to add a note to new paragraph (c)(14) stating that the higher payment for limb reconstruction of the arm or uniplegia under new paragraph (c)(7) will be made for the same arm. The note would also state that the higher payment for limb reconstruction of arm or amputation of a hand at or above the wrist under new paragraph (c)(9) will be made for the same arm, and that the higher payment for limb reconstruction of the arm or amputation at or above the metacarpophalangeal joint(s) of either the thumb or the other 4 fingers on 1 hand under new paragraph (c)(10) will be made for the same arm.

VA proposes to add a note in new § 9.21(c)(15) pertaining to limb reconstruction of a leg stating that: (1) The higher payment for limb reconstruction of leg or uniplegia under new paragraph (c)(7) will be made for the same leg; (2) the higher payment for limb reconstruction of the leg or amputation of a foot at or above the ankle under new paragraph (c)(11) will be made for the same leg; (3) the higher payment for limb reconstruction of leg or amputation at or above the metatarsophalangeal joints of all toes on 1 foot under new paragraph (c)(12) will be made for the same leg; and (4) the higher payment for limb reconstruction of leg or amputation at or above the metatarsophalangeal joint(s) of either the big toe, or the other 4 toes on 1 foot under new paragraph (c)(13) will be made for the same leg.

10. New § 9.21(c)(16)—Facial Reconstruction

VA proposes to amend the criteria for facial reconstruction in new § 9.21(c)(16) to clarify the nature and extent of loss required for each payment under this paragraph. Discontinuity of the upper or lower jaw and eyes would require bone loss; discontinuity of the nose would require loss of cartilage or tissue; discontinuity of the upper or lower lip would require tissue loss; and discontinuity of facial areas would require loss of bone or tissue. We also propose to add a requirement that a surgeon document that the criteria for ''facial reconstruction'' are satisfied in order to establish the loss.

VA also proposes to revise the second note in new paragraph (c)(16) by changing ''paragraphs 9.20(f)(1) through (18)'' to ''§ 9.21(c)(1) through (19)'' to incorporate the 2012 amendments to the schedule that added genitourinary system losses and to make the note consistent with the recodification of the schedule. VA also proposes to add a third note stating that bone grafts for teeth implants would not constitute facial reconstruction under new paragraph (c)(16) because teeth implants do not involve a ''discontinuity defect'' of the jaw, which would be defined in new § 9.21(a)(7) as ''the absence of bone and/or tissue from its normal bodily location.'' Teeth implants instead involve placing additional tissue on top of the existing jaw to build up the area for the implants. *https://www.colgate.com/en-us/oral-health/cosmetic-dentistry/implants/single-tooth-implants.*

11. New § 9.21(c)(17)—Coma or TBI

We have revised the title of this loss by omitting ''from traumatic injury'' because the phrase is redundant of new § 9.20(e)(1) defining a ''scheduled loss'' as a condition in new § 9.21(c) ''if directly caused by a traumatic injury.'' Current § 9.20(e)(6)(xviii) does not actually define ''coma,'' but rather contains the criterion for this scheduled loss. *i.e.,* a Glasgow Coma Scale (GCS) Score of 8 or less. The GCS possible values range from 3, indicating deep coma, to 15, indicating normal consciousness. *https://www.glasgowcomascale.org/faq.* According to the Centers for Disease Control, a GCS score of 8 or less indicates a severe head Injury. *https://www.cdc.gov/masstrauma/resources/gcs.pdf.* We therefore propose to incorporate the criterion for ''coma,'' *i.e.,* a Glasgow Coma Score of 8 or less, in the title of the loss.

12. New § 9.21(c)(18)—Hospitalization Due to TBI

VA proposes to revise the first note in new § 9.21(c)(18) to explain that: (1) Payment for hospitalization would replace only the first milestone in new § 9.21(c)(17), *i.e.,* 15 consecutive days of coma or ADL loss; and (2) payment would be made for the 15-day period of hospitalization or the first period of coma or ADL loss, whichever occurs earlier.

The note would also be amended to state that, once payment has been made under new § 9.21(c)(18) based on hospitalization, coma, or ADL loss, a member would not be entitled to additional payments for a subsequent 15-day period of hospitalization due to the same traumatic injury. This proposed amendment aligns with 38 U.S.C. 1980A(a)(2), which states that, ''[i]f a member suffers more than one . . . qualifying loss as a result of traumatic injury from the same traumatic event, payment shall be made under [the schedule] for the *single loss* providing the highest payment.'' (Emphasis added.)

Finally, VA would amend the note to state that, if a member receives a TSGLI payment under new § 9.21(c)(18) based upon hospitalization, such payment may replace only the first payment for loss of ADLs under new paragraph (c)(17), and the member would be entitled to an additional payment for loss of ADLs only if the member reaches a subsequent milestone for loss of ADLs. For example, if a member suffers a TBI and is hospitalized for 16 days, the member would be entitled to a TSGLI payment for 15 days of hospitalization under new paragraph (c)(18). To obtain an additional payment for TBI based on loss of ADLs under new paragraph (c)(17), the member would have to suffer a loss of ADLs for an additional 14 days immediately after discharge from the hospital to reach the next payment milestone of 30 consecutive days of ADL loss. If the member can perform ADLs immediately after discharge from the hospital and then later has a setback and loses ADLs, the consecutive day count would start anew.

VA would also amend the second note in current § 9.20(f)(18) to explain that the duration of hospitalization under new § 9.21(c)(17) includes any period of time for a therapeutic trip as defined in new § 9.21(a)(11).

Finally, TBI, mental illnesses, and brain or neurologic disorders can have similar symptomology and often require in-depth diagnostic assessment to discern which is present or if both may be present. *See* Jan E. Kennedy, et al., *Posttraumatic Stress Disorder and Posttraumatic Stress Disorder-Like Symptoms and Mild Traumatic Brain Injury,* 44 J. Rehabilitation Research & Dev. 895–920 (2007); D.G. Amen, et al., *Functional Neuroimaging Distinguishes Posttraumatic Stress Disorder from Traumatic Brain Injury in Focused and Large Community Datasets,* 10 Plos One 1–22 (2015). Therefore, VA proposes to add a note to new § 9.21(c)(18) stating that, if a member is hospitalized for 15 consecutive days for a diagnostic assessment for any mental illness and/or brain or neurologic disorder, and if

the assessment concludes that the member has a mental illness or brain or neurologic disorder only, the member would not be entitled to TSGLI under this paragraph. In such cases, the hospitalization would be caused solely by an illness or disease, such as posttraumatic stress disorder, which falls under the exclusions from traumatic injury pursuant to 38 CFR 9.20(c)(2)(i) and (ii). However, if a member is hospitalized for 15 consecutive days for a diagnostic assessment to determine whether the member has TBI, the loss would be payable if a member is diagnosed with TBI, TBI and PTSD, or PTSD and not TBI. If a member is hospitalized for 15 consecutive days for a diagnostic assessment to determine whether the member has PTSD, the loss would be payable if the member has TBI or TBI and PTSD.

13. New § 9.21(c)(21)—Hospitalization Due to OTI

VA proposes to amend the first and second notes under new § 9.21(c)(21) for loss based on hospitalization due to OTI. These amendments would be the same as the amendments to the first and second notes in new § 9.21(c)(18). The first note in current § 9.20(f)(21) states that ''[p]ayment for hospitalization replaces the first payment period in loss 19.'' VA proposes to amend the note to refer to ''loss 20'' for OTI resulting in inability to perform ADLs rather than loss 19 and to state that payment for hospitalization would only replace the first milestone in new § 9.21(c)(20), *i.e.,* 30 consecutive days of ADL loss. This corrects a scrivener's error in 2011 when genitourinary losses were added to the schedule of losses. 76 FR 75458 (Dec. 2, 2011).

The first note would also be amended to state that payment would be made for the 15-day period of hospitalization or the first period of ADL loss, whichever occurs earlier and that, once payment has been made under new § 9.21(c)(20) on the basis of hospitalization or ADL loss, a member would not be entitled to additional payments for a subsequent 15-day period of hospitalization due to the same OTI. For example, if a member suffers an OTI due to a motorcycle accident, is hospitalized for 10 days, and experiences loss of ADL for 30 days, the member would be entitled to a TSGLI payment based on loss of ADLs for 30 days. If the member is subsequently hospitalized for another consecutive 15 days, a month later for the same motorcycle accident, the member would not be entitled to an additional TSGLI payment for hospitalization. These proposed amendments are consistent with 38 U.S.C. 1980A(a)(2), which states for payment under the schedule ''for the single loss providing the highest payment'' if a member suffers more than one qualifying loss as a result of traumatic injury from the same traumatic event.

Finally, VA would amend the first note to state that, if a member receives a TSGLI payment under new paragraph (c)(20) based upon loss of ADLs, the member would be entitled to an additional payment for loss of ADLs under new paragraph (c)(20) only if the member reaches a subsequent milestone for loss of ADLs in new paragraph (c)(20), *i.e.,* 60, 90 or 120 consecutive days of ADL loss without a break in the consecutive day period where no ADL loss is present. This proposed amendment aligns with the design of the TSGLI program, which is to provide benefits payments for severe traumatic injuries that require an extended period of rehabilitation. 70 FR 75940. Requiring a member to reach the next payment milestone without a break between the consecutive days ensures that the injury is equivalent in severity to other losses under the schedule.

VA would also amend the second note in new § 9.21(c)(21) to explain that the duration of hospitalization includes a period of time between admission and discharge during which a member takes a therapeutic trip as defined in new § 9.21(a)(11).

III. Petition for Rulemaking

On March 16, 2015, a petition for rulemaking was submitted to the Secretary of Veterans Affairs requesting that VA:

1. Amend the definition of ''traumatic event'' in current § 9.20(b)(1) to include ''application of . . . explosive ordnance . . . causing damage to a living being.''
2. Amend the definition of ''traumatic injury'' in current § 9.20(c)(2)(ii) to include a ''physical illness or disease . . . caused by . . . explosive ordnance.''
3. Amend the list of exclusions in current § 9.20(e)(4)(i) to provide that a scheduled loss resulting from a ''physical illness or disease caused by explosive ordnance'' will not be excluded from TSGLI coverage.
4. Add the following definition of ''explosive ordnance'' to current § 9.20(e)(6): ''all munitions containing explosives, . . . includ[ing], but . . . not limited to, improvised explosive devices (IEDs).''

In considering this proposal, VA conducted a review of medical literature on the numbers, types, and onset period of illnesses and diseases resulting from explosive ordnance exposure. VA also interviewed a range of medical experts in the fields of traumatic brain injury, concussive force trauma, combat trauma, and retained toxic fragment impacts as well as epidemiologists and other medical researchers studying the impacts of blast injuries on today's military. Based upon this review of the issue, VA denies the petition for rulemaking for the following reasons.

A. Definition of ''Traumatic Event''

Current § 9.20(b) defines a ''traumatic event'' as ''the application of external force, violence, chemical, biological, or radiological weapons, or accidental ingestion of a contaminated substance causing damage to a living being.'' We agree with petitioner that IEDs are a unique hazard of military service. Therefore, since the start of the TSGLI program on December 1, 2005, explosion of an ordnance including an improvised explosive device causing damage to a living being has been considered as a traumatic event, *i.e.,* damage caused by application of external force due to fragments of debris propelled by the explosion or due to a member being thrown to the ground or into an object. *Gulf War & Health, Volume 7: Long-Term Consequences of Traumatic Brain Injury,* at 7 (2009). Between December 22, 2005, and July 31, 2019, the TSGLI program provided more than $357 million in benefits to 6,207 servicemembers who suffered a traumatic injury due to an improvised explosive device, mortar attack, shrapnel, or rocket propelled grenade that resulted in a scheduled loss. VA, therefore, sees no need to amend § 9.20(b)(1) to include an explosive ordnance or to add a definition of improvised explosive device to § 9.20(e)(6).

B. Illness or Disease Caused by Explosive Ordnance

The petition seeks to amend current 38 CFR 9.20(c)(2)(ii) and (e)(4)(i) to ensure TSGLI coverage of physical illness or disease caused by TBI, which has been called a signature injury of the conflict in Iraq. Petition at 12–15. Petitioner contends that the harm caused by explosion of an ordnance is ''just like'' application of chemical, biological, and radiological weapons and accidental ingestion of a contaminated substance because they ''produce immediate bodily harm but their biological effects may *not* immediately manifest'' and ''may have a latency of months to years before manifesting.'' Petition at 23. Petitioner's request is inconsistent with the nature

of TSGLI, which is modeled on AD&D insurance, and congressional intent.

The plain language of 38 U.S.C. 1980A(a)(1) and (2), (b)(1), (c)(1) and (2) authorizes TSGLI benefits for a qualifying loss resulting directly from a ''traumatic injury.'' The word ''disease'' does not appear in the statute. Consistent with the maxim ''*expressio unius est exclusio alterius,*'' Congress knows how to include TSGLI coverage for diseases if it so desires, and it did not do so. *See Russello* v. *United States,* 464 U.S. 16, 23 (1983) (''[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'').

VA implemented 38 U.S.C. 1980A in 2005 by defining the term ''traumatic injury'' in current 38 CFR 9.20(c)(1) to mean ''physical damage . . . caused by'' the ''application of external force, violence, chemical, biological, or radiological weapons, or accidental ingestion of a contaminated substance.'' In the 2005 interim final-rule notice, VA stated that ''[w]e believe that inherent in the term 'traumatic injury' is the notion that the injury occurs immediately.'' 70 FR 75,941; *see* 10 Couch on Insurance § 139:28, at 139–64 (''accidental bodily injury has been defined as a localized abnormal condition of the living body directly and contemporaneously caused by accident''). VA expressly excluded losses caused by a ''disease'' from TSGLI coverage in current 38 CFR 9.20(c)(2)(ii) and (e)(4)(i), which states that ''traumatic injury'' does not include damage to a living body caused by a disease, whether physical or mental in nature. 70 FR 75,941. VA stated that the ''term 'injury' refers to the result of an external trauma rather than a degenerative process, while the ''term 'disease' . . . refers to some type of internal infection or degenerative process.'' *Id.* (citing VAOPGCPREC 86–90).

VA's conclusion that TSGLI only extends to traumatic injuries which cause immediate harm and require immediate treatment as compared to diseases is supported by the legislative history when 38 U.S.C. 1980A was enacted in 2005. TSGLI coverage was intended for injuries occurring immediately after a traumatic event, *e.g.,* wounds suffered on the battlefield, and to provide financial support when the wounded servicemembers return home and are undergoing rehabilitation prior to medical discharge from service. *See* 151 Cong. Rec. 7454–55 (2005).

VA, however, defined ''injury'' to include physical illness or disease ''caused by a pyogenic infection, chemical, biological or radiological weapons, or accidental ingestion of a contaminated substance'' because ''including immediate traumatic harm due to those unique hazards of military service is consistent with the purpose of TSGLI.'' 70 FR 75,941 (emphasis added); 38 CFR 9.20(c)(2)(ii). VA stated that the ''physical damage resulting in a covered loss would generally occur immediately and require prompt medical treatment.'' 70 FR 75,941.

Scientific reports indicate that the consequences of a TBI may not become manifest for a long period of time. For example, the Institute of Medicine report, *Long-Term Consequences of Traumatic Brain Injury,* at 7, found a ''weak but significant association between TBI and meningioma and of an increase in risk of brain tumors 10 years or more after TBI; that suggests a long latent period before clinical presentation.'' *See also id.* at 355. A study showing a link between TBI and increased risk of stroke in the first five years after injury found that, in the cohort studied, the average time between a patient's use of health care services and onset of stroke was 543 days for patients with TBI. Yi-Hua Chen, et al., *Patients with Traumatic Brain Injury: Population-Based Study Suggests Increased Risk of Stroke,* 42 Stroke 2733–39 (2011). Studies of occurrence of Parkinson's disease following TBI also show a delayed onset. Lindsay Wilson, *et al., Traumatic Brain Injury 4: The Chronic and Evolving Neurological Consequences of Traumatic Brain Injury,* 16 The Lancet 813–825 (2017).

Because Congress intended to provide TSGLI compensation for ''injuries'' rather than diseases occurring immediately after a traumatic event and that require prompt medical treatment, the Secretary denies the petition to provide TSGLI coverage for physical illness or disease caused by TBI that ''may not immediately manifest'' and ''may have a latency of months to years before manifesting.''

Paperwork Reduction Act

This proposed rule contains no provisions constituting a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501–3521).

Executive Orders 12866, 13563, and 13771

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Office of Information and Regulatory Affairs has determined that this rule is not a significant regulatory action under Executive Order 12866.

VA's impact analysis can be found as a supporting document at *http://www.regulations.gov,* usually within 48 hours after the rulemaking document is published. Additionally, a copy of the rulemaking and its impact analysis are available on VA's website at *http://www.va.gov/orpm* by following the link for ''VA Regulations Published From FY 2004 Through Fiscal Year to Date.''

This proposed rule is not expected to be an E.O. 13771 regulatory action because this proposed rule is not significant under E.O. 12866.

Regulatory Flexibility Act

The Secretary hereby certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. The provisions contained in this proposed rulemaking are specifically managed, processed, and conducted within VA and through Prudential Insurance Company of America, which is not considered to be a small entity. Therefore, pursuant to 5 U.S.C. 605(b), the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604 do not apply.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule 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. This proposed rule would have no such effect on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance number and title for the program affected by this document is 64.103, Life Insurance for Veterans.

List of Subjects in 38 CFR Part 9

Life insurance, Servicemembers, Veterans.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Brooks D. Tucker, Acting Chief of Staff, Department of Veterans Affairs, approved this document on July 17, 2020, for publication.

Luvenia Potts,

Regulation Development Coordinator, Office of Regulation Policy & Management, Office of the Secretary, Department of Veterans Affairs.

For the reasons stated in the preamble, the Department of Veterans Affairs proposes to amend 38 CFR part 9 as follows:

PART 9—SERVICEMEMBERS' GROUP LIFE INSURANCE AND VETERANS' GROUP LIFE INSURANCE

■ 1. The authority citation for Part 9 continues to read as follows:

Authority: 38 U.S.C. 501, 1965–1980A, unless otherwise noted.

■ 2. Amend § 9.20 by:
■ a. Revising paragraph (b)(1);
■ b. Redesignating paragraph (c)(3) as (c)(4) and adding a new paragraph (c)(3);
■ c. Revising paragraphs (d)(2) and (4), and (e)(1), (e)(3)(i)(C) and (ii), and (e)(6);
■ c. Removing paragraph (f);
■ d. Revising paragraph (g);
■ e. Redesignating paragraph (h) as paragraph (f) and revising newly redesignated paragraph (f);
■ f. Redesignating paragraphs (i) through (k) as paragraphs (h) through (j) respectively and revising newly redesignated paragraphs (h) through (j).

The revisions read as follows:

§ 9.20 Traumatic injury protection.

* * * * *

(b) * * * (1) A traumatic event is damage to a living being occurring on or after October 7, 2001, caused by:

(i) Application of an external force;

(ii) Application of violence or chemical, biological, or radiological weapons;

(iii) Accidental ingestion of a contaminated substance;

(iv) Exposure to low environmental temperatures, excessive heat, or documented non-penetrating blast waves; or

(v) An insect bite or sting or animal bite.

* * * * *

(c) *What is a traumatic injury?*

* * * * *

(3) The term traumatic injury includes anaphylactic shock directly caused by an insect bite or sting or animal bite.

* * * * *

(d) * * *

(2) You must suffer a scheduled loss that results directly from a traumatic injury and from no other cause.

(i) A scheduled loss does not result directly from a traumatic injury and from no other cause if a pre-existing illness, condition, or disease or a post-service injury substantially contributed to the loss.

(ii) A scheduled loss results directly from a traumatic injury and no other cause if the loss is caused by a medical or surgical procedure used to treat the traumatic injury.

* * * * *

(4) You must suffer a scheduled loss under § 9.21(c) within two years of the traumatic injury.

(i) If a loss with a required time period milestone begins but is not completed within two years of the traumatic injury, the loss would nonetheless qualify for TSGLI if the requisite time period of loss continues uninterrupted and concludes after the end of the two-year period.

(ii) If a required time period for a loss is satisfied before the end of the two-year period and a member suffers another period of loss after expiration of the two-year time limit, the member is not entitled to TSGLI for this time period of loss.

* * * * *

(e) * * * (1) The term ''scheduled loss'' means a condition listed in the schedule in § 9.21(c) if directly caused by a traumatic injury and from no other cause. A scheduled loss is payable at the amount specified in the schedule.

* * * * *

(3) * * *

(i) * * *

(C) Diagnostic procedures, preventive medical procedures such as inoculations, medical or surgical treatment for an illness or disease, or any complications arising from such procedures or treatment, unless the diagnostic procedure or medical or surgical treatment is necessary to treat a traumatic injury;

* * * * *

(ii) Sustained while a member was committing an act that clearly violated a penal law classifying such an act as a felony.

* * * * *

(6) *Definitions.* For purposes of this section and § 9.21—

(i) The term *biological weapon* means biological agents or microorganisms intended to kill, seriously injure, or incapacitate humans through their physiological effects.

(ii) The term *chemical weapon* means chemical substances intended to kill, seriously injure, or incapacitate humans through their physiological effects.

(iii) The term *contaminated substance* means food or water made unfit for consumption by humans because of the presence of chemicals, radioactive elements, bacteria, or organisms.

(iv) The term *external force* means a sudden or violent impact from a source outside of the body that causes an unexpected impact and is independent of routine body motions such as twisting, lifting, bending, pushing, or pulling.

(v) The term *ingestion* means to take into the gastrointestinal tract by means of the mouth.

(vi) The term *medical professional* means a licensed practitioner of the healing arts acting within the scope of his or her practice, including, *e.g.,* a licensed physician, optometrist, nurse practitioner, registered nurse, physician assistant, or audiologist.

(vii) The term *medically incapacitated* means an individual who has been determined by a medical professional to be physically or mentally impaired by physical disability, mental illness, mental deficiency, advanced age, chronic use of drugs or alcohol, or other causes that prevent sufficient understanding or capacity to manage his or her own affairs competently.

(viii) The term *pyogenic infection* means a pus-producing infection.

(ix) The term *radiological weapon* means radioactive materials or radiation-producing devices intended to kill, seriously injure, or incapacitate humans through their physiological effects.

(f) *How does a member make a claim for traumatic injury protection benefits?* (1)(i) A member who believes he or she qualifies for traumatic injury protection benefits must complete and sign Part A of the TSGLI Benefits Form and submit evidence substantiating the member's traumatic injury and resulting loss. A medical professional must complete and sign Part B of the Application for TSGLI Benefits Form.

(ii) If a medical professional certifies in Part B of the Application for TGSLI Benefits Form that a member is unable to sign Part A of the Form because the member is medically incapacitated, the Form must be signed by one of the following: The member's guardian; if none, the member's agent or attorney

acting under a valid Power of Attorney; if none, the member's military trustee.

(iii) If a member suffered a scheduled loss as a direct result of the traumatic injury, survived seven full days from the date of the traumatic event, and then died before the maximum benefit for which the service member qualifies is paid, the beneficiary or beneficiaries of the member's Servicemembers' Group Life Insurance policy should complete an Application for TSGLI Benefits Form.

(2) If a member seeks traumatic injury protection benefits for a scheduled loss occurring after submission of a completed Application for TSGLI Benefits Form for a different scheduled loss, the member must submit a completed Application for TSGLI Benefits Form for the new scheduled loss and for each scheduled loss that occurs thereafter and for each increment of a scheduled loss that occurs thereafter. For example, if a member seeks traumatic injury protection benefits for a scheduled loss due to coma from traumatic injury and/or the inability to carry out activities of daily living due to traumatic brain injury (§ 9.21(c)(17)), or the inability to carry out activities of daily living due to loss directly resulting from a traumatic injury other than an injury to the brain (§ 9.21(c)(20)), a completed Application for TSGLI Benefits Form must be submitted for each increment of time for which TSGLI is payable. Also, for example, if a member suffers a scheduled loss due to a coma, a completed Application for TSGLI Benefits Form should be filed after the 15th consecutive day that the member is in the coma, for which $25,000 is payable. If the member remains in a coma for another 15 days, another completed Application for TSGLI Benefits Form should be submitted and another $25,000 will be paid.

(g) *How will the uniformed service decide a TSGLI claim?*

(1) Each uniformed service will certify its own members for traumatic injury protection benefits based upon section 1032 of Public Law 109–13, section 501 of Public Law 109–233, and this section. The uniformed service will certify whether a member was insured under Servicemembers' Group Life Insurance at the time of the traumatic injury and whether the member sustained a qualifying traumatic injury and qualifying loss.

(2) The uniformed service office may request additional evidence from the member if the record does not contain sufficient evidence to decide the member's claim.

(3) The uniformed service office shall consider all medical and lay evidence of record, including all evidence provided by the member, and determine its probative value. When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of TSGLI benefits, the uniformed service shall give the benefit of the doubt to the member.

(4) Notice of a decision regarding a member's eligibility for traumatic injury protection benefits will include an explanation of the procedure for obtaining review of the decision, and all negative decisions shall include a statement of the basis for the decision and a summary of the evidence considered.

(h) *How does a member or beneficiary appeal an adverse eligibility determination?* (1) Each uniformed service has a three-tiered appeal process. The first tier of appeal is called a reconsideration, followed by a second-level appeal and then a third-level appeal. A member, beneficiary, or other person eligible to submit a claim under paragraph (f)(1)(ii) or (iii) may submit an appeal using the appeal process of the uniformed service that issued the original decision.

(i) *Reconsideration.* (A) Reconsideration of an eligibility determination, such as whether the loss occurred within 730 days of the traumatic injury, whether the member was insured under Servicemembers' Group Life Insurance when the traumatic injury was sustained, or whether the injury was self-inflicted or whether a loss of hearing was total and permanent, is initiated by filing, with the office of the uniformed service identified in the eligibility decision within one year of the date of a denial of eligibility, a written notice of appeal that identifies the issues for which reconsideration is sought.

(B) The uniformed service TSGLI office will review the claim, including evidence submitted with the notice of appeal by or on behalf of the member that was not previously part of the record before the uniformed service, and issue a decision on the claim.

(ii) *Second-level appeal.* (A) A second-level appeal of the reconsideration decision is initiated by filing, with the second-level appeal office of the uniformed service within one year of the date of the reconsideration decision, a written notice of appeal that identifies the issues being appealed.

(B) The uniformed service second-level appeal office will review the claim, including evidence submitted with the notice of appeal by or on behalf of the member that was not previously part of the record before the uniformed service, and issue a decision on the claim.

(iii) *Third-level appeal.* (A) A third-level review of the second-level uniformed service appeal office is initiated by filing, with the third-level appeal office of the uniformed service within one year of the date of the decision by the second-level appeal office of the uniformed service, a written notice of appeal that identifies the issues being appealed.

(B) The uniformed service third-level appeal office will review the claim, including evidence submitted with the notice of appeal by or on behalf of the member that was not previously part of the record before the uniformed service, and issue a decision on the claim.

(2) If a timely notice of appeal seeking reconsideration of the initial decision by the uniformed service or seeking review of the decision by the second-level uniformed service appeal office is not filed, the initial decision by the uniformed service or the decision by the second-level uniformed service appeal office, respectively, shall become final, and the claim will not thereafter be readjudicated or allowed except as provided in paragraph (h)(3).

(3) New and material evidence. (i) If a member, beneficiary, or other person eligible to submit a claim under paragraph (f)(1)(ii) or (iii) submits new and material evidence with respect to a claim that has been finally disallowed as provided in paragraph (h)(2), the uniformed service office will consider the evidence, determine its probative value, and readjudicate the claim. New and material evidence is evidence that was not previously part of the record before the uniformed service, is not cumulative or redundant of evidence of record at the time of the prior decision and is likely to have a substantial effect on the outcome.

(ii) A decision finding that new and material evidence was not submitted may be appealed in accordance with paragraph (h)(1).

(4) Nothing in this section precludes a member from pursuing legal remedies under 38 U.S.C. 1975 and 38 CFR 9.13. However, if a member files suit in U.S. district court after an adverse initial decision on a TSGLI claim by a uniformed service, the member may not file an appeal pursuant to paragraph (h)(1) if the lawsuit is pending before a U.S. district court, U.S. court of appeals, or U.S. Supreme Court or the time for appeal or filing a petition for a writ of certiorari has not expired. If a member files suit in U.S. district court after filing an appeal pursuant to paragraph (h)(1), the appeal will be stayed if the lawsuit

is pending before a U.S. district court, U.S. court of appeals, or U.S. Supreme Court or the time for appeal or filing a petition for a writ of certiorari has not expired.

(i) *Who will be paid the traumatic injury protection benefit?* The injured member who suffered a scheduled loss will be paid the traumatic injury protection benefit in accordance with 38 U.S.C. 1980A except under the following circumstances:

(A) If a member has been determined by a medical professional, in Part B of the Application for TSGLI Benefits Form, to be medically incapacitated, the member's guardian or, or if there is no guardian, the member's agent or attorney acting under a valid Power of Attorney will be paid the benefit on behalf of the member.

(B) If no guardian, agent, or attorney is authorized to act as the member's legal representative, a military trustee who has been appointed under the authority of 37 U.S.C. 602 will be paid the benefit on behalf of the member. The military trustee will report the receipt of the traumatic injury benefit payment and any disbursements from that payment to the Department of Defense.

(C) If a member dies before payment is made, the beneficiary or beneficiaries who will be paid the benefit will be determined in accordance with 38 U.S.C. 1970(a).

(j) The Traumatic Servicemembers' Group Life Insurance program will be administered in accordance with this rule, except to the extent that any regulatory provision is inconsistent with subsequently enacted applicable law.

■ 3. Redesignate §§ 9.21 and 9.22 as §§ 9.22 and 9.23 and add a new § 9.21 to read as follows:

§ 9.21 Schedule of Losses.

(a) *Definitions.* For purposes of the Schedule of Losses in paragraph (c)—

(1) The term *accommodating equipment* means tools or supplies that enable a member to perform an activity of daily living without the assistance of another person, including, but not limited to, a wheelchair; walker or cane; reminder applications; Velcro clothing or slip-on shoes; grabber or reach extender; raised toilet seat; wash basin; shower chair; or shower or tub modifications such as wheelchair access or no-step access, grab-bar or handle.

(2) The term *adaptive behavior* means compensating skills that allow a member to perform an activity of daily living without the assistance of another person.

(3) The term *amputation* means the severance or removal of a limb or genital organ or part of a limb or genital organ resulting from trauma or surgery. With regard to limbs, an amputation above a joint means a severance or removal that is closer to the body than the specified joint is.

(4) The term *assistance from another person* means that a member, even while using accommodating equipment or adaptive behavior, is nonetheless unable to perform an activity of daily living unless another person physically supports the member, is needed to be within arm's reach of the member to provide assistance because the member's ability fluctuates, or provides oral instructions to the member while the member attempts to perform the activity of daily living.

(5) The term *avulsion* means a forcible detachment or tearing of bone and/or tissue due to a penetrating or crush injury.

(6) The term *consecutive* means to follow in uninterrupted succession.

(7) The term *discontinuity defect* means the absence of bone and/or tissue from its normal bodily location, which interrupts the physical consistency of the face and impacts at least one of the following functions: Mastication, swallowing, vision, speech, smell, or taste.

(8) The term *hospitalization* means admission to a ''hospital'' as defined in 42 U.S.C. 1395x(e) or ''skilled nursing facility'' as defined in 42 U.S.C. 1395i–3(a).

(9) The term *inability to carry out activities of daily living* means the inability to perform at least two of the six following functions without assistance from another person, even while using accommodating equipment or adaptive behavior, as documented by a medical professional.

(i) *Bathing* means washing, while in a bathtub or shower or using a sponge bath, at least three of the six following regions of the body in its entirety: Head and neck, back, front torso, pelvis (including the buttocks), arms, or legs.

(ii) *Continence* means complete control of bowel and bladder functions or management of a catheter or colostomy bag, if present.

(iii) *Dressing* means obtaining clothes and shoes from a closet or drawers and putting on the clothing and shoes, excluding tying shoelaces or use of belts, buttons, or zippers.

(iv) *Eating* means moving food from a plate to the mouth or receiving nutrition via a feeding tube or intravenously but does not mean preparing or cutting food or obtaining liquid nourishment through a straw or cup.

(v) *Toileting* means getting on and off the toilet; taking clothes off before toileting or putting clothes on after toileting; cleaning organs of excretion after toileting; or using a bedpan or urinal.

(vi) *Transferring* means moving in and out of a bed or chair.

(10) The term *permanent* means clinically stable and reasonably certain to continue throughout the lifetime of the member.

(11) The term *therapeutic trip* means an approved pass by the member's attending physician to leave a hospital as defined in 42 U.S.C. 1395x(e) or ''skilled nursing facility'' as defined in 42 U.S.C. 1395i–3(a), accompanied or unaccompanied by hospital or facility staff, as part of a member's treatment plan and with which the member is able to return without having to be readmitted to the hospital or facility.

(b)(1) For losses listed in paragraphs (c)(1) through (19) of this section—

(i) Except where noted otherwise, multiple losses resulting from a single traumatic event may be combined for purposes of a single payment.

(ii) The total payment amount may not exceed $100,000 for losses resulting from a single traumatic event.

(2) For losses listed in paragraphs (c)(20) and (21) of this section—

(i) Payments may not be made in addition to payments for losses under paragraphs (c)(1) through (19); instead, the higher amount will be paid.

(ii) The total payment amount may not exceed $100,000 for losses resulting from a single traumatic event.

(3) Required period of consecutive days of loss. For losses in paragraphs (c)(17) through (18) and (20) through (21)—

(i) A period of consecutive days of loss that is interrupted by a day or more during which the criteria for the scheduled loss are not satisfied will not be added together with a subsequent period of consecutive days of loss. The counting of consecutive days starts over at the end of any period in which the criteria for a loss are not satisfied.

(ii) A required period of consecutive days will be satisfied if a loss begins within two years of a traumatic injury and continues without interruption after the end of the two-year period. A subsequent period of consecutive days of a scheduled loss will be satisfied if it follows uninterrupted immediately after an initial period of consecutive days of loss that ended after expiration of the two-year period.

(c) *Schedule of Losses.* (1) *Total and permanent loss of sight* is:

(i) Visual acuity in the eye of 20/200 or less/worse with corrective lenses lasting at least 120 days;

(ii) Visual acuity in the eye of greater/better than 20/200 with corrective

lenses and a visual field of 20 degrees of less lasting at least 120 days; or

(iii) Anatomical loss of the eye.

(iv) The amount payable for the loss of each eye is $50,000.

(2) *Total and permanent loss of hearing* is:

(i) Average hearing threshold sensitivity for air conduction of at least 80 decibels, based on hearing acuity measured at 500, 1,000, and 2,000 Hertz via pure tone audiometry by air conduction, without amplification device

(ii) The amount payable for loss of one ear is $25,000. The amount payable for the loss of both ears is $100,000.

(3) *Total and permanent loss of speech* is:

(i) Organic loss of speech or the ability to express oneself, both by voice and whisper, through normal organs for speech, notwithstanding the use of an artificial appliance to simulate speech.

(ii) The amount payable for the loss of speech is $50,000.

(4) *Quadriplegia* is:

(i) Total and permanent loss of voluntary movement of all four limbs resulting from damage to the spinal cord, associated nerves, or brain.

(ii) The amount payable for quadriplegia is $100,000.

(5) *Hemiplegia* is:

(i) Total and permanent loss of voluntary movement of the upper and lower limbs on one side of the body from damage to the spinal cord, associated nerves, or brain.

(ii) The amount payable for hemiplegia is $100,000.

(6) *Paraplegia* is:

(i) Total and permanent loss of voluntary movement of both lower limbs resulting from damage to the spinal cord, associated nerves, or brain.

(ii) The amount payable for paraplegia is $100,000.

(7) *Uniplegia* is:

(i) Total and permanent loss of voluntary movement of one limb resulting from damage to the spinal cord, associated nerves, or brain.

(ii) The amount payable for the loss of each limb is $50,000.

(iii) Payment for uniplegia of arm cannot be combined with loss 9 or 10 for the same arm. The higher payment for uniplegia or loss 14 will be made for the same arm. Payment for uniplegia of leg cannot be combined with loss 11 or 12 for the same leg. The higher payment for uniplegia or loss 13 will be made for the same leg. The higher payment for uniplegia or loss 15 will be made for the same leg.

(8) *Burns:* (i) The percentage of the body burned may be measured using the Rule of Nines or any means of measurement generally accepted within the medical profession.

(ii) The amount payable for partial thickness burns covering 20% of face or body that do not require skin grafting is $50,000.

(iii) The amount payable for partial thickness burns or worse located on the face, hands, feet, genitalia, perineum, ankles, knees, hips, wrists, elbows, or shoulders that require grafting is $100,000.

(iv) The amount payable for full thickness burns covering 20% of the face or body is $100,000.

(v) Road rash, which is a skin abrasion caused by sliding on a hard or rough surface, will be evaluated under paragraphs (c)(20) and (21).

(9) *Amputation of a hand at or above the wrist:* (i) The amount payable for the loss of each hand is $50,000.

(ii) Payment for amputation of hand cannot be combined with payment for loss 7 or 10 for the same hand. The higher payment for amputation of hand or loss 14 will be made for the same hand.

(10) *Amputation at or above the metacarpophalangeal joint(s) of either the thumb or the other 4 fingers on 1 hand:* (i) The amount payable for the loss of each hand is $50,000.

(ii) Payment for amputation of 4 fingers on 1 hand or thumb alone cannot be combined with payment for loss 7 or 9 for the same hand. The higher payment for amputation of 4 fingers on 1 hand or thumb alone or loss 14 will be made for the same hand. Payment for loss of the thumb cannot be made in addition to payment for loss of the other 4 fingers for the same hand.

(11) *Amputation of a foot at or above the ankle:* (i) The amount payable for the loss of each foot is $50,000.

(ii) Payment for amputation of foot cannot be combined with loss 7 or 12 for the same foot. The higher payment for amputation of foot or Loss 13 will be made for the same foot. The higher payment for amputation of foot or Loss 15 will be made for the same foot.

(12) Amputation at or above the metatarsophalangeal joints of all toes on 1 foot: (i) The amount payable for the loss of each foot is $50,000.

(ii) Payment for amputation of all toes including the big toe on 1 foot cannot be combined with loss 7 or 11 for the same foot. The higher payment for amputation of all toes including the big toe on 1 foot or loss 13 will be made for the same foot. The higher payment for amputation of all toes including the big toe on 1 foot or loss 15 will be made for the same foot.

(13) *Amputation at or above the metatarsophalangeal joint(s) of either the big toe or the other 4 toes on 1 foot:* (i) The amount payable for the loss of each foot is $25,000.

(ii) The higher payment for amputation of big toe only, or other 4 toes on 1 foot, or loss 7 will be made for the same foot. The higher payment for amputation of big toe only, or other 4 toes on 1 foot, or loss 11 will be made for the same foot. The higher payment for amputation of big toe only, or other 4 toes on 1 foot, or loss 12 will be made for the same foot. The higher payment for amputation of big toe only, or other 4 toes on 1 foot, or loss 15 will be made for the same foot.

(14) *Limb reconstruction of arm (for each arm):* (i) A surgeon must certify that a member had surgery to treat at least one of the following injuries to a limb:

(A) Bony injury requiring bone grafting to re-establish stability and enable mobility of the limb;

(B) Soft tissue defect requiring grafting/flap reconstruction to reestablish stability;

(C) Vascular injury requiring vascular reconstruction to restore blood flow and support bone and soft tissue regeneration; or

(D) Nerve injury requiring nerve reconstruction to allow for motor and sensory restoration and muscle re-enervation.

(ii) The amount payable for losses involving 1 of the 4 listed surgeries is $25,000. The amount payable for losses involving 2 or more of the 4 listed surgeries is $50,000.

(iii) The higher payment for limb reconstruction of arm or loss 7 will be made for the same arm. The higher payment for limb reconstruction of arm or loss 9 will be made for the same arm. The higher payment for limb reconstruction of arm or loss 10 will be made for the same arm.

(15) *Limb reconstruction of leg (for each leg):* (i) A surgeon must certify that a member had at least one of the following injuries to a limb requiring the identified surgery for the same limb:

(A) Bony injury requiring bone grafting to re-establish stability and enable mobility of the limb;

(B) Soft tissue defect requiring grafting/flap reconstruction to reestablish stability;

(C) Vascular injury requiring vascular reconstruction to restore blood flow and support bone and soft tissue regeneration; or

(D) Nerve injury requiring nerve reconstruction to allow for motor and sensory restoration and muscle re-enervation.

(ii) The amount payable for losses involving 1 of the 4 listed surgeries is

$25,000. The amount payable for losses involving 2 or more of the 4 listed surgeries is $50,000.

(iii) The higher payment for limb reconstruction of leg or loss 7 will be made for the same leg. The higher payment for limb reconstruction of leg or loss 11 will be made for the same leg. The higher payment for limb reconstruction of leg or loss 12 will be made for the same leg. The higher payment for limb reconstruction of leg or loss 13 will be made for the same leg.

(16) *Facial reconstruction:* (i) A surgeon must certify that a member had surgery to correct a traumatic avulsion of the face or jaw that caused a discontinuity defect to one or more of the following facial areas:

(A) Surgery to correct discontinuity loss involving bone loss of the upper or lower jaw-the amount payable for this loss is $75,000;

(B) Surgery to correct discontinuity loss involving cartilage or tissue loss of 50% or more of the cartilaginous nose-the amount payable for this loss is $50,000;

(C) Surgery to correct discontinuity loss involving tissue loss of 50% or more of the upper or lower lip-the amount payable for loss of one lip is $50,000, and the amount payable for loss of both lips is $75,000;

(D) Surgery to correct discontinuity loss involving bone loss of 30% or more of the periorbita-the amount payable for loss of each eye is $25,000;

(E) Surgery to correct discontinuity loss involving loss of bone or tissue of 50% or more of any of the following facial subunits: Forehead, temple, zygomatic, mandibular, infraorbital, or chin-the amount payable for each facial subunit is $25,000.

(ii) Losses due to facial reconstruction may be combined with each other, but the maximum benefit for facial reconstruction may not exceed $75,000.

(iii) Any injury or combination of losses under facial reconstruction may be combined with other losses in § 9.21(c)(1)–(19) and treated as one loss, provided that all losses are the result of a single traumatic event. However, the total payment amount may not exceed $100,000.

(iv) Bone grafts for teeth implants alone do not meet the loss standard for facial reconstruction from jaw surgery.

(17) *Coma (8 or less on Glasgow Coma Scale) AND/OR Traumatic Brain Injury resulting in inability to perform at least 2 activities of daily living (ADL):* (i) The amount payable at the 15th consecutive day of ADL loss is $25,000.

(ii) The amount payable at the 30th consecutive day of ADL loss is an additional $25,000.

(iii) The amount payable at the 60th consecutive day of ADL loss is an additional $25,000.

(iv) The amount payable at the 90th consecutive day of ADL loss is an additional $25,000.

(v) Duration of coma and inability to perform ADLs include date of onset of coma or inability to perform ADLs and the first date on which member is no longer in a coma or is able to perform ADLs.

(18) *Hospitalization due to traumatic brain injury:* (i) The amount payable at the 15th consecutive day of hospitalization is $25,000.

(ii) Payment for hospitalization may only replace the first ADL milestone in loss 17. Payment will be made for 15-day hospitalization, coma, or the first ADL milestone, whichever occurs earlier. Once payment has been made for the first payment milestone in loss 17 for coma or ADL, there are no additional payments for subsequent 15-day hospitalization due to the same traumatic injury. To receive an additional ADL payment amount under loss 17 after payment for hospitalization in the first payment milestone, the member must reach the next payment milestones of 30, 60, or 90 consecutive days.

(iii) Duration of hospitalization includes the dates on which member is transported from the injury site to a hospital as defined in 42 U.S.C. 1395x(e) or skilled nursing facility as defined in 42 U.S.C. 1395i–3(a), admitted to the hospital or facility, transferred between a hospital or facility, leaves the hospital or facility for a therapeutic trip, and discharged from the hospital or facility.

(iv) In cases where a member is hospitalized for 15 consecutive days for a diagnostic assessment for a mental illness and/or brain or neurologic disorder, and the assessment determines the member has a mental illness or brain or neurologic disorder, and not TBI, this loss is not payable because the loss was due to illness or disease and is excluded from payment. If a member is hospitalized for 15 consecutive days for a diagnostic assessment to determine whether the member has TBI and is diagnosed with TBI, TBI and PTSD, or PTSD and not TBI, the loss is payable for $25,000. If a member is hospitalized for 15 consecutive days for a diagnostic assessment to determine whether the member has PTSD and is diagnosed with TBI or TBI and PTSD, the loss is payable for $25,000.

(19) *Genitourinary losses:* (i) Amputation of the glans penis or any portion of the shaft of the penis above glans penis (*i.e.* closer to the body) or damage to the glans penis or shaft of the penis that requires reconstructive surgery-the amount payable for this loss is $50,000.

(ii) Permanent damage to the glans penis or shaft of the penis that results in complete loss of the ability to perform sexual intercourse-the amount payable for this loss is $50,000.

(iii) Amputation of or damage to a testicle that requires testicular salvage, reconstructive surgery, or both-the amount payable for this loss is $25,000.

(iv) Amputation of or damage to both testicles that requires testicular salvage, reconstructive surgery, or both-the amount payable for this loss is $50,000.

(v) Permanent damage to both testicles requiring hormonal replacement therapy-the amount payable for this loss is $50,000.

(vi) Complete or partial amputation of the vulva, uterus, or vaginal canal or damage to the vulva, uterus, or vaginal canal that requires reconstructive surgery-the amount payable for this loss is $50,000.

(vii) Permanent damage to the vulva or vaginal canal that results in complete loss of the ability to perform sexual intercourse-the amount payable for this loss is $50,000.

(viii) Amputation of an ovary or damage to an ovary that requires ovarian salvage, reconstructive surgery, or both-the amount payable for this loss is $25,000.

(ix) Amputation of both ovaries or damage to both ovaries that requires ovarian salvage, reconstructive surgery, or both-the amount payable for this loss is $50,000.

(x) Permanent damage to both ovaries requiring hormonal replacement therapy-the amount payable for this loss is $50,000.

(xi) Permanent damage to the urethra, ureter(s), both kidneys, bladder, or urethral sphincter muscle(s) that requires urinary diversion and/or hemodialysis-the amount payable for this loss is $50,000.

(xii) Losses due to genitourinary injuries may be combined with each other, but the maximum benefit for genitourinary losses may not exceed $50,000.

(xiii) Any genitourinary loss may be combined with other injuries listed in § 9.21(b)(1)–(18) and treated as one loss, provided that at all losses are the result of a single traumatic event. However, the total payment may not exceed $100,000.

(20) *Traumatic injury, other than traumatic brain injury, resulting in inability to perform at least 2 activities of daily living (ADL):* (i) The amount

payable at the 15th consecutive day of ADL loss is $25,000.

(ii) The amount payable at the 30th consecutive day of ADL loss is an additional $25,000.

(iii) The amount payable at the 60th consecutive day of ADL loss is an additional $25,000.

(iv) The amount payable at the 90th consecutive day of ADL loss is an additional $25,000.

(v) Duration of inability to perform ADL includes the date of the onset of inability to perform ADL and the first date on which member is able to perform ADL.

(21) *Hospitalization due to traumatic injury other than traumatic brain injury:* (i) The amount payable at 15th consecutive day of ADL loss is $25,000.

(ii) Payment for hospitalization may only replace the first ADL milestone in loss 20. Payment will be made for 15-day hospitalization or the first ADL milestone, whichever occurs earlier. Once payment has been made for the first payment milestone in loss 20, there are no additional payments for subsequent 15-day hospitalization due to the same traumatic injury. To receive an additional ADL payment amount under loss 20 after payment for hospitalization in the first payment milestone, the member must reach the next payment milestones of 60, 90, or 120 consecutive days.

(iii) Duration of hospitalization includes the dates on which member is transported from the injury site to a hospital as defined in 42 U.S.C. 1395x(e) or skilled nursing facility as defined in 42 U.S.C. 1395i–3(a), admitted to the hospital or facility, transferred between a hospital or facility, leaves the hospital or facility for a therapeutic trip, and discharged from the hospital or facility.

(Authority: 38 U.S.C. 501(a), 1980A)

[FR Doc. 2020–15981 Filed 8–18–20; 8:45 am]

BILLING CODE 8320–01–P

GENERAL SERVICES ADMINISTRATION

48 CFR Parts 8 and 38

[GSAR Case 2020–G502; Docket No. GSA–GSAR–2020–0014; Sequence No. 1]

RIN 3090–AK15

General Services Administration Acquisition Regulation (GSAR); Increasing Order Level Competition for Federal Supply Schedules

AGENCY: Office of Acquisition Policy, General Services Administration (GSA).

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The General Services Administration (GSA) is issuing this advance notice of proposed rulemaking (ANPR) to seek public comments that can be used to assist in the implementation of Section 876 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 for the Federal Supply Schedule (FSS) program. Section 876 amended the United States Code by providing an exception to the requirement to consider price as an evaluation factor for the award of certain indefinite-delivery, indefinite-quantity contracts and Federal Supply Schedule contracts.

DATES: Interested parties should submit written comments at the address shown below on or before September 18, 2020 to be considered in the formulation of a proposed rule.

ADDRESSES: Submit comments in response to GSAR Case 2020–G502 to *https://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by searching for ''GSAR Case 2020–G502''. Select the link ''Comment Now'' that corresponds with GSAR Case 2020–G502. Follow the instructions provided at the ''Comment Now'' screen. Please include your name, company name (if any), and ''GSAR Case 2020–G502'' on your attached document.

Instructions: Please submit comments only and cite GSAR Case 2020–G502 in all correspondence related to this case. Comments received generally will be posted without change to *https://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *https://www.regulations.gov* approximately two to three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: Mr. Thomas O'Linn, Procurement Analyst, at 202–445–0390 or *thomas.olinn@gsa.gov* for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov.* Please cite GSAR Case 2020–G502.

SUPPLEMENTARY INFORMATION:

I. Background

The Federal Supply Schedule (FSS) program provides the Government with a simplified process of acquiring commercial supplies and services in varying quantities while obtaining volume discounts. Federal Acquisition Regulation (FAR) subpart 8.4 and part 38, along with various parts of the GSA Acquisition Regulation (GSAR) provide direction to customers, offerors, contractors, and GSA contracting officers as it relates to the FSS program. GSA is seeking public comment for purposes of assisting GSA in effectively implementing Section 876 of the NDAA for FY 2019 (Pub. L. 115–232) as it relates to the FSS program.

Section 876 amended 41 U.S.C. 3306(c) to modify the requirement to consider cost or price as an evaluation factor for the award of certain indefinite-delivery, indefinite-quantity multiple-award contracts and certain FSS contracts to qualifying offerors. Currently, offerors responding to solicitations for award of FSS contracts are required to submit commercial sales practice data, or other cost or price information with their proposals. Section 876 gives GSA the discretion to not include price as an evaluation factor in certain FSS contracts and other Indefinite Delivery Indefinite Quantity (IDIQ) contracts provided that (1) the agency intends to make a contract award to each qualifying offeror, (2) task or delivery orders will be based on hourly rates, and (3) competition takes place at the order level. To be eligible for award a ''qualifying offeror'' must be a responsible source; submit a proposal that conforms to the requirements of the solicitation; meet all technical requirements; and be otherwise eligible for award.

The Federal Acquisition Regulatory Council has opened FAR case 2018–014, Increasing Task-order Level for purposes of implementing 41 U.S.C. 3306(c), which provides an exception to the requirement to consider price as an evaluation factor for the award of certain indefinite-delivery, indefinite-quantity contracts and FSS contracts. Since the FAR case is still in development, GSA is issuing this ANPR to aid in thinking through a series of questions related to applying this authority to the FSS program.

GSA will consider comments received in response to this ANPR in future rulemaking: (i) To proceed with rulemaking through the publication of a proposed rule to amend the GSAR, (ii) to inform the Federal Acquisition Regulatory Council on its implementation of this authority within the FAR (*i.e.,* FAR case 2018–014), and (iii) to revise other GSA policies, procedures, and guidance that support the FSS program.

II. Expected Impact

Because of the length of the contracts, reach of the program, and unique statutory environment, GSA anticipates

that implementing this authority will be more complex for the FSS program than for other IDIQs. GSA expects that complete implementation will require substantial retraining and communication efforts and may require a number of changes to both the FAR and the GSAR. GSA expects that successful implementation will decrease the costs of entry into the FSS program thus increasing competition, increasing opportunity for small business, and possibly reducing price. A successful implementation will also increase the ability for ordering agencies to purchase a total solution under the FSS program.

GSA may choose to exempt some or all of the hourly rate services within the FSS program from the requirement to submit commercial sales practice or other cost or pricing data. By removing the requirement to establish priced hourly labor rates, GSA acquisition officials involved in the award of FSS contracts will be able to focus their energy on establishing and evaluating the non-price factors that will result in more meaningful distinctions among offerors for purposes of making an award, becoming better experts in the services they acquire, and will enable a stronger focus on contract administration.

However, there may be additional complexity that needs to be considered for purposes of implementing this authority. For example, the statute only applies to services procured based on hourly rates. Not all offerors propose strictly services priced on hourly rates FSS solicitations. This ANPR poses a number of questions to help GSA think through the authority.

III. Anticipated Savings

Not having to demonstrate price reasonableness for hourly rates at the Schedule contract level should reduce costs for offerors to enter into the FSS program. Not having to track sales under the price reduction clause should reduce the administrative cost of contract compliance. Not having to justify price changes under the economic price adjustments clause should reduce costs of administrative compliance.

Therefore, GSA anticipates that the net result of this authority will be to reduce total administrative cost.

However, within that overall reduction, offerors may see greater burdens in some areas such as more detailed proposals at the task or delivery order level, and the need to submit data under the transactional data reporting. The time and effort expended to develop and prepare cost or price information for purposes of responding to a solicitation or other requests varies according to numerous factors, such as the source selection approach, the contract type, the offeror's proposal (*e.g.,* services only, or a mix of supplies and services), or the offeror's internal processes and resources. GSA is interested in understanding the potential for cost savings both pre-award and post-award and is seeking to attempt to monetize any such costs or savings that offerors and resultant awardees may see as a result of the implementation of this authority for the FSS program.

IV. Public Comment

In order to develop the best implementation strategy, GSA welcomes feedback on all the known or anticipated benefits and concerns associated with such a fundamental change to the FSS pricing model. GSA is especially interested in seeking comment in seven major topic areas:

- Implementing the Authority
- Contract Type
- Mixed-Use Contracts
- FAR Changes Necessary
- GSAR Changes Necessary
- Updated GSA Guidance
- Regulatory Impacts-Costs/Savings

These topics are further detailed below. When commenting, please include citations, as appropriate, to relevant sources of information that may be used to substantiate the basis for the response provided.

1. Implementing the Authority

Inclusive of options, FSS contracts last up to 20 years and are continuously open. In addition, GSA is in the midst of migrating to a single Schedule platform. With these facts in mind, should GSA look at beginning with the entire FSS program or just a portion (*e.g.,* one or more category, subcategory, or SIN)? If the latter, which portion? Should GSA strip hourly rate pricing out of current Schedule contracts or permit a two tier approach in which older Schedule contracts have established hourly rates and newer Schedule contracts do not?

2. Contract Type

The following are two specific elements of the Section 876 authority that GSA is particularly interested in seeking comments:

(a) Section 876 states, ''. . . a solicitation for one or more contracts for services to be acquired on an hourly rate basis . . .''

(i) Does this language restrict use of the exception to labor-hour or time-and-material type contracts?

(ii) Does this language support the use of fixed price contracts wherein the services being offered can be converted into hourly rate calculations through a labor mix provided by the offeror?

(b) Section 876 states, ''. . . feature individually competed task or delivery orders based on hourly rates . . .''

(i) Does this language restrict the use of the exception to full and open competition set-forth in FAR subpart 6.3?

(ii) Does this language support the authority provided in FAR 8.405–6 Limiting Sources?

(iii) Does this language limit the types of services that can be ordered to only those that are performed on an hourly-rate basis?

3. Mixed-Use Contracts

Many FSS contracts include both products and services, and not all pricing for services are based on hourly rates. Should GSA establish separate FSS contracts for priced and unpriced items? Or should GSA combine them into one contract in which some items are priced and other items are not priced?

4. FAR Changes Necessary

Although GSA is looking at implementing the IDIQ price evaluation exception authority through the GSAR, GSA welcomes the public's insight into the potential impact to the FAR as well, which portions of the FAR should be amended and why.

(a) FAR 8.404(d) states, ''Services offered on the schedule are priced either at hourly rates, or at a fixed price for performance of a specific task (*e.g.,* installation, maintenance, and repair).''

(i) Is the FAR language still sufficient in light of the statutory language using ''an hourly rate basis''? If not please provide suggested language.

(ii) Would it be reasonable to read Section 876 as allowing for pricing for services offered on a Schedule not to be established at the FSS contract-level, but at the order-level? If so, what, if any, mechanisms could be established at the FSS contract-level concerning pricing?

(iii) If pricing is not established at the FSS contract-level, is the FAR language still accurate or even necessary?

(iv) Are separate ordering procedures necessary for services not priced on an hourly basis, such as fixed unit rates?

(b) FAR 8.405(d) provides that GSA has already determined the prices of supplies and fixed-price services, and rates for services offered at hourly rates, under schedule contracts to be fair and reasonable. Ordering activities do not have to make a separate determination of fair and reasonable pricing, except for a price evaluation as required by 8.405–2(d).

(i) If pricing for services is no longer evaluated as part of the contract award, can a fair and reasonable determination still be made for other items? If not, then how would the lack of determination of price reasonableness at the FSS contract-level still support FAR 12.209?

(ii) Would it be possible for FSS contractors submitting offers involving services to submit price or cost information in response to solicitation for award of a task or delivery order in order to support a fair and reasonable determination being made by the ordering activity? What if there ends up being no other competition on the agency order?

(c) FAR 8.401 states, ''Multiple Award Schedule (MAS) means contracts awarded by GSA . . . for similar or comparable supplies, or services, established with more than one supplier, at varying prices . . .''

(i) If pricing is no longer established at the FSS contract-level since it is no longer being evaluated, then would the language ''at varying prices'' still be accurate or even necessary?

(ii) Since similar language concerning 'pricing' can be found throughout FAR subpart 8.4 (*e.g.,* FAR 8.402), are other changes to the FAR necessary?

(d) FAR 12.207(c)(1) provides that indefinite-delivery contracts (see subpart 16.5) may be used when—1) The prices are established based on a firm-fixed-price or fixed-price with economic price adjustment; or (2) are established for commercial services acquired on a time-and-materials or labor-hour basis.

(i) Is the language in either paragraph still sufficient in light of the statutory language using ''an hourly rate basis''? If not, please provide suggested language.

5. GSAR Changes Necessary

GSA welcomes the public's insight into the potential impact to the GSAR in relation to the FSS program as a result of implementation of this authority. The following are areas of particular interest in terms of impact: (a) Price reductions, (b) transactional data reporting, (c) evaluation and use of options, (d) economic price adjustment, (e) price list, and (f) others.

6. Updated GSA Guidance

GSA would appreciate any thoughts about the potential impact to FSS solicitation and ordering requirements and what changes should be made in FSS solicitations, instructions, ordering guidance, and training. What, if any type, of pricing information for services should be requested as part of an offeror's response to a FSS solicitation? Even though pricing would not be evaluated at the contract-level for hourly rate services, should GSA still ask for pricing as part of the solicitation?

7. Regulatory Cost Impacts

GSA would appreciate any thoughts about how GSA should think about the regulatory cost increase or decrease associated with moving to unpriced hourly rate Schedule contracts. GSA is particularly interested in the following:

(a) Confirmation of GSA's belief that this change will result in a net burden reduction;

(b) The type of (*e.g.,* accountants or program managers) and number of employees used to develop and prepare cost or price information in response to a solicitation seeking to award a FSS contract, a solicitation seeking to award a task/delivery order under a FSS contract, and requests where cost or pricing information is required/requested under the FSS program;

(c) The number of hours (in a range) that would be spent by each type of employee to develop and prepare the cost or price information;

(d) The average hourly rate for each type of employee used to develop and prepare the cost or price information, or the total average amount spent for each type of employee to develop and prepare the cost or price information for such a proposal;

(e) The types of services organizations typically submit responses for and whether or not efforts/costs to provide cost or price information vary depending on different factors such as the solicitation (*e.g.,* contract type, type of service), the mix and type of supplies and services being offered, or request/requirement (*e.g.,* complying with GSAR clause, 552.238–81 Price Reductions);

(f) To the extent possible, a description of any variations in efforts and costs; and

(g) Other possible areas of savings that an offeror or FSS awardee may see as a result of implementation of this authority for the FSS program.

Jeffrey A. Koses,

Senior Procurement Executive, Office of Acquisition Policy, Office of Governmentwide Policy, General Services Administration.

[FR Doc. 2020–16681 Filed 8–18–20; 8:45 am]

BILLING CODE 6820–61–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R8–ES–2019–0113; FF09E22000 FXES11130900000 201]

RIN 1018–BE64

Endangered and Threatened Wildlife and Plants; Reclassification of Stephens' Kangaroo Rat From Endangered To Threatened With a Section 4(d) Rule

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to reclassify the Stephens' kangaroo rat (*Dipodomys stephensi*) from endangered to threatened under the Endangered Species Act (Act). This proposed action is based on a thorough review of the best scientific and commercial data available, which indicates that the Stephens' kangaroo rat no longer meets the definition of endangered under the Act. If this proposal is finalized, the Stephens' kangaroo rat would remain protected as a threatened species under the Act. We also propose a rule under section 4(d) of the Act that provides for the conservation of the Stephens' kangaroo rat. This document constitutes our proposed rule.

DATES: We will accept comments on this proposed rule that are received or postmarked on or before October 19, 2020. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below) are to be received by 11:59 p.m. Eastern Time on the closing date. Submit requests for public hearings, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by October 5, 2020.

ADDRESSES: You may submit comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: *http://www.regulations.gov.* In the Search box, enter FWS–R2–ES–2019–0113, which is the docket number for this rulemaking. Then, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rules link to locate this document. You may submit a comment by clicking on ''Comment Now!''

(2) *By hard copy:* Submit by U.S. mail: Public Comments Processing, Attn: FWS–R2–ES–2019–0113, U.S. Fish and Wildlife Service Headquarters, MS:

JAO/1N, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We request that you send comments only by the methods described above. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see *Public Comments,* below, for more information).

FOR FURTHER INFORMATION CONTACT: Scott Sobiech, Field Supervisor, U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office, 2177 Salk Avenue, Suite 250, Carlsbad, CA 92008; telephone 760–431–9440. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Information Requested

Public Comments

We intend that any final action resulting from this proposed rule will be based on the best scientific and commercial data available and be as accurate and as effective as possible. Therefore, we request comments or information from the public, other concerned governmental agencies, Native American tribes, the scientific community, industry, or any other interested parties concerning this proposed rule. We specifically request comments on:

(1) New information on the historical and current status, range, distribution, population size, life history, ecology, and habitat use of the Stephens' kangaroo rat, including the locations of any additional populations.

(2) New information on the known, potential, and future threats to the Stephens' kangaroo rat, particularly any projected quantities and locations of potential threats to the Stephens' kangaroo rat or its habitat.

(3) Any available data on the effects that climate change may have on the ecosystem on which this species depends, particularly information related to temperature and precipitation changes; and

(4) Information on regulations that may be necessary and advisable to provide for the conservation of the Stephens' kangaroo rat and that the Service can consider in developing a 4(d) rule for the species. In particular, information concerning the extent to which we should include any of the section 9 prohibitions in the 4(d) rule or whether any other forms of take should be excepted from the prohibitions in the 4(d) rule.

Please include sufficient information with your submission (such as scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include.

Please note that submissions merely stating support for, or opposition to, the action under consideration without providing supporting information, although noted, will not be considered in making a determination, as section 4(b)(1)(A) of the Act directs that determinations as to whether any species is an endangered or a threatened species must be made ''solely on the basis of the best scientific and commercial data available.''

You may submit your comments and materials concerning this proposed rule by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

If you submit information via *http://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the website. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *http://www.regulations.gov.*

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *http://www.regulations.gov.*

Public Hearing

Section 4(b)(5) of the Act provides for a public hearing on this proposed rule, if requested. Requests are to be received by the date specified in **DATES**. Send requests to the address shown in **FOR FURTHER INFORMATION CONTACT**. We will schedule a public hearing on this proposal, if any are requested, and announce the date, time, and place of those hearings, as well as how to obtain reasonable accommodation, in the **Federal Register** at least 15 days before the first hearing. For the immediate future, we will provide these public hearings using webinars that will be announced on the Service's website, in addition to the **Federal Register**. The use of these virtual public hearings is consistent with our regulation at 50 CFR 424.16(c)(3).

Because we will consider all comments and information received during the comment period, our final determinations may differ from this proposal. Based on the new information we receive (and any comments on that new information), we may conclude that the species should remain endangered, threatened as proposed, or we may conclude that the species does not warrant listing as either an endangered species or a threatened species. Such final decisions would be a logical outgrowth of this proposal, as long as we: (1) Base the decisions on the best scientific and commercial data available after considering all of the relevant factors; (2) do not rely on factors Congress has not intended us to consider; and (3) articulate a rational connection between the facts found and the conclusions made, including why we changed our conclusion.

Previous Federal Actions

The Stephens' kangaroo rat was listed as an endangered species under the Act on September 30, 1988 (53 FR 38465). We issued a draft recovery plan in April of 1997 (Service 1997, entire). On August 19, 2010, we published a 12-month finding (75 FR 51204) on two petitions (received May 1, 1995, and February 25, 2002) to delist the Stephens' kangaroo rat, where we concluded that the threats had not been sufficiently removed or their imminence, intensity, or magnitude had not been reduced to the extent that the species would no longer require the protections of the Act. On July 22, 2011, we completed a status review (''5-year review'') under section 4(c)(2)(A) of the Act for the species (Service 2011, entire). The 5-year review recommended that the Stephens' kangaroo rat be reclassified as threatened. On November 10, 2014, we received a petition again requesting that Stephens' kangaroo rat be removed from the Federal List of Endangered and Threatened Wildlife, based on a new analysis of the species' dispersal ability. We published a 90-day finding on September 18, 2015 (80 FR 56423), where we found the petition did not contain substantial scientific or commercial information indicating that the petitioned action to delist may be warranted. This document serves as our proposed rule on the information outlined and recommendation found in our 2011 5-year review to reclassify the Stephens' kangaroo rat from endangered to threatened.

Species Report for Stephens' Kangaroo Rat

We prepared a report for the Stephens' kangaroo rat (Species Report) (Service 2020, entire), which includes a thorough review of the species' taxonomy, natural history, habitats, ecology, populations, range, and threats facing the species or its habitat to assist us in determining the status of the species. We have solicited and incorporated peer review of the Species

Report from objective and independent scientific experts. The report concludes with a discussion of the species' viability in terms of resiliency, redundancy and representation. We define viability as the ability of a species to persist and to avoid extinction over the long term (Service 2016, p. 9). Resiliency refers to the population size and demographic characteristics necessary to endure stochastic (random) environmental variation (Shaffer and Stein 2000, pp. 308–310; Smith *et al.* 2018, pp. 5–7). Redundancy refers to a species' ability to withstand catastrophic events (Shaffer and Stein 2000, pp. 308–310; Smith *et al.* 2018, pp. 5–7). As defined here, catastrophic events are rare occurrences, usually of finite duration, that can cause severe impacts to one or more populations. Species that have multiple resilient populations distributed over a larger landscape or a species having a single population with a broad geographic distribution are more likely to survive catastrophic events, because not all individuals within the population(s) would be affected. Representation refers to the genetic diversity, both within and among populations, necessary to conserve long-term adaptive capability (Shaffer and Stein 2000, pp. 307–308; Smith *et al.* 2018, pp. 5–7).

The Act directs us to determine whether any species is an endangered species or a threatened species because of factors affecting its continued existence, as set forth in section 4(a)(1) of the Act. The Species Report documents the biological information relating to the Stephens' kangaroo rat, including an assessment of the potential threats to the species. It does not represent a decision on whether the species should remain classified as an endangered species or reclassified as threatened under the Act. The Species Report (Service 2020) along with the 5-year Review (Service 2011, entire), and draft Recovery Plan (Service 1997, entire) provide the scientific basis that informs our regulatory decision, which involves the further application of standards within the Act and its implementing regulations and Service policies.

I. Proposed Downlisting Determination

Background

As discussed, a thorough review of the biological information including taxonomy, life history, ecology, and conservation activities for the Stephens' kangaroo rat as well as threats facing the species or its habitat is presented in the Species Report (Service 2020) and is available at *http://www.regulations.gov* under Docket No. FWS–R8–ES–2019–0113. The following is a summary of the key results and conclusions from the Species Report. Please refer to the Species Report for additional discussion and background information.

Species Description, Habitat, Range, and Distribution

The Stephens' kangaroo rat is a small, nocturnal mammal, with external cheek pouches, large hind legs, relatively small front legs, a long tail, and a large head (Service 1997, p. 1; Service 2020, Chapter 2). The total adult body-plus-tail length ranges between 9–12 inches (in.) (23–30 centimeters (cm)) (Service 1997, p. 2). The Stephens' kangaroo rat has a dusky cinnamon buff overfur, pure white underfur, and a lateral white tail band. The tail is crested and bicolored (Service 1997, p. 2). Kangaroo rats possess a number of behavioral, morphological, and physiological adaptations that allow them to inhabit warm, arid environments (Service 2020, pp. 2, 25).

Stephens' kangaroo rat habitat generally consists of open grasslands and sparsely vegetated scrub (Moore-Craig 1984, p. 6; O'Farrell and Uptain 1987, p. 44). Populations of the Stephens' kangaroo rat reach their highest densities in grassland communities dominated by forbs and characterized by moderate to high amounts of bare ground, moderate slopes, and well-drained soils (Bontrager 1973, p. 100; O'Farrell and Uptain 1987, pp. 39, 45; Burke *et al.* 1991, p. 22; Andersen and O'Farrell 2000, p. 12). In general, areas with high perennial shrub cover and dense grasses restrict the presence of Stephens' kangaroo rat (O'Farrell 1990, p. 80; Service 1997, p. 9; Shier 2009, p. 4). The Stephens' kangaroo rat lives in underground burrows that serve as resting and nesting sites (Service 1997, p. 13). For additional information on the Stephens' kangaroo rat, see the Species Report (Service 2020, Chapters 2–4).

Populations of the Stephens' kangaroo rat occur in three geographic regions of southern California. These regions are western Riverside County, western San Diego County, and central San Diego County. At the time of listing in 1988, the known geographic range of the species included 11 general areas in Riverside and San Diego Counties, California (Service 1988, entire; Service 2020, Chapter 3). As noted in our 2010 12-month finding (Service 2010, 75 FR 51206, August 19, 2010), the species was known from 13 geographical areas in two counties (two additional areas were considered nonviable) (75 FR 51205–51206; Table 1). Since 1988, additional populations have been found due to increased survey efforts as a result of listing the species. Currently the species is extant or presumed extant in 18 areas (12 areas in Riverside County and 6 areas in San Diego County) (Service 2020, Table 1, p. 5). Based on our analysis of recent detections and observations, the Stephens' kangaroo rat continues to be found in a patchy distribution in suitable (*e.g.,* grasslands, open areas with forbs) habitat in western-southwestern Riverside County and central-northwestern San Diego County.

Population Trend and Demographic Information

Exact population trends and density estimates for the Stephens' kangaroo rat are not determinable at this time given the incomplete surveys of all potentially occupied areas and variable information collected during those surveys. Field investigation reports sometimes present incomparable results, with some reporting density estimates and others reporting potential occupancy, or both. In addition, studies have found that the abundance of the Stephens' kangaroo rat and its probability of capture are highly variable, making it difficult to detect demographic trends (Brehme *et al.* 2017, p. 8).

The Stephens' kangaroo rat occurs in dispersed patches within suitable habitat in western-southwestern Riverside and northern San Diego Counties, with a few locations containing high densities of animals (Service 2020, Figures 5 and 6, pp. 35–36). However, based on the survey information that is available, we conclude that the Stephens' kangaroo rat continues to occur in suitable habitat across its range with some areas having relatively abundant seemingly stable populations.

Since population trends have not been determinable for Stephens' kangaroo rat, suitable habitat was modeled to provide an estimate of currently available habitat (Service 2020, Table 4, p. 54). This potentially suitable modeled habitat is used in lieu of rangewide occupied habitat estimates or rangewide population estimates. This is used in conjunction with current and historical survey reports that provide population level occupancy throughout the range (Service 2020, Table 1, pp. 5–6).

Current Conservation Efforts

Two large-scale habitat conservation planning efforts have been implemented in Riverside County (the Stephens' kangaroo rat Habitat Conservation Plan

(Riverside Habitat Conservation Agency [SKR HCP] 1996, entire) and the Western Riverside County Multi-Species Habitat Conservation Plan (Western Riverside MSHCP) (Dudek and Associates 2003, entire)) since listing. The implementation of these conservation plans has helped to offset potential losses of habitat from urban and agricultural development.

Three military installations also occur within the range of the species in western San Diego County. These DoD facilities (Marine Corps Base Camp Pendleton (Camp Pendleton); Naval Base Coronado Remote Training Site Warner Springs (Warner Springs); and Naval Weapons Station Seal Beach Detachment Fallbrook (Detachment Fallbrook) have developed Service-approved INRMPs and are committed to actively managing their activities and habitat for the conservation of the Stephens' kangaroo rat. These DoD facilities have implemented numerous actions to manage and conserve areas occupied by Stephens' kangaroo rat.

Implementation of these conservation efforts has greatly reduced the impact of loss and degradation of habitat for the species on the lands conserved under the two HCPs and managed at three installations. See Draft Recovery Plan Implementation and Status Criteria below, for how these efforts are assisting conservation and reducing threats for the species.

Draft Recovery Plan Information

Section 4(f) of the Act directs us to develop and implement recovery plans for the conservation and survival of endangered and threatened species unless we determine such a plan will not promote the conservation of the species. Recovery plans identify site-specific management actions that will achieve recovery of the species, measurable criteria that set a trigger for review of the species' status, and methods for monitoring recovery progress. However, recovery plans are not regulatory documents; instead they are intended to establish goals for long-term conservation of listed species and define measurable criteria that are designed to indicate when the threats facing a species have been removed or reduced to such an extent that the species may no longer need the protections of the Act, as well as actions that may be employed to achieve reaching the criteria.

A draft Recovery Plan for the Stephens' Kangaroo Rat was developed in 1997 (Service 1997, entire). Although it was never finalized, the draft Recovery Plan is part of the public record on the Service's views on recovery for the species at that time. The objective of the draft Recovery Plan is to protect and maintain sufficient populations of Stephens' kangaroo rat and its habitat. The plan states this objective can be accomplished by: (a) Establishing ecosystem-based conservation units; (b) preventing destruction and degradation of habitat; (c) managing use of rodenticides and pesticides; (d) reducing nonnative predators such as domestic cats; (e) establishing research programs to examine the species' biological and ecological needs; and (f) developing and implementing a proactive outreach program for the public and landowners.

The draft plan also identifies several downlisting and delisting criteria (Service 1997, pp. 52–60) for the species. The downlisting criteria include: (1) Establishment of four reserves, which encompass at least 15,000 acres (ac) (6,070 hectares (ha)) of occupied habitat and are permanently protected, funded, and managed, in western Riverside County (inside or outside any habitat conservation planning area) (Service 1997, pp. 39–40); and (2) establishment of one ecosystem-based reserve in either western or central San Diego County that is permanently protected, funded, and managed.

The delisting criteria for the Stephens' kangaroo rat identified in the draft Recovery Plan (Service 1997, pp. 53–60) are: (1) Establish a minimum of five reserves in western Riverside County, of which one is ecosystem based, and that encompass at least 16,500 ac (6,675 ha) of occupied habitat that is permanently protected, funded, and managed; and (2) establish two ecosystem-based reserves in San Diego County. One of these San Diego County reserves needs to be established in the Western Conservation Planning Area, and one reserve needs to be established in the Central Conservation Planning Area. These reserves are to be permanently protected, funded, and managed.

While the criteria in the draft Recovery Plan appropriately indicate the need for habitat protection and management of reserves, the criteria do not reflect the species' current conservation status and no longer adequately identify the current threats to the species. At the time the draft Recovery Plan was developed, habitat loss was the major concern for the species. Due to the implementation of land conservation and management actions (see *Current Conservation Efforts*), other threats may now need greater attention and be a focus for recovery actions (see Summary of Factors Affecting the Species below). As a result, the downlisting and delisting criteria in the draft Recovery Plan may not reflect the only means to achieving recovery for the species. However, we still agree with the conservation objectives outlined in the draft Recovery Plan regarding ecosystem reserves and other protected areas (such as those on Department of Defense (DoD) facilities being managed by Service-approved integrated natural resources management plans (INRMPs)) being important for the long-term persistence of Stephens' kangaroo rat throughout its range.

Draft Recovery Plan Implementation and Status Criteria

As stated above, the draft Recovery Plan identifies several criteria for determining when and if downlisting and delisting are appropriate for the Stephens' kangaroo rat (Service 1997, pp. 52–60).

Currently, under the SKR HCP and Western Riverside MSHCP, eight reserves have been established for Stephens' kangaroo rat in Riverside County. This number exceeds the four reserves identified by criterion 1 of the draft Recovery Plan (Service 1997, p. 52). Criterion 1 of the draft Recovery Plan also identifies that the reserve lands should total approximately 15,000 ac (6,070 ha). We estimate that, of the 69,104 ac (27,966 ha) of modeled potentially suitable habitat for Stephens' kangaroo rat in Riverside County, approximately 16,438 ac (6,652 ha) of the modeled habitat is considered within conserved lands (including reserves) in Riverside County. This total includes Federal, State, local, tribal, and private lands (Service 2020, Appendix D). Although the draft recovery plan identifies the 15,000 ac ((6,070 ha) of conserved lands be in just four reserves, the majority of the eight reserves currently conserved occur in four main reserves, with the additional four reserves being smaller but still providing conservation for the Stephens' kangaroo rat. In addition, three of the four smaller reserves have the opportunity for expansion due to the surrounding lands not being developed or in agricultural use (Service 2020, Appendix F).

We estimate that approximately 22,434 ac (9,079 ha) of modeled Stephens' kangaroo rat suitable habitat occurs in San Diego County (Service 2020, Appendix D). Over 50 percent (12,129 ac (4,908 ha)) of this area is located on lands that have been either conserved, are in conservation easement, or are located on public or DoD lands. Criterion 2 for downlisting states that one ecosystem-based reserve

be established in San Diego County. Current efforts are under way to develop an HCP for San Diego County that would benefit Stephens' kangaroo rat and other listed species. Though surveys are being conducted in a reserve near Ramona Grassland, the HCP for San Diego County is not yet finalized, and no ecosystem-based reserve has been established on private lands in San Diego County. However, active Service-approved INRMPs for the species have been developed and implemented at three military installations (Camp Pendleton, Detachment Fallbrook, and Warner Springs). These provide ongoing management and include actions to provide for the long-term conservation of Stephens' kangaroo rat on DoD lands. The amount of modeled habitat at each installation is approximately 2,275 (921 ha) for Camp Pendleton, 2,994 ac (1,212 ha) for Detachment Fallbrook and 1,012 ac (409 ha) for Warner Springs. INRMPs are based, to the maximum extent practicable, on ecosystem management principles and provide for the management of Stephens' kangaroo rat and its habitat while sustaining necessary military land uses. As described in the Species Report (Service 2020, pp. 40–44). Therefore, the INRMPs effectively meet the intent of the draft recovery plan's Criterion 2 for downlisting by providing long-term management for the conservation of Stephens' kangaroo rat with one ecosystem-based reserve in western San Diego County.

We conclude that the number and amount of reserved lands being protected, funded, and managed in Riverside and San Diego Counties provide conservation benefits equivalent to the requirements of downlisting from endangered to threatened according to the criteria in the draft Recovery Plan.

The delisting criteria for the Stephens' kangaroo rat includes: (1) Establishment of a minimum of five reserves in western Riverside County, of which one is ecosystem based, and that encompass at least 16,500 ac (6,675 ha) of occupied habitat that is permanently protected, funded, and managed; and (2) establish two ecosystem-based reserves in San Diego County.

The amount of land conserved in Riverside County (16,438 ac (6,652 ha) for delisting has mostly been met and we expect additional lands will be conserved through further implementation of the two HCPs. However, the number of ecosystem-based reserves in San Diego County (currently one) does not meet the criteria identified in the draft recovery plan for delisting for having two ecosystem reserves, with one being in central San Diego County. Therefore, we will not meet all of the delisting criteria in the draft recovery plan until: (1) Additional lands are conserved in Riverside County to meet the 16,500-ac (6,675-ha) threshold; and (2) at least one additional ecosystem-based reserve that is occupied, permanently protected, funded, and managed is established in central San Diego County.

5-Year Review

In our 2011 5-year review, we recommended Stephens' kangaroo rat be reclassified from endangered to threatened (Service 2011, p. 4). We based our recommendation on the reduction of threats associated with habitat loss and destruction, and on the establishment of reserves for the species in portions of its range. As a result, we changed the recovery priority number of the species from 2C (a full species facing a high degree of threat but with a high potential for recovery, if appropriately managed, and with recovery that may be in conflict with construction or other forms of economic activity) to a recovery priority number 11 (a full species facing a moderate degree of threat and low potential of recovery, because of poorly understood limiting factors and poorly understood or pervasive and difficult-to-alleviate threats, with intensive management needed) (Service 2011, p. 7).

Summary of Factors Affecting the Species

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations (50 CFR part 424) set forth the procedures for listing species, reclassifying species, or removing species from listed status. The Act defines an endangered species as a species that is ''in danger of extinction throughout all or a significant portion of its range,'' and a threatened species as a species that is ''likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' The Act requires we determine whether any species is an ''endangered species'' or a ''threatened species'' because of any of the following factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. A species may be reclassified or delisted on the same basis.

These factors represent broad categories of natural or human-caused actions or conditions that could have an effect on a species' continued existence. In evaluating these actions and conditions, we look for those that may have a negative effect on individuals of the species, as well as other actions or conditions that may ameliorate any negative effects or that may have positive effects.

We use the term ''threat'' to refer in general to actions or conditions that are known to or are reasonably likely to negatively affect individuals of a species. The term ''threat'' includes actions or conditions that have a direct impact on individuals (direct impacts), as well as those that affect individuals through alteration of their habitat or required resources (stressors). The term ''threat'' may encompass—either together or separately—the source of the action or condition, or the action or condition itself.

However, the mere identification of any threat(s) does not necessarily mean that the species meets the statutory definition of an ''endangered species'' or a ''threatened species.'' In determining whether a species meets either definition, we evaluate all identified threats by considering the expected response by the species, and the effects of the threats—in light of those actions and conditions that will ameliorate the threats—on an individual, population, and species level. We evaluate each threat and its expected effects on the species, then analyze the cumulative effect of all of the threats on the species as a whole. We also consider the cumulative effect of the threats in light of those actions and conditions that will have positive effects on the species—such as any existing regulatory mechanisms or conservation efforts. The Secretary determines whether the species meets the definition of an ''endangered species'' or a ''threatened species'' only after conducting this cumulative analysis and describing the expected effect on the species now and in the foreseeable future.

The Act does not define the term ''foreseeable future,'' which appears in the statutory definition of ''threatened species.'' Our implementing regulations at 50 CFR 424.11(d) set forth a framework for evaluating the foreseeable future on a case-by-case basis. The term foreseeable future extends only so far into the future as the Service can reasonably determine that both the future threats and the species' responses to those threats are likely. In other words, the foreseeable future is the period of time in which we can make reliable predictions. ''Reliable'' does not mean ''certain''; it means sufficient to provide a reasonable degree of

confidence in the prediction. Thus, a prediction is reliable if it is reasonable to depend on it when making decisions.

It is not always possible or necessary to define foreseeable future as a particular number of years. Analysis of the foreseeable future uses the best scientific and commercial data available and should consider the timeframes applicable to the relevant threats and to the species' likely responses to those threats in view of its life-history characteristics. Data that are typically relevant to assessing the species' biological response include species-specific factors such as lifespan, reproductive rates or productivity, certain behaviors, and other demographic factors.

The Species Report (Service 2020) represents a compilation of the best scientific and commercial data available concerning the current status of the species, including the past, present, and future threats. We used this information to evaluate the current and future viability of the Stephens' kangaroo rat. The effects of conservation actions were also assessed as part of the current condition of the Stephens' kangaroo rat. The Species Report identified the following factors as threats to Stephens' kangaroo rats: Habitat loss, fragmentation, and modification (Factor A), predation (Factor C), rodenticides, and the effects of climate change (Factor E). Below we discuss these threats and their relationship to Stephens' kangaroo rat current and future persistence.

Habitat Loss

In our 1988 listing determination, we determined one of the primary threats and main factors leading to our endangered status determination for Stephens' kangaroo rat was the permanent loss of habitat resulting from urbanization and other land uses (53 FR 38468, September 30, 1988). In our 2010 12-month finding, we estimated the amount of occupied habitat (54,909 ac (22,221 ha)) for the Stephens' kangaroo rat, and compared that estimate to developed and conserved lands in Riverside and San Diego Counties (75 FR 51210–51211). We estimated a total of 3,494 ac (1,414 ha) of occupied habitat was lost to development from 1984 to 2006, while 19,237 (7,785 ha) of baseline occupied habitat was conserved over this same period (75 FR 51211, Table 2; Service 2020, pp. 48–49). The majority of the lands conserved occurred after the implementation of the two habitat conservation plans (HCPs) for the species in 1996 and 2003 (see *Current Conservation Efforts* above).

In order to determine the current extent and impact of loss of habitat for the Stephens' kangaroo rat, we developed a model to estimate areas that could be considered as potentially suitable habitat for the species; we spatially modeled habitat using suitable vegetation, detections/observations, elevation, and slope, and removed areas that were considered urbanized or otherwise unsuitable (Service 2018, entire; Service 2020, pp. 52–56). We then evaluated those areas with regard to their current status of conservation and protection. Based on this information, we have determined that the threat from habitat loss due to development and land conversion has been mostly ameliorated.

Our modeling efforts identified approximately 69,104 ac (27,966 ha) of potentially suitable, modeled habitat for the Stephens' kangaroo rat in Riverside County and 22,434 ac (9,079 ha) in San Diego County. Of the modeled suitable habitat approximately 16,438 ac (6,652 ha) in Riverside County and 12,129 ac (4,908 ha) in San Diego County is considered to be conserved. Therefore, a total of 28,567 ac (11,560 ha) of 91,538 ac (37,044 ha) of modeled habitat is conserved (31.2 percent). In Riverside County, approximately 3 percent of the modeled habitat occurs on Federal lands, 7 percent occurs on State lands, nearly 16 percent on local lands, 1 percent on tribal lands, and 72 percent occurs on private lands. In San Diego County, approximately 28 percent occurs on Federal lands, more than 2 percent on State lands, 21 percent on local lands, 1 percent on tribal lands, and nearly 48 percent occurs on private lands (Service 2020, Section 3.3.3).

To determine land conservation status and protection, we combined several data sets to estimate the ''Current Conserved Lands'' for the species. For western Riverside County, this includes those areas identified with conservation easements, conserved lands, public lands, and Public/Quasi-Public lands as identified in data from the Western Riverside MSHCP (as of July 2018). For San Diego County, we combined information from several data sources such as the Conserved Lands database (Sandag/SanGIS, February 2017) as well as all Federal, State, and DoD lands that are not likely to be impacted by urban development or agricultural conversion. A total of 16,438 ac (6,652 ha) of modeled habitat in Riverside County is considered within the Current Conserved Lands (23.8 percent). The majority of this modeled habitat is conserved through the two HCPs in Riverside County (15,563 ac (6,298 ha)) (Service 2020, p. 93). In San Diego County, roughly 54 percent (12,129 ac, (4,908 ha)) of the potentially suitable habitat for the Stephens' kangaroo rat is conserved (Service 2020. Appendix D). Approximately half of this modeled habitat (6,281 ac, (2,542 ha)) is considered conserved through management of INRMPs at the three military installations (Service 2020, Appendix D). See Appendices D and E of the Species Report for more information on modeled habitat and land ownership.

As stated above, and in our 2010 12-month finding (75 FR 51204, August 19, 2010) and 2011 5-year Review (Service 2011, entire), habitat loss to Stephens' kangaroo rat has been mostly ameliorated in Riverside County through the protections afforded by the conservation measures contained in the two HCPs developed by the County of Riverside since listing the species. These measures implement long-term conservation and adaptive management principles applicable to large habitat blocks. The implementation of the two HCPs for the Stephens' kangaroo rat has resulted in a more controlled development pattern and the creation/conservation of eight reserves in western Riverside County. The established eight reserves exceed the four reserves (in number) identified as one of the criteria for downlisting by the draft Recovery Plan for the Stephens' Kangaroo Rat (Service 1997, p. 52). Without these two geographically comprehensive plans, unregulated habitat loss would likely have continued, and more individual or localized conservation measures or plans may have been developed but they would be less effective and comprehensive for accomplishing an organized conservation strategy for the Stephens' kangaroo rat in Riverside County. Because of these two HCPs, we conclude that direct habitat loss of Stephens' kangaroo habitat in western Riverside County from large-scale development is no longer the predominant threat to the species. Habitat loss from development is still occurring, but it is on a smaller scale and at a slower rate when compared to the timeframe prior to the implementation of the two HCPs. However, the effects of past habitat loss and future habitat loss is still a concern. Previous and current development has led to extensive habitat fragmentation, which has reduced connectivity and isolated Stephens' kangaroo rat populations (see Habitat Fragmentation section below).

As stated above, for downlisting the draft Recovery Plan for the Stephens' Kangaroo Rat recommended four reserve areas (encompassing at least 15,000 ac (6,070 ha)) be established in western

Riverside County and one ecosystem-based reserve be established in San Diego County (either western or central). Under the SKR HCP and Western Riverside MSHCP, a total of 15,563 ac (6,298 ha) including eight reserves (encompassing 9,029 ac (3,654 ha)) have been established for Stephens' kangaroo rat in western Riverside County. This number exceeds the four reserves and amount of area identified by criterion 1 of the draft Recovery Plan for the Stephens' Kangaroo Rat (Service 1997, p. 52).

In addition, active Service-approved INRMPs for the species have been developed and implemented at Camp Pendleton, Detachment Fallbrook, and Warner Springs, and include actions to provide for the long-term conservation of Stephens' kangaroo rat and its habitat on Federal military lands (U.S. Navy 2013, entire; U.S. Navy 2016, entire; U.S. Marine Corps 2018, entire). The INRMPs are based, to the maximum extent practicable, on ecosystem management principles and provide for the management of Stephens' kangaroo rat and its habitat while sustaining necessary military land uses. In our 2010 12-month finding (75 FR 51210, 51215, August 19, 2010), we stated that these INRMPs may meet the intent of the draft Recovery Plan to establish one ecosystem-based reserve in western San Diego County. We further stated that, in consideration of some occupied habitat within Camp Pendleton and Detachment Fallbrook that may be in decline, in combination with a lack of a second ecosystem-based reserve in central San Diego County (75 FR 51210, 51223), that delisting criteria had not been met. Since that time, we have been working closely with the military installations on conservation of Stephens' kangaroo rat and its habitat through additional consultations and continued refinement and development of the conservation measures identified in the INRMPs, and now confirm these plans effectively meet the intent of the draft recovery plan's Criterion 2 for downlisting by establishing one ecosystem-based reserve in western San Diego County.

Although great strides have been made in implementing the two HCPs in western Riverside County and working to curtail large-scale development and conserve lands, the two conservation plans are not fully implemented and some threats facing Stephens' kangaroo rat still remain. We have determined that approximately 13 percent (9,029 ac (3,654 ha)) of all the suitable habitat (modeled large and small patch habitat) available to Stephens' kangaroo rat occurs in the SKR HCP core reserves in Riverside County (Service 2020, Appendix C). Some impacts from development or land conversion continue to occur throughout the range in occupied and suitable habitat that is not conserved.

The indirect effect of past habitat loss—fragmentation and isolation of populations—continues to threaten the species by curtailing opportunities for dispersal, reducing connectivity between populations, and may place limits on the ability to develop larger scale species' and habitat conservation strategies. We expect these indirect effects will continue into the future. This is especially true in San Diego County outside of Department of Defense lands, where conservation efforts have not kept pace with development or other land use conversion, leaving large areas of Stephens' kangaroo rat habitat subject to future loss. We expect this rate and level of loss to continue rangewide for the species into the future, especially in areas in the southern portion of the species' range in San Diego County.

Habitat Fragmentation

Historically, Stephens' kangaroo rat was considered a single population. Stephens' kangaroo rat habitat has been largely fragmented as a result of urban and agricultural development. The current distribution of the species as a result of this habitat loss and fragmentation has resulted in the species functioning more as a metapopulation (a regional group of connected populations of a species), in which numerous populations have some interchange between populations where connectivity and habitat remain. Habitat fragmentation reduces connectivity, which in turn can result in a loss of local populations, increases the isolation of populations, and decreases the potential for persistence over time. Analysis of the genetic makeup of individuals across the range of the species has identified recently occurring genetic differences between populations, potentially as a result of the species' populations being fragmented and isolated from each other (Service 2020, pp. 28–30).

Based on habitat modeling, we determined that there are approximately 69,104 ac (27,966 ha) in Riverside County and 22,434 ac (9,078 ha) in San Diego County of potentially suitable habitat for the Stephens' kangaroo rat (see Species Report section 6.2 Habitat Fragmentation (Service 2020, pp. 51–56)). We determined that 76 percent of this habitat in Riverside County exists in larger continuous patches greater than 247 ac (100 ha), and nearly 24 percent occurs as small patches less than 247 ac (100 ha). A patch size of 247 ac (100 ha) has been determined to be the minimum patch size required to reasonably expect long-term survival of an isolated population of the species (Price and Endo 1989, p. 299). In San Diego County, nearly 70 percent of the modeled habitat occurs in larger continuous patches greater than 247 ac (100 ha), and 30 percent of habitat occurs as small patches less than 247 ac (100 ha). Current data suggest that management actions to restore connectivity and/or continuing ongoing translocation efforts may be needed in the future to reduce the effects of habitat fragmentation, to ensure gene flow between reserves and other occupied areas, and to assist in the recolonization of unoccupied areas.

Translocation efforts are underway and have been successful in maintaining populations and at providing for interchange between populations. However, these efforts have been local and are not occurring throughout the range of the species. As a result, impacts from habitat fragmentation (*i.e.,* isolation, limited genetic exchange) are still occurring and will continue to impact the species. Based on the best available data, we have determined that habitat fragmentation remains a moderate- to high-level threat to the Stephens' kangaroo rat and its habitat, and we can reliably predict that these habitat conditions are likely to remain into the future based on the level of small, isolated, unmanaged areas currently occupied by the species.

Habitat Modification

In our 2010 12-month finding, we identified habitat modification from wildfire (direct effects from uncontrolled wildfire) and wildfire suppression (effects resulting from activities to suppress uncontrolled wildfire (*e.g.,* dozing, vehicle access, staging area construction)), nonnative and invasive plants, grazing activities, and unauthorized off-highway vehicle use as threats to Stephens' kangaroo rat.

Wildfire: Uncontrolled wildfire and prescribed fire can modify habitat for Stephens' kangaroo rat. Large uncontrolled wildfires, depending on severity and intensity, can remove habitat and promote the spread and introduction of invasive nonnative plant species resulting in modification or loss of habitat for the Stephens' kangaroo rat. However, prescribed fire can provide important benefits in maintaining suitable habitat for the Stephens' kangaroo rat and is regularly used on both reserve lands in Riverside County and on military installations in San

Diego County to reduce fuel loads and to manage invasive nonnative plants (see section 6.4.3 of the Species Report (Service 2020, pp. 61–62)). Both wildfire and prescribed fire have been shown to cause mortality in small mammal species, and lead to a loss of important resources such as nest sites (Price *et al.* 1995, p. 52). However, studies of fire impacts on areas occupied by Stephens' kangaroo rat showed little direct impacts to individuals due to their ability to survive intense fires by moving to underground burrows where temperatures remain cool and the ambient air remains clean (Bond 2015, p. 95).

Based on the best available information, the effects of wildfire or prescribed fire, despite causing either direct loss or indirect effects to Stephens' kangaroo rat, can also provide important benefits in maintaining suitable habitat for the species. Though impacts to some individuals may occur, effects of wildfire or prescribed fire are not currently a significant threat at the population- or species-level. Wildland fire management plans and wildfire suppression/prevention activities are being implemented (on DOD, HCP, and other conserved lands) as part of a habitat management tool (see section 6.4.3 of the Species Report (Service 2020, pp. 61–62)) within large portions of the current range of the species. These actions (such as vegetation management and firebreak development) reduce the potential for and the impact of wildfire and help protect and enhance natural resources by removing excess vegetation and invasive plants. We expect wildfires to continue to occur in areas occupied by the species, but the effects of wildfire have been greatly ameliorated through land management activities.

Nonnative and invasive plant species: Nonnative and invasive plant species occur throughout the range of Stephens' kangaroo rat. Nonnative and invasive plant species (*e.g.,* foxtail fescue (*Vulpea megalura)* great brome (*Bromus diandrus*), red brome (*B. madritensis* ssp. *rubens*), and wild oat (*Avena fatua*)) outcompete native vegetation and cause excessive vegetation buildup, which reduces or removes the open spaces preferred by the Stephens' kangaroo rat (Service 1997, p. 9). However, on reserve lands or lands being managed for Stephens' kangaroo rat, nonnative and invasive plants are being managed through a variety of techniques to reduce their impact on the species and its habitat. Management actions to control these species are ongoing and include studies to identify better control measures and techniques. As a result, the impacts from this threat are localized and not acting on Stephens' kangaroo rat at the population- or species-level. Given the ongoing management actions to control these species, the threat from nonnative and invasive plants is considered a low-level threat. We expect this situation to remain the same into the future.

Grazing: At the time of listing (1988), commercial grazing occurred in areas occupied by Stephens' kangaroo rat year-round at high densities, using both sheep and cattle, and was not managed in a manner compatible with conservation of the species. Commercial grazing has since been reduced, and where grazing still exists, impacts have been lessened compared to when the species was listed. In our 2010 12-month finding, we determined that grazing practices no longer represented a rangewide threat to the Stephens' kangaroo rat (75 FR 51216, August 19, 2010). Grazing continues to be used to assist in habitat restoration and management for some populations of the Stephens' kangaroo rat. Based on the best available information, we affirm our previous determination that grazing practices do not represent a rangewide threat to the Stephens' kangaroo rat. Impacts from grazing are localized and not impacting Stephens' kangaroo rat at the population- or species-level.

Unauthorized Off-Highway Vehicles (OHVs): OHV activity can result in both direct (mortality or injury) and indirect (damage to burrow systems, rutting of habitat) effects to the Stephens' kangaroo rat and its habitat. To manage unauthorized OHV use on reserve lands in Riverside County, the Reserve Management Coordinating Committee, since 2007, has successfully implemented coordinated security efforts for the Reserve system, and this has resulted in a noticeable decline in unauthorized OHV activity within Stephens' kangaroo rat reserves. For example, one core area (Potrero) is completely fenced, limiting the possibility of OHV activity. Therefore, we have determined that habitat modification or destruction due to OHV activity is limited in scope and scale, and this activity is currently being managed within the reserves established under conditions set out in the 1996 SKR HCP.

Predation

As noted in the Species Report (Service 2020, pp. 64–65), the Stephens' kangaroo rat is prey to a number of native species as well as nonnative species. In our 1988 final listing rule (53 FR 38467, September 30, 1988) and 2010 12-month finding (75 FR 51218, August 19, 2010), we stated that predation from feral and domesticated cats (*Felis catus*) was expected within areas of occurrence located adjacent to urban areas. However, no supporting information was presented regarding the incidence or levels of predation from cats. Our review of the information available and discussion with managers of preserve areas adjacent to residential areas has identified predation by cats as only occasional and so is not a significant threat to the Stephens' kangaroo rat (Shomo 2018, entire). Predation from native species has not been discussed in the literature and is not likely to cause or lead to significant declines for the species. Therefore, based on the best available information, predation, whether by native or nonnative animals, represents a low-level impact to individuals of the species and is not likely to be a population- or species-level impact at the present time or in the future.

Rodenticides

In our 2010 12-month finding, we determined that, while we did not know the magnitude of the threat of rodenticide exposure, rodenticide use was a rangewide threat to the Stephens' kangaroo rat, especially because second-generation anticoagulants were commonly used by the public as rodenticides targeting rats, mice, ground squirrels, and other rodents. Anticoagulant rodenticides target an animal's ability to clot blood. Although first generation (which required multiple feedings) and second generation (required only one feeding) anticoagulant rodenticides are both toxic to nontarget species, the second-generation anticoagulant rodenticides are more so because of their higher toxicity (Khan and Schell 2020, unpaginated). However, since that time new Federal and State regulations (Environmental Protection Agency (EPA), California State Department of Pesticide Regulation (CDPR)), restrictions, and management practices have been put into place. These include changes to the formulation of the pesticides available to the public to first-generation rodenticides in paste or block type form (as opposed to pelleted form, which could be more widely broadcast) (EPA 2018, p. 1), Now the more toxic rodenticides are only available and can only be used by licensed pesticide applicators (see Species Report sections 6.8 Use of Rodenticides and 7.2.3 California Environmental Protection Agency–Department of Pesticide Regulation (Service 2020, pp. 65–67, 85–86)). In addition, a majority of the lands

formerly used as orchards surrounding areas occupied by Stephens' kangaroo rat have been converted to other nonagricultural land uses, mainly urbanized areas, which do not require use of rodenticides (Service 2020, pp. 49, 65–66), and use of rodenticides on State Park lands at Lake Perris State Recreation area has been eliminated (Service 2020, pp. 65–66). These changes in the use restrictions and land use changes have most likely reduced the incidence of exposure of Stephens' kangaroo rats to rodenticides and as a result reduced the magnitude of this threat now and into the future. As a result, we have determined that rodenticides may still impact individuals, but the level of impact does not rise to a rangewide-level threat.

Effects of Climate Change

The effects of climate change due to global warming is influencing regional climate patterns that may result in changes to the habitat and habitat conditions for the Stephens' kangaroo rat in the future (Hall *et al.* 2018, p. 9; Kalansky *et al.* 2018, p. 23). Downscaled climate model projections (mid- and late-century) (Representative Concentration Pathways (RCP) 4.5 or RCP 8.5) for the South Coast and Southern Interior regions of California occupied by the Stephens' kangaroo rat indicate low to moderate increases in temperature and a slight increase (RCP 4.5) or decrease (RCP 8.5) in precipitation (He *et al.* 2018, pp. 8–9) with these increases being more frequent than the current conditions (Service 2020, pp. 69–75; U.S. Global Change Research Program (USGCRP) 2017, p. 139). Increases in temperature may hamper vegetation growth and exacerbate drought conditions (Hall *et al.* 2018, p. 13; Kalansky *et al.* 2018, pp. 24, 25) thereby potentially increasing bare ground patches preferred by the species. However, higher temperatures and greater precipitation events may also increase vegetation and wildfire frequency and severity causing potential habitat loss and, depending on fire severity, loss of individuals (see section 6.10 in the Species Report).

Based on the best available regional downscaled data on the current effects related to climate change (precipitation and temperature changes) within locations occupied by the Stephens' kangaroo rat, we have determined that the effects of climate change on the species' habitat are a low to moderate threat to Stephens' kangaroo rat at the present time. Based on model projections, we have concluded that potential effects to the habitat occupied by the Stephens' kangaroo rat from climate change from temperature and precipitation changes appear to be minimal due to the species' capability of inhabiting dry environmental conditions and represent a low-moderate threat to the Stephens' kangaroo rat and its habitat, and the level is likely to remain there to the 2060s.

Existing Regulatory Mechanisms

Section 4(b)(1)(A) of the Act requires that the Service take into account ''those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species. . . .'' In relation to Factor D under the Act, we interpret this language to require the Service to consider relevant Federal, State, and Tribal laws, regulations, and other such binding legal mechanisms that may ameliorate or exacerbate any of the threats we describe in threat analyses under the other four factors or otherwise enhance the species' conservation. We give the strongest weight to statutes and their implementing regulations and to management direction that stems from those laws and regulations. For additional information on the existing regulatory mechanisms see section 7 of the Species Report (Service 2020, pp. 75–89).

Endangered Species Act. As an endangered species, the Stephens' kangaroo rat is currently provided all the protections as described under section 9(a) of the Act. This includes all forms of ''take'' of the species. The term ''take'' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Some of these provisions have been further defined in regulation at 50 CFR 17.3. Take can result knowingly or otherwise, by direct and indirect impacts, intentionally or incidentally. The regulations adopted as part of the Stephens' kangaroo rat being an endangered species under the Act have helped conserve the species and its habitat. The Act would continue to provide protection to the Stephens' kangaroo rat after reclassification to threatened status because the proposed 4(d) rule would maintain all section 9 prohibitions for the species with only those activities which benefit the species or its habitat being excepted. See Provisions of the Proposed 4(d) Rule.

In addition, section 10 of the Act allows for exceptions to section 9 prohibitions if a Service-approved conservation plan (Habitat Conservation Plan (HCP)) is developed for management and conservation of a species or its habitat. As described above, two HCPs have been developed for conservation of the Stephens' kangaroo rat or its habitat in western Riverside County (1996 SKR HCP and the 2003 Western Riverside MSHCP). These two HCPs have greatly reduced the amount and rate of habitat loss for the species and implemented numerous conservation actions for management and conservation of the Stephens' kangaroo rat and its habitat in the area of coverage of these two HCPs.

Sikes Act. Under section 101 of the Sikes Act (16 U.S.C. 670a), the Department of Defense is required to carry out programs to provide for the conservation and rehabilitation of natural resources on military installations. To facilitate this program, each military department is required to prepare and implement an integrated natural resources management plan (INRMP) for each military installation in the United States unless deemed inappropriate. Section 201 of the Sikes Act states that the military facilities are required to cooperate and coordinate with the Secretary of Interior on conservation and rehabilitation programs including specific habitat improvement projects and related activities and adequate protection for threatened or endangered wildlife and plants. Each INRMP is reviewed and or revised every 5 years.

As stated above, three military installations occur within the range of the species in western San Diego County. These DoD facilities have developed Service-approved INRMPs and actively manage their activities and habitat for the conservation of the Stephens' kangaroo rat. The implementation of these conservation efforts has greatly reduced the impact of loss and degradation of habitat for the species on the lands managed by the DoD. The INRMPs effectively meet the intent of the draft recovery plan's Criterion 2 for downlisting by establishing an ecosystem-based reserve in western San Diego County.

Environmental Protection Agency (EPA) and California State Department of Pesticide Regulation (CDPR). As stated above, Federal and State regulations implemented by EPA and the CDPR have limited the exposure of wildlife to anticoagulant rodenticides. These include restrictions and changes on application, use and availability for the public. These restrictions have reduced the impact of nontarget poisoning toward wildlife including the Stephens' kangaroo rat.

National Environmental Policy Act (NEPA). All Federal agencies are required to adhere to the NEPA of 1970

(42 U.S.C. 4321 *et seq.*) for projects they fund, authorize, or carry out. Prior to implementation of such projects with a Federal nexus, NEPA requires the agency to analyze the project for potential impacts to the human environment, including natural resources.

Although NEPA requires full evaluation and disclosure of information regarding the effects of contemplated Federal actions on sensitive species and their habitats, it does not by itself regulate activities that might affect the Stephens' kangaroo rat; that is, effects to the species and its habitat would receive the same scrutiny as other plant and wildlife resources during the NEPA process and associated analyses of a project's potential impacts to the human environment.

California Endangered Species Act. The Stephens' kangaroo rat is designated as threatened under the California Endangered Species Act (CESA), which prohibits the take of any species of wildlife designated by the California Fish and Game Commission as endangered, threatened, or candidate species (CDFW 2018a). Additionally, permits are required to take or possess any and all plants and animals in the state, and as noted above, the CDFW may authorize the take of any such species if certain conditions are met through the issuance of permits (*e.g.,* research permits, Incidental Take Permits) (CDFW 2018b). The Stephens' kangaroo rat was identified as important to the State's biodiversity and was therefore listed as a Species of Greatest Conservation Need (SGCN) in the State's Wildlife Action Plan (CDFW 2015, pp. C–1, C–24; Appendix C). State lands within the range of the Stephens' kangaroo rat are being managed for the protection and conservation of the species.

California Environmental Quality Act. The California Environmental Quality Act (CEQA) (California Public Resources Code 21000–21177) is the principal statute mandating environmental assessment of projects in California. The purpose of CEQA is to evaluate whether a proposed project may have an adverse effect on the environment and, if so, to determine whether that effect can be reduced or eliminated by pursuing an alternative course of action, or through mitigation. CEQA applies to certain activities of State and local public agencies; a public agency must comply with CEQA when it undertakes an activity. As with NEPA, CEQA does not provide a direct regulatory role for the CDFW relative to activities that may affect the Stephens' kangaroo rat. However, CEQA requires a complete assessment of the potential for a proposed project to have a significant adverse effect on the environment. Among the conditions outlined in the CEQA Guidelines that may lead to a mandatory findings of significance are where the project ''has the potential to . . . substantially reduce the habitat of a fish or wildlife species; cause a fish or wildlife population to drop below self-sustaining levels; threaten to eliminate a plant or animal community; substantially reduce the number or restrict the range of an endangered, rare or threatened species'' (14 CCR § 15065(a)(1)). If significant effects are identified, the lead agency has the option of requiring mitigation through changes in the project or to decide that overriding considerations make mitigation infeasible.

The Natural Community Conservation Planning Act. The Natural Community Conservation Planning Act (NCCP) program is a cooperative effort between the State of California and numerous private and public partners with the goal of protecting habitats and species. The NCCP program identifies and provides for the regional or area-wide protection of plants, animals, and their habitats, while allowing compatible and appropriate economic activity. The program uses an ecosystem approach to planning for the protection and continuation of biological diversity. Regional NCCPs provide protection to federally listed and other covered species by conserving native habitats upon which the species depend. Many NCCPs are developed in conjunction with habitat conservation plans (HCPs) developed under section 10 of the ESA (CDFW 2020, unpaginated) as is the case of the 2003 Western Riverside MSHCP.

The existing HCPs on private lands, management plans of State lands, and INRMPs on DoD facilities in western Riverside and western San Diego Counties are being implemented as intended and are assisting to conserve and protect the Stephens' kangaroo rat and its habitat by providing for a reduction of threats from development, military training, and wildfire. Additional regulatory mechanisms have reduced the threat from rodenticides. Commitment to management actions for the benefit of Stephens' kangaroo rat is strong among the various partnerships; nevertheless, uncertainty of future condition of the species does exist. Currently, resource conditions and management are adequate in western Riverside and western San Diego Counties. However, conservation measures being implemented outside these areas are limited, especially in central San Diego County, an area identified as being the location of a second ecosystem reserve for the species. Although the current risk of extinction has been reduced, there is enough risk associated with habitat fragmentation, loss of habitat connectivity, and population isolation such that the species is vulnerable and likely to become endangered throughout all of its range within the foreseeable future despite existing regulatory mechanisms.

Cumulative Effects

In general, threats acting on a species or its habitat may operate independently of each other or they may impact the species or its habitat in conjunction with each other. Some individually identified threats may not rise to a level of concern or be insignificant in nature and not influence a decline in the species' status on the landscape. However, combined these threats may result in a greater overall cumulative impact to a species or its habitat. In our analysis of the Stephens' kangaroo rat, the status of the species was determined by evaluating the cumulative effects of all the threats, along with the effects of all regulatory mechanisms and conservation efforts, to arrive at our final determination. We use this analysis to weigh the overall impacts from all threats against the overall impact of all ameliorating efforts and make a determination on status. In the case of the Stephens' kangaroo rat, the cumulative effect of all ameliorating efforts helping conserve the species have reduced the level of threats currently acting on the species or its habitat.

Determination of Stephens' Kangaroo Rat Status

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations (50 CFR part 424) set forth the procedures for determining whether a species meets the definition of ''endangered species'' or ''threatened species.'' The Act defines an ''endangered species'' as a species that is ''in danger of extinction throughout all or a significant portion of its range,'' and a ''threatened species'' as a species that is ''likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' For a more detailed discussion on the factors considered when determining whether a species meets the definition of ''endangered species'' or ''threatened species'' and our analysis on how we determine the foreseeable future in making these decisions, please see the Summary of Factors Affecting the Species section above.

Foreseeable Future

To determine if a species is considered a threatened species under the Act, we look to future threats facing the species and how the species will likely respond to those threats. For the Stephens' kangaroo rat, the foreseeable future for the individual threats vary. However, as stated above, the major threat driving the overall status of Stephens' kangaroo rat is habitat fragmentation. Based solely on biological factors, we consider 25–30 years to be the foreseeable future within which we can reasonably determine that the future threat and Stephens' kangaroo rat's response to the threat of habitat fragmentation is likely. This time period includes multiple generations of the species and allows adequate time for conservation efforts (such as additional land protections or species' relocation efforts) to be implemented or changes in threats to be indicated through population responses.

Extensive land management planning through development of HCPs in western Riverside County and management and conservation on DoD lands in San Diego County has resulted in large areas being conserved and managed for the species. These efforts have largely ameliorated the threat of unregulated urban development and conversion of lands to agriculture resulting in significant amounts of habitat loss—which was the driving factor for originally listing the species as endangered in 1988. We have determined that the implementation of these conservation measures and management plans, essentially meet the criteria for downlisting relative to our draft Recovery Plan.

While we do not have specific quantified survey information on the status and trends for populations of the species, no significant population declines or extirpations have been observed and it appears that the species remains stable and extant at more locations than were originally identified in the 1988 listing. However, we recognize that localized habitat loss is still occurring and will occur into the future and the impacts from past and future habitat fragmentation continue to impact the species. This continued habitat loss/fragmentation will result in increasing population isolation and habitat dis-connectivity, which we expect will lower the species' resiliency, redundancy, and representation, and thus its viability in the foreseeable future. We expect that additional conservation of lands and management actions will continue to be necessary to maintain population connectivity now and into the foreseeable future.

Status Throughout All of Its Range

After evaluating threats to the species and assessing the cumulative effect of the threats combined under the section 4(a)(1) factors, as well as the factors ameliorating those threats, we have found that the current viability of the Stephens' kangaroo rat is higher now than at the time of listing as an endangered species under the Act, due to implementation of extensive conservation actions and management.

The Stephens' kangaroo rat was listed as endangered in 1988, mostly due to the direct and indirect effects of rapid loss, degradation, and fragmentation of habitat for the species. Since the time of listing, numerous searches and surveys have resulted in the discovery of additional areas where Stephens' kangaroo rat occurs. Currently 18 areas (12 areas in Riverside County and 6 areas in San Diego County) have been identified, 7 more than what was known at the time of listing. Although not considered a population expansion since listing, the discovery of additional occupied areas has reduced the level of threat for the species as a whole and increased the redundancy for the species making it more able to recover from catastrophic events.

Also since the time of listing, several large-scale habitat conservation efforts (SKR HCP, Western Riverside MSHCP) have been implemented. These two conservation efforts have established a total of eight adaptively managed reserves for Stephens' kangaroo rat in Riverside County. In addition, the DoD has developed INRMPs for conserving the species and its habitat on two military facilities in San Diego County. Together, these conservation efforts in Riverside and San Diego Counties have conserved approximately 28,567 ac (11,561 ha) of modeled Stephens' kangaroo rat habitat throughout the species' range. These conservation measures have largely met the intent of the downlisting criteria identified in our draft recovery plan. However, the lingering effects of past development have left the habitat fragmented and populations isolated. We expect this threat to manifest itself in the future if not managed. Therefore, based on the species' continued occupancy and distribution across its range and on the conservation efforts that have been implemented to curtail habitat loss and protect and manage existing populations, we have determined that the current viability of the Stephens' kangaroo rat is higher now than at the time of listing.

Thus, after assessing the best available information, we have determine that because of the large scale implementation of habitat conservation through HCPs and DoD resource management, the Stephens' kangaroo rat is not currently in danger of extinction throughout all of its range, but is likely to become so within the foreseeable future.

Status Throughout a Significant Portion of Its Range

Under the Act and our implementing regulations, a species may warrant listing if it is in danger of extinction or likely to become so in the foreseeable future throughout all or a significant portion of its range. The court in *Center for Biological Diversity* v. *Everson,* 2020 WL 437289 (D.D.C. Jan. 28, 2020) (*Center for Biological Diversity*), vacated the aspect of the 2014 Significant Portion of its Range Policy that provided that the Services do not undertake an analysis of significant portions of a species' range if the species warrants listing as threatened throughout all of its range. Therefore, we proceed to evaluating whether the species is endangered in a significant portion of its range—that is, whether there is any portion of the species' range for which both (1) the portion is significant; and, (2) the species is in danger of extinction in that portion. Depending on the case, it might be more efficient for us to address the ''significance'' question or the ''status'' question first. We can choose to address either question first. Regardless of which question we address first, if we reach a negative answer with respect to the first question that we address, we do not need to evaluate the other question for that portion of the species' range.

Following the court's holding in *Center for Biological Diversity,* we now consider whether there are any significant portions of the species' range where the species is in danger of extinction now (*i.e.,* endangered). In undertaking this analysis for Stephens' kangaroo rat, we choose to address the status question first—we consider information pertaining to the geographic distribution of both the species and the threats that the species faces to identify any portions of the range where the species is endangered.

The statutory difference between an endangered species and a threatened species is the time horizon in which the species becomes in danger of extinction; an endangered species is in danger of extinction now while a threatened species is not in danger of extinction now but is likely to become so in the foreseeable future. Thus, we considered

the time horizon for the threats that are driving the Stephens' kangaroo rat to remain listed as a threatened species throughout all of its range. As stated above, the effects of habitat fragmentation (limiting dispersal and recolonization, reducing genetic exchange, isolating populations) is the greatest future threat to the species. These effects are expected to occur in the future throughout its range in both western Riverside and San Diego Counties. Based on current population sizes, distribution, and trends it appears that the species currently has a relatively stable status. Fragmentation will impact the species in the future as development continues. Existing conserved and managed lands in both western Riverside and San Diego Counties are currently benefiting the species to the level that the species is not now endangered. However, because development and loss of habitat was so extensive and severe in the past, work is needed to reconnect populations in conserved areas currently being managed as ecosystem reserves and for areas outside those considered as ecosystem reserves such as central San Diego County. The impacts from future habitat fragmentation will continue to isolate populations. This is especially true if land conservation efforts are not able to conserve areas between populations for connectivity. In addition, currently occupied lands, both conserved and not conserved, will require ongoing management such as prescribed fire or other measures to reduce vegetation buildup ensuring habitat suitability and persistence of the species. We expect vegetation control will be an ongoing habitat management concern and the species will continue to be reliant to some degree of habitat or species management into the future.

Because the Stephens' kangaroo rat's population structure follows a metapopulation dynamic and is based on the equilibrium between colonization and extirpation of local populations, the importance of habitat and population connectivity is emphasized. Our analysis and modeling of the existing suitable habitat available to the Stephens' kangaroo rat shows the species faces some level of habitat fragmentation in both western Riverside and San Diego Counties; however, the effects of the fragmentation have not yet impacted the species based on the current existing population information. Approximately 75 percent of modeled suitable habitat exists in continuous patches greater than 1 square kilometer (km^2) (0.4 square mile (mi^2)—the threshold suggested by at least one study as necessary for sustainable populations (Price and Endo 1989, p. 299). We expect the effects of habitat fragmentation to impact the species in the future. Future habitat loss will continue to isolate and fragment habitat occupied by the species and reduce connectivity, but at a reduced rate and extent since listing. These analyses indicate that restoring connectivity and/or conducting translocation efforts may be needed to maintain some populations in the future. In addition, although estimates have been made on habitat patch size and its availability, there has been no rangewide systematic assessment of the population structure for the Stephens' kangaroo rat to determine the requirements or characteristics of stable populations or estimate the minimum number of interconnected patches needed to support a potential metapopulation. Without these forms of information, the current and best available information on habitat conditions, species persistence within occupied areas, and species distribution indicates that populations appear stable.

Given this assessment of the current best available information, and recognition that the current amount and type of reserves for Stephens' kangaroo rat does not meet the draft Recovery Plan requirements for delisting, we have concluded that the best scientific and commercial data available indicate that the time horizon on which those threats to the species and the species' responses to those threats are likely to occur is in the foreseeable future in all portions of the species' range. Therefore, we determine that the Stephens' kangaroo rat is not in danger of extinction now in any portion of its range, but that the species is likely to become in danger of extinction within the foreseeable future throughout all of its range. This is consistent with the courts' holdings in *Desert Survivors* v. *Department of the Interior,* No. 16–cv–01165–JCS, 2018 WL 4053447 (N.D. Cal. Aug. 24, 2018), and *Center for Biological Diversity* v. *Jewell,* 248 F. Supp. 3d, 946, 959 (D. Ariz. 2017).

Determination of Status

Our review of the best available scientific and commercial information indicates that the Stephens' kangaroo rat meets the definition of a threatened species in accordance with section 3(20) of the Act. Therefore, we propose to reclassify the Stephens' kangaroo rat as a threatened species on the List of Endangered and Threatened Wildlife (50 CFR 17.11).

II. Proposed Rule Issued Under Section 4(d) of the Act

Background

Section 4(d) of the Act contains two sentences. The first sentence states that the ''Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation'' of species listed as threatened. The U.S. Supreme Court has noted that statutory language like ''necessary and advisable'' demonstrates a large degree of deference to the agency (see *Webster* v. *Doe,* 486 U.S. 592 (1988)). Conservation is defined in the Act to mean ''the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the Act] are no longer necessary.'' Additionally, the second sentence of section 4(d) of the Act states that the Secretary ''may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1), in the case of fish or wildlife, or section 9(a)(2), in the case of plants.'' Thus, the combination of the two sentences of section 4(d) provides the Secretary with a wide latitude of discretion to select and promulgate appropriate regulations tailored to the specific conservation needs of the threatened species. The second sentence grants particularly broad discretion to the Service when adopting the prohibitions under section 9.

The courts have recognized the extent of the Secretary's discretion under this standard to develop rules that are appropriate for the conservation of a species. For example, courts have upheld rules developed under section 4(d) as a valid exercise of agency authority where they prohibited take of threatened wildlife or included a limited taking prohibition (see *Alsea Valley Alliance* v. *Lautenbacher,* 2007 U.S. Dist. Lexis 60203 (D. Or. 2007); *Washington Environmental Council* v. *National Marine Fisheries Service,* 2002 U.S. Dist. Lexis 5432 (W.D. Wash. 2002)). Courts have also upheld 4(d) rules that do not address all of the threats a species faces (*see State of Louisiana* v. *Verity,* 853 F.2d 322 (5th Cir. 1988)). As noted in the legislative history when the Act was initially enacted, ''once an animal is on the threatened list, the Secretary has an almost infinite number of options available to him with regard to the permitted activities for those species. He may, for example, permit taking, but not importation of such species, or he may choose to forbid both taking and importation but allow the transportation

of such species,'' (H.R. Rep. No. 412, 93rd Cong., 1st Sess. 1973).

Exercising its authority under section 4(d), the Service has developed a proposed rule that is designed to address the Stephens' kangaroo rat's specific threats and conservation needs. Although the statute does not require the Service to make a ''necessary and advisable'' finding with respect to the adoption of specific prohibitions under section 9, we find that this rule as a whole satisfies the requirement in section 4(d) of the Act to issue regulations deemed necessary and advisable to provide for the conservation of the Stephens' kangaroo rat. As explained above, we have determined that the Stephens' kangaroo rat meets the definition under the Act of a threatened species, in that it is likely to become an endangered species within the foreseeable future throughout its range. As such, we are proposing to reclassify Stephens' kangaroo rat as a threatened species on the List of Endangered and Threatened Wildlife. We have also determined that it is necessary and advisable to issue protective regulations under section 4(d) of the Act in order to reduce the likelihood of the Stephens' kangaroo rat becoming an endangered species. Under our proposed section 4(d) rule, except as described and explained below, all prohibitions and provisions that apply to endangered wildlife under section 9(a)(1) of the Act would apply to the Stephens' kangaroo rat. Applying these section 9(a)(1) prohibitions will help minimize threats that could cause further declines in the status of the species. The provisions of this rule are one of many tools that the Service would use to promote the conservation of this species. This proposed 4(d) rule would apply only if and when the Service makes final the reclassification of the Stephens' kangaroo rat as a threatened species.

Provisions of the Proposed 4(d) Rule

This proposed 4(d) rule would provide for the conservation of the Stephens' kangaroo rat by prohibiting the following activities, except as otherwise authorized or permitted: importing or exporting; take; possession and other acts with unlawfully taken specimens; delivering, receiving, carrying, transporting, or shipping in interstate or foreign commerce in the course of commercial activity; or selling or offering for sale in interstate or foreign commerce.

Under the Act, ''take'' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Some of these provisions have been further defined in regulation at 50 CFR 17.3. Take can result knowingly or otherwise, by direct and indirect impacts, intentionally or incidentally. The long-term viability of the Stephens' kangaroo rat, as with many wildlife species, is intimately tied to the availability and condition of its habitat. As described in our analysis of the species' status, the primary driving threats to the Stephens' kangaroo rat's continued viability is habitat fragmentation and modification. These threats reduce habitat availability and suitability due to a lack of connectivity between areas and buildup of dense vegetation resulting from a lack of disturbance. The Stephens' kangaroo rat prefers open, annual grasslands and open intermediate-seral-stage (secondary succession) plant communities that are maintained by disturbance. Areas with dense vegetation (grasses or shrubs) are avoided and are not suitable habitat. Therefore, activities that are conducted for the purpose of maintaining, enhancing, or restoring open areas are beneficial for providing the habitat needs of the species. Such activities may include, but are not limited to: nonnative or invasive plant removal, grazing activities used for the purpose of vegetation management, prescribed burns, wildfire suppression activities, mowing, activities designed to promote native annual forbs and maintain or restore open habitat for the species, or other actions related to habitat restoration or species' recovery efforts.

More specifically, nonnative, invasive, or noxious plant removal includes noxious weed control in the course of habitat management and restoration to benefit Stephens' kangaroo rat or other sensitive species in the grassland habitat. Livestock grazing includes those grazing activities conducted as part of habitat management and restoration to benefit Stephens' kangaroo rat or other native species in the grassland habitat as described in a Service-approved plan. Fire and wildfire management and suppression includes activities such as prescribed burns, fuel reduction activities, maintenance of fuel breaks, defensible space maintenance actions, and firefighting activities associated with actively burning fires to reduce risk to life or property.

We believe that actions taken by management entities in the range of the Stephens' kangaroo rat for the purpose of reducing the risk or severity of habitat modification and designed to promote native annual forbs and maintain or restore open habitat for Stephens' kangaroo rat, even if these actions may result in some short-term or small level of localized negative effect to Stephens' kangaroo rats, will further the goal of reducing the likelihood of the species from becoming an endangered species, and will also continue to contribute to its conservation and long-term viability.

We recognize that the types of actions identified above are often undertaken by land management entities or private land owners through inclusion in land management plans, or strategies, or cooperative agreements that are approved by the Service, and that these plans, strategies, and agreements address identified negative effects to Stephens' kangaroo rat conservation. We believe that such approved plans, strategies, or agreements, developed in coordination with the Service, will adequately reduce or offset any negative effects to Stephens' kangaroo rat so that they will not result in a further decline of the species. Likewise, actions undertaken by management entities included in formal, Service-approved land management conservation plans (such as INRMPs), where the intended purpose is consistent with the conservation needs of the Stephens' kangaroo rat, also provide an overall conservation benefit for the species.

We also recognize the special and unique relationship with our State natural resource agency partners in contributing to conservation of listed species. State agencies often possess scientific data and valuable expertise on the status and distribution of endangered, threatened, and candidate species of wildlife and plants. State agencies, because of their authorities and their close working relationships with local governments and landowners, are in a unique position to assist the Services in implementing all aspects of the Act. In this regard, section 6 of the Act provides that the Services shall cooperate to the maximum extent practicable with the States in carrying out programs authorized by the Act. Therefore, any qualified employee or agent of a State conservation agency which is a party to a cooperative agreement with the Service in accordance with section 6(c) of the Act, who is designated by his or her agency for such purposes, will be able to conduct activities designed to conserve the Stephens' kangaroo rat that may result in otherwise prohibited take without additional authorization.

In addition, because the Stephens' kangaroo rat is an endangered species under the California Endangered Species Act (CESA), there may be other actions undertaken by State natural resource entities, such as the California

Department of Fish and Wildlife (CDFW) under the authority of the CESA, to improve habitat conditions, conduct research, or contribute to the long-term viability of species. We realize these actions may also result in some short-term or small level of localized negative effects to Stephens' kangaroo rats or their habitat. However, we acknowledge that these types of actions are often undertaken through inclusion in land management plans or agreements that are approved by the CDFW, under the authority of the CESA, and that these plans and agreements address effects to the Stephens' kangaroo rat. In our view, actions under such State-approved plans or agreements will adequately reduce or offset any negative effects to the Stephens' kangaroo rat so that they will not result in a further decline of the species, and, therefore, we are excepting take as a result of them from the section 9(a)(1) prohibitions in the 4(d) rule.

While we recognize the potential that the actions identified above may result in some small level of localized disturbance or temporary negative effects to Stephens' kangaroo rat or their habitat, we believe these conservation actions will improve overall habitat conditions or contribute to the species' overall long-term viability. As such, we have determined that any resulting take from these actions do not need to be included in the section 9(a)(1) prohibitions provided for the species.

Therefore, we are proposing to issue protective regulations under section 4(d) of the Act, in which all the prohibitions and provisions that apply to endangered wildlife under section 9(a)(1) of the Act, with the exemptions outlined below, would apply to the Stephens' kangaroo rat.

Exemptions from prohibitions. This proposed 4(d) rule would exempt from the general prohibitions in 50 CFR 17.21 take that is incidental to the following activities when conducted within habitats currently or historically occupied by Stephens' kangaroo rat:

(1) Activities conducted in accordance with a permit issued under § 17.32.

(2) Actions taken by the CDFW for conserving Stephens' kangaroo rat under the California Endangered Species Act (CESA).

(3) Actions, approved by the Service and conducted by entities outside those identified in (1) above, that implement measures for maintaining, enhancing, or restoring open habitat areas, such as: livestock grazing, wildfire management and suppression, prescribed fire activities, or nonnative, invasive, or noxious plant removal in the course of habitat management and restoration for the purpose of Stephens' kangaroo rat conservation;

(4) Actions identified in and conducted as part of a Service- or State-approved plan that are for the purpose of Stephens' kangaroo rat conservation;

While we are providing these exemptions to the prohibitions and provisions of section 9(a)(1) of the Act, we clarify that all Federal agencies (including the Service) that fund, permit, or carry out the activities described above will still need to ensure, in consultation with the Service (including intra-Service consultation when appropriate), that the activities are not likely to jeopardize the continued existence of the species. Private entities who undertake any actions other than those described in the exceptions above that may result in adverse effects to Stephens' kangaroo rat, when there is no associated Federal nexus to the action, may wish to seek an incidental take permit from the Service before proceeding with the activity. Nothing in this proposed 4(d) rule would change in any way the recovery planning provisions of section 4(f) of the Act, the consultation requirements under section 7 of the Act, or the ability of the Service to enter into partnerships for the management and protection of Stephens' kangaroo rat. However, interagency cooperation may be further streamlined through planned programmatic consultations for the species between Federal agencies and the Service, where appropriate. We ask the public, particularly State agencies and other interested stakeholders that may be affected by the proposed 4(d) rule, to provide comments and suggestions regarding additional guidance and methods that the Service could provide or use, respectively, to streamline the implementation of this proposed 4(d) rule (see Information Requested). Additional details on the proposed 4(d) exemptions are found in Proposed Regulation Promulgation, below.

Permits for Threatened Wildlife

We may issue permits to carry out otherwise prohibited activities involving threatened wildlife under certain circumstances. Regulations governing permits for threatened wildlife are codified at 50 CFR 17.32. With regard to threatened wildlife, a permit may be issued for the following purposes: Scientific purposes, to enhance the propagation or survival, for economic hardship, for zoological exhibition, for educational purposes, for incidental taking, or for special purposes consistent with the purposes of the Act. There are also certain statutory exemptions and prohibitions, which are found in sections 9 and 10 of the Act. Questions regarding whether specific activities would constitute a violation of 50 CFR 17.40 should be directed to the Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Effects of the Rule

Nothing in this proposed 4(d) rule would change in any way the recovery planning provisions of section 4(f) of the Act, the consultation requirements under section 7 of the Act, or our ability to enter into partnerships for the management and protection of the Stephens' kangaroo rat. However, interagency cooperation may be further streamlined through planned programmatic consultations for the species between us and other Federal agencies, where appropriate. We ask the public, particularly State agencies and other interested stakeholders that may be affected by the proposed 4(d) rule, to provide comments and suggestions regarding additional guidance and methods that we could provide or use, respectively, to streamline the implementation of this proposed 4(d) rule (see Information Requested).

Required Determinations

Clarity of the Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(1) Be logically organized;

(2) Use the active voice to address readers directly;

(3) Use clear language rather than jargon;

(4) Be divided into short sections and sentences; and

(5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to

prepare environmental analyses pursuant to the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)).]

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes. There are no federally recognized tribes affected by this proposed rule.

References Cited

A complete list of all references cited in this proposed rule is available at *http://www.regulations.gov* at Docket No. FWS–R8–ES–2019–0113, or upon request from the Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this proposed rule are staff members of the Interior's California Great Basin and Lower Colorado Basin Region and Field Offices.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as follows:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

■ 2. Amend § 17.11(h) by revising the entry for ''Kangaroo rat, Stephens' '' under **MAMMALS** in the List of Endangered and Threatened Wildlife to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Common name	Scientific name	Where listed	Status	Listing citations and applicable rules
		Mammals		
*	*	*	*	* * *
Kangaroo rat, Stephens'.	*Dipodomys stephensi* (incl. *D. cascus*).	Wherever found	T	53 FR 38465, 9/30/1988; [**Federal Register** *citation when published as a final rule*]; 50 CFR 17.40(s).[4d]
*	*	*	*	* * *

■ 3. Amend § 17.40 by adding paragraph (s) to read as follows:

§ 17.40 Special rules—mammals.

* * * * *

(s) Stephens' kangaroo rat (*Dipodomys stephensi*).

(1) *Prohibitions.* The following prohibitions that apply to endangered wildlife also apply to Stephens' kangaroo rat. Except as provided under paragraph (s)(2) of this section and §§ 17.4 and 17.5, it is unlawful for any person subject to the jurisdiction of the United States to commit, to attempt to commit, to solicit another to commit, or cause to be committed, any of the following acts in regard to this species:

(i) Import or export, as set forth at § 17.21(b).

(ii) Take, as set forth at § 17.21(c)(1).

(iii) Possession and other acts with unlawfully taken specimens, as set forth at § 17.21(d)(1).

(iv) Interstate or foreign commerce in the course of commercial activity, as set forth at § 17.21(e).

(v) Sale or offer for sale, as set forth at § 17.21(f).

(2) *Exceptions from prohibitions.* For Stephens' kangaroo rat, you may engage in the following actions:

(i) Activities in accordance with a permit issued under § 17.32.

(ii) Take, as set forth at § 17.21(c)(2) through (4) for endangered wildlife.

(iii) Take, as set forth at § 17.31(b).

(iv) Possession and other acts with unlawfully taken specimens, as set forth at § 17.21(d)(2) for endangered wildlife.

(v) Actions taken by the California Department of Fish and Wildlife for conserving Stephens' kangaroo rat under the California Endangered Species Act (CESA).

(vi) Livestock grazing in the course of habitat management and restoration to benefit Stephens' kangaroo rat or other native species in the grassland habitat as approved by the Service.

(vii) The following wildfire suppression activities:

(A) Activities necessary to maintain the minimum clearance (defensible space) requirement of 30 meters (100 feet) from any occupied dwelling, occupied structure, or to the property line, whichever is nearer, to provide reasonable fire safety and comply with State of California fire codes to reduce wildfire risks.

(B) Fire management actions (*e.g.,* prescribed burns, hazardous fuel reduction activities) on protected/preserve lands to maintain, protect, or enhance habitat occupied by Stephens' kangaroo rat. These activities are to be coordinated with and reported to the Service in writing and approved the first time an individual or agency undertakes them.

(C) Maintenance of existing fuel breaks identified by local fire authorities to protect existing structures.

(D) Firefighting activities associated with actively burning wildfires to reduce risk to life or property.

(viii) Removal of nonnative, invasive, or noxious plants for the purpose of Stephens' kangaroo rat conservation as approved by the Service. This includes noxious weed control and other vegetation reduction in the course of habitat management and restoration to benefit Stephens' kangaroo rat, provided that these activities are conducted in a manner consistent with Federal and applicable State laws, including Environmental Protection Agency label restrictions for pesticide application.

(ix) Activities conducted as part of a Service- or State-approved plan that are for the purpose of Stephens' kangaroo rat conservation.

* * * * *

Aurelia Skipwith,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 2020–16719 Filed 8–18–20; 8:45 am]

BILLING CODE 4333–15–P

Notices

Federal Register

Vol. 85, No. 161

Wednesday, August 19, 2020

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

Animal and Plant Health Inspection Service

[Docket No. APHIS–2020–0076]

Notice of Request for Revision to and Extension of Approval of an Information Collection; Black Stem Rust; Identification Requirements for Addition of Rust-Resistant Varieties

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Revision to and extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request a revision to and extension of approval of an information collection associated with the black stem rust quarantine and regulations.

DATES: We will consider all comments that we receive on or before October 19, 2020.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!docket Detail;D=APHIS-2020-0076.*
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2020–0076, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *http://www.regulations.gov/#!docket Detail;D=APHIS-2020-0076* or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW, Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

FOR FURTHER INFORMATION CONTACT: For information on black stem rust quarantine and regulations, contact Mr. Allen Proxmire, National Policy Manager, PHP, PPQ, APHIS, 4700 River Road Unit 26, Riverdale, MD 20737; (301) 851–2307. For more information on the information collection process, contact Mr. Joseph Moxey, APHIS' Information Collection Coordinator; (301) 851–2483.

SUPPLEMENTARY INFORMATION: *Title:* Black Stem Rust; Identification Requirements for Addition of Rust-Resistant Varieties.

OMB Control Number: 0579–0186.

Type of Request: Revision to and extension of approval of an information collection.

Abstract: Under the Plant Protection Act (7 U.S.C. 7701 *et seq.*), the Secretary of Agriculture is authorized to prohibit or restrict the importation, entry, or interstate movement of plants, plant products, and other articles to prevent the introduction of plant pests into the United States or their dissemination within the United States.

Black stem rust is one of the most destructive plant diseases of small grains that is known to exist in the United States. The disease is caused by a fungus that reduces the quality and yield of infected wheat, oat, barley, and rye crops by robbing host plants of food and water. In addition to infecting small grains, the fungus lives on a variety of alternate host plants that are species of the genera *Berberis, Mahoberberis,* and *Mahonia.* The fungus is spread from host to host by wind-borne spores.

The black stem rust quarantine and regulations, contained in 7 CFR 301.38 through 301.38–8 (referred to below as the regulations), quarantine the conterminous 48 States and the District of Columbia and govern the interstate movement of certain plants of the genera *Berberis, Mahoberberis,* and *Mahonia,* known as barberry plants. The species of these plants are categorized as either rust-resistant or rust-susceptible. Rust-resistant plants do not pose a risk of spreading black stem rust or of contributing to the development of new races of rust; rust-susceptible plants do pose such risks.

Paragraph (b) of § 301.38–2 provides the requirements for the submission of a request to the Animal and Plant Health Inspection Service to add a variety to the list of rust-resistant barberry varieties in the regulations. A request must include a description of the variety, including a written description and color pictures that can be used by an inspector to clearly identify the variety and distinguish it from other varieties. This requirement helps to ensure that State plant inspectors can clearly determine whether plants moving into or through their States are rust-resistant varieties listed in § 301.38–2.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities, as described, for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; *e.g.,* permitting electronic submission of responses.

Estimate of burden: The public burden for this collection of information is estimated to average 1 hour per response.

Respondents: Nurseries.

Estimated annual number of respondents: 2.

Estimated annual number of responses per respondent: 2.

Estimated annual number of responses: 4.

Estimated total annual burden on respondents: 4 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request

for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 13th day of August 2020.

Mark Davidson,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2020–18136 Filed 8–18–20; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2020–0030]

State University of New York College of Environmental Science and Forestry; Petition for Determination of Nonregulated Status for Blight-Resistant Darling 58 American Chestnut

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: We are advising the public that the Animal and Plant Health Inspection Service (APHIS) has received a petition from the State University of New York College of Environmental Science and Forestry (ESF) seeking a determination of nonregulated status for blight-resistant Darling 58 American chestnut (*Castanea dentata*). The petition has been submitted in accordance with our regulations concerning the introduction of certain genetically engineered organisms. We are making available for public comment the ESF petition and requesting public input regarding potential issues and impacts that APHIS should be considering in our evaluation of the petition.

DATES: We will consider all comments that we receive on or before October 19, 2020.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!docketDetail;D=APHIS-2020-0030.*
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2020–0030, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238.

The petition and any comments we receive on this docket may be viewed at *http://www.regulations.gov/#!docketDetail;D=APHIS-2020-0030* or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW, Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

The petition is also available on the APHIS website at: *https://www.aphis.usda.gov/aphis/ourfocus/biotechnology/permits-notifications-petitions/petitions/petition-status* under APHIS petition 19–309–01p.

FOR FURTHER INFORMATION CONTACT: Ms. Cindy Eck, Biotechnology Regulatory Services, APHIS, 4700 River Road Unit 147, Riverdale, MD 20737–1236; (301) 851–3892, email: *cynthia.a.eck@usda.gov.*

SUPPLEMENTARY INFORMATION:

Under the authority of the plant pest provisions of the Plant Protection Act (7 U.S.C. 7701 *et seq.*), the regulations in 7 CFR part 340, ''Introduction of Organisms and Products Altered or Produced Through Genetic Engineering Which Are Plant Pests or Which There Is Reason to Believe Are Plant Pests,'' regulate, among other things, the introduction (importation, interstate movement, or release into the environment) of organisms and products altered or produced through genetic engineering that are plant pests or that there is reason to believe are plant pests. Such organisms and plants developed using genetic engineering are considered ''regulated articles.''

The regulations in § 340.6(a) provide that any person may submit a petition to the Animal and Plant Health Inspection Service (APHIS) seeking a determination that an article should not be regulated under 7 CFR part 340. Paragraphs (b) and (c) of § 340.6 describe the form that a petition for a determination of nonregulated status must take and the information that must be included in the petition.

APHIS has received a petition (APHIS Petition Number 19–309–01p) from the State University of New York College of Environmental Science and Forestry (ESF), seeking a determination of nonregulated status for Darling 58 American chestnut (*Castanea dentata*). The ESF petition states that Darling 58 American chestnut has been genetically engineered for fungal resistance to chestnut blight caused by *Cryphonectria parasitica* and is unlikely to pose a plant pest risk and, therefore, should not be a regulated article under APHIS' regulations in 7 CFR part 340.

As described in the petition, resistance to this exotic pathogen in Darling 58 American chestnuts was enhanced by adding a gene for an enzyme called oxalate oxidase (OxO). This enzyme has no direct fungicidal properties, but rather detoxifies oxalic acid (oxalate) produced by the fungus, preventing the acid from killing the chestnut's tissues, which can lead to lethal cankers on the tree. In the presence of OxO, the damage caused by the oxalate is significantly restricted, resulting in superficial cankers. For this reason, the tree can coexist with the fungus in a manner similar to Asian chestnut species in the fungus' natural range.

Data were gathered on multiple parameters and used by the applicant to evaluate agronomic characteristics and product performance. These and other data are used by APHIS to determine if the new variety poses a plant pest risk.

Paragraph (d) of § 340.6 provides that APHIS will publish a notice in the **Federal Register** providing 60 days for public comment for petitions for a determination of nonregulated status. On March 6, 2012, we published in the **Federal Register** (77 FR 13258–13260, Docket No. APHIS–2011–0129) a notice [1] describing our process for soliciting public comment when considering petitions for determinations of nonregulated status for organisms developed using genetic engineering. In that notice, we indicated that APHIS would accept written comments regarding a petition once APHIS deemed it complete.

In accordance with § 340.6(d) of the regulations and our process for soliciting public input when considering petitions for determinations of nonregulated status for organisms developed using genetic engineering, we are publishing this notice to inform the public that APHIS will accept written comments regarding the petition for a determination of nonregulated status from interested or affected persons for a period of 60 days from the date of this notice. The petition is available for public review and comment, and copies are available as indicated under **ADDRESSES** and **FOR FURTHER INFORMATION CONTACT** above. We are interested in receiving comments regarding potential environmental and interrelated economic issues and impacts that APHIS may determine should be considered in our evaluation of the petition. We are particularly interested in receiving comments regarding biological, cultural, or ecological issues, and we encourage the submission of scientific data, studies, or research to support your comments.

[1] To view the notice, go to *http://www.regulations.gov/#!docketDetail;D=APHIS-2011-0129.*

After the comment period closes, APHIS will review all written comments received during the comment period and any other relevant information. Any substantive issues identified by APHIS based on our review of the petition and our evaluation and analysis of comments will be considered in the development of our decision-making documents. As part of our decision-making process regarding an organism's regulatory status, APHIS prepares a plant pest risk assessment to assess its plant pest risk and the appropriate environmental documentation—either an environmental assessment (EA) or an environmental impact statement (EIS)—in accordance with the National Environmental Policy Act (NEPA), to provide the Agency with a review and analysis of any potential environmental impacts associated with the petition request. For petitions for which APHIS prepares an EA, APHIS will follow our published process for soliciting public comment (see footnote 1) and publish a separate notice in the **Federal Register** announcing the availability of APHIS' EA and plant pest risk assessment.

Should APHIS determine that an EIS is necessary, APHIS will complete the NEPA EIS process in accordance with Council on Environmental Quality regulations (40 CFR part 1500–1508) and APHIS' NEPA implementing regulations (7 CFR part 372).

Authority: 7 U.S.C. 7701–7772 and 7781–7786; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.3.

Done in Washington, DC, this 13th day of August 2020.

Mark Davidson,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2020–18135 Filed 8–18–20; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Forest Service

Saguache—Upper Rio Grande Resource Advisory Committee; Meeting

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Saguache—Upper Rio Grande Resource Advisory Committee (RAC) will hold a virtual meeting. The committee is authorized under the Secure Rural Schools and Community Self-Determination Act (the Act) and operates in compliance with the Federal Advisory Committee Act. The purpose of the committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with the Act. RAC information can be found at the following website: *https://www.fs.usda.gov/main/riogrande/workingtogether/advisorycommittees.*

DATES: The meeting will be held on Tuesday, September 15, 2020 at 9:00 a.m.

All RAC meetings are subject to cancellation. For status of meeting prior to attendance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

ADDRESSES: The meeting will be held with virtual attendance only. For virtual meeting information, please see the website listed under *Summary.*

Written comments may be submitted as described under **SUPPLEMENTARY INFORMATION**. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at Rio Grande National Forest Headquarters. Please call ahead to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Gregg Goodland, RAC Coordinator, by phone at 719–588–7045 or via email at *gregg.goodland@usda.gov.*

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The purpose of the meeting is to:

1. Review RAC funding, roles, responsibilities, and operating guidelines;
2. Allow public input on project proposals;
3. Allow time for project proposal presentations;
4. Discuss, recommend, and approve new Title II projects; and
5. Discuss possible future meetings and next steps.

The meeting is open to the public. The agenda will include time for people to make oral statements of three minutes or less. Individuals wishing to make an oral statement should request in writing by Wednesday, September 9, 2020, to be scheduled on the agenda. Anyone who would like to bring related matters to the attention of the committee may file written statements with the committee staff before or after the meeting. Written comments and requests for time to make oral comments must be sent to Gregg Goodland, RAC Coordinator, Rio Grande National Forest Headquarters, 1803 West Highway 160, Monte Vista, Colorado 81144; by email to *gregg.goodland@usda.gov,* or via facsimile to 719–852–6250.

Meeting Accommodations: If you are a person requiring reasonable accommodation, please make requests in advance for sign language interpreting, assistive listening devices, or other reasonable accommodation. For access to the facility or proceedings, please contact the person listed in the section titled **FOR FURTHER INFORMATION CONTACT.** All reasonable accommodation requests are managed on a case-by-case basis.

Cikena Reid,

USDA Committee Management Officer.

[FR Doc. 2020–18091 Filed 8–18–20; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF AGRICULTURE

Forest Service

Information Collection; Significant Cave Nomination

AGENCY: Forest Service, USDA.

ACTION: Notice; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Forest Service is seeking comments from all interested individuals and organizations on a new information collection, Significant Cave Nominations under the Federal Cave Resources Protection Act (FCRPA).

DATES: Comments must be received in writing on or before October 19, 2020 to be assured of consideration. Comments received after that date will be considered to the extent practicable.

ADDRESSES: Written comments concerning this notice may be submitted via mail to Minerals and Geology Management, Attn: Significant Cave Nomination, 1400 Independence Avenue, Mail Stop 1126, Washington, DC 20250.

FOR FURTHER INFORMATION CONTACT: Cheryl Nabahe, Minerals and Geology Management, 202–578–2680, by email at *cheryl.nabahe@usda.gov.* Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

Title: Significant Cave Nomination.

OMB Number: 0596-New.

Expiration Date of Approval: Not applicable, new request.

Type of Request: New.

Abstract: The information covered in this request applies to caves on Federal lands administered by the Department of Agriculture, U.S. Forest Service.

The U.S. Forest Service, in accordance with the FCRPA, collects information from appropriate private sector interests, including ''cavers,'' in order to update a list of significant caves that are under the jurisdiction of the agencies listed above. The U.S. Forest Service also processes requests for confidential information regarding significant caves. While the FCRPA does not define what ''significant'' means, it does require the Secretaries of Agriculture and Interior to issue regulations that define criteria for identification of significant caves. The criteria can be found at 36 Code of Federal Regulation 290.3. This information enables the U.S. Forest Service to comply with the FCRPA (16 U.S.C. 4301–4310).

Estimate of Annual Burden per Response: 11 hours.

Type of Respondents: Individuals and Households.

Estimated Annual Number of Respondents: 10.

Estimated Annual Number of Responses per Respondent: One.

Estimated Total Annual Burden on Respondents: 110.

Comment is Invited:

Comment is invited on: (1) Whether this collection of information is necessary for the stated purposes and the proper performance of the functions of the agency, including whether the information will have practical or scientific utility; (2) the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

All comments received in response to this notice, including names and addresses when provided, will be a matter of public record. Comments will be summarized and included in the submission request toward Office of Management and Budget approval.

Jacqueline Emanuel,

Acting Associate Deputy Chief, National Forest System.

[FR Doc. 2020–18174 Filed 8–18–20; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF COMMERCE

Census Bureau

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Generic Clearance for internet Panel Pretesting and Qualitative Survey Methods Testing

The Department of Commerce 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. We invite the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. Public comments were previously requested via the **Federal Register**, on page 34175 of Volume 85, on June 3, 2020, during a 60-day comment period. This notice allows for an additional 30 days for public comments.

Agency: U.S. Census Bureau.

Title: Generic Clearance for internet Panel Pretesting and Qualitative Survey Methods Testing.

OMB Control Number: 0607–0978.

Form Number(s): TBD.

Type of Request: Extension without change of a currently approved collection.

Number of Respondents: 67,600.

Average Hours Per Response: 0.25 hours.

Burden Hours: 16,900.

Needs and Uses: The information collected in this program of developing and testing questionnaires will be used by staff from the Census Bureau and sponsoring agencies to evaluate and improve the quality of the data in the surveys and censuses that are ultimately conducted. Because the questionnaires being tested under this clearance are still in the process of development, the data that result from these collections are not considered official statistics of the Census Bureau or other Federal agencies. Data will be included in research reports prepared for sponsors inside and outside of the Census Bureau. The results may also be prepared for presentations related to survey methodology at professional meetings or publications in professional journals.

Affected Public: Individuals or households.

Frequency: Once.

Respondent's Obligation: Voluntary.

Legal Authority: Data collection for this project is authorized under the authorizing legislation for the questionnaire being tested. This may be Title 13, Sections 131, 141, 161, 181, 182, 193, and 301 for Census Bureau-sponsored surveys, and Title 13 and 15 for surveys sponsored by other Federal agencies. We do not now know what other titles will be referenced, since we do not know what survey questionnaires will be pretested during the course of the clearance.

This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view the Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the collection or the OMB Control Number 0607–0978.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2020–18102 Filed 8–18–20; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–54–2020]

Foreign-Trade Zone (FTZ) 136—Brevard County, Florida; Notification of Proposed Production Activity; Airbus OneWeb Satellites North America LLC (Satellites and Satellite Systems), Merritt Island, Florida

Airbus OneWeb Satellites North America LLC (Airbus OneWeb) submitted a notification of proposed production activity to the FTZ Board for its facility in Merritt Island, Florida. The notification conforming to the requirements of the regulations of the FTZ Board (15 CFR 400.22) was received on August 12, 2020.

Airbus OneWeb already has authority to produce satellites for commercial, private, and military applications within FTZ 136. The current request would add foreign status materials/components to the scope of authority. Pursuant to 15 CFR 400.14(b),

additional FTZ authority would be limited to the specific foreign-status materials/components described in the submitted notification (as described below) and subsequently authorized by the FTZ Board.

Production under FTZ procedures could exempt Airbus OneWeb from customs duty payments on the foreign-status materials/components used in export production. On its domestic sales, for the foreign-status materials/components noted below, Airbus OneWeb would be able to choose the duty rates during customs entry procedures that apply to its already authorized finished products (duty-free). Airbus OneWeb would be able to avoid duty on foreign-status components which become scrap/waste. Customs duties also could possibly be deferred or reduced on foreign-status production equipment.

The materials/components sourced from abroad include: xenon propellant; MAPSIL: Silicone based elastomer adhesive; heat shrink tubing, not rigid, not reinforced or combined with other materials, without fittings—of polyethylene and polyolefin; electrical adhesive tape; multi-layer insulation sheets, all flexible and over 0.152 mm in thickness and not in rolls, used for thermal protection from extreme heat or cold on spacecraft—layers include mylar, kevlar, dacron, and nomex; hot pressed boron nitrate, industrial ceramic disk; stainless steel tubes or pipe fittings—threaded elbows, bends or sleeves; stainless steel tubes or pipe fittings—not threaded or not bent; assorted stainless steel screws of various lengths that are 6mm or more in diameter, hexagonal heads; stainless steel nuts, not lugnuts; iron or steel rivets; and, RIVNUT—aluminum, threaded fasteners, long shape nut with rivet top (duty rate ranges from duty-free to 8.5%). The request indicates that certain materials/components are subject to duties under Section 232 of the Trade Expansion Act of 1962 (Section 232) and Section 301 of the Trade Act of 1974 (Section 301), depending on the country of origin. The applicable Section 232 and Section 301 decisions require subject merchandise to be admitted to FTZs in privileged foreign status (19 CFR 146.41).

Public comment is invited from interested parties. Submissions shall be addressed to the Board's Executive Secretary and sent to: *ftz@trade.gov.* The closing period for their receipt is September 28, 2020.

A copy of the notification will be available for public inspection in the ''Reading Room'' section of the Board's website, which is accessible via *www.trade.gov/ftz.*

For further information, contact Christopher Wedderburn at *Chris.Wedderburn@trade.gov* or (202) 482–1963.

Dated: August 13, 2020.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2020–18165 Filed 8–18–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–580–905]

4th Tier Cigarettes From the Republic of Korea: Postponement of Final Determination of Sales at Less-Than-Fair-Value Investigation

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) is postponing the deadline for issuing the final determination in the less-than-fair-value (LTFV) investigation of 4th tier cigarettes from the Republic of Korea (Korea) until December 4, 2020, and is extending the provisional measures from a four-month period to a period of not more than six months.

DATES: Applicable August 19, 2020.

FOR FURTHER INFORMATION CONTACT: Thomas Martin at (202) 482–3936, AD/CVD Operations, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Background

On January 7, 2020, Commerce initiated an LTFV investigation of imports of 4th tier cigarettes from Korea.[1] The period of investigation is October 1, 2018 through September 30, 2019. On July 22, 2020, Commerce published its *Preliminary Determination* in this LTFV investigation.[2]

Postponement of Final Determination

Section 735(a)(2) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.210(b)(2) provide that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by the exporters or producers who account for a significant proportion of exports of the subject merchandise, or in the event of a negative preliminary determination, a request for such postponement is made by the petitioner. Further, 19 CFR 351.210(e)(2) requires that such postponement requests by exporters be accompanied by a request for extension of provisional measures from a four-month period to a period of not more than six months, in accordance with section 733(d) of the Act.

On July 22, 2020, KT&G Corporation (KT&G), the mandatory respondent in this investigation, requested that Commerce postpone the deadline for the final determination until no later than 135 days from the publication of the *Preliminary Determination;* and on July 28, 2020, KT&G requested that Commerce extend the application of the provisional measures from a four-month period to a period of not more than six months.[3] In accordance with section 735(a)(2)(A) of the Act and 19 CFR 351.210(b)(2)(ii), because: (1) The preliminary determination was affirmative; (2) the request was made by the exporter and producer who accounts for a significant proportion of exports of the subject merchandise; and (3) no compelling reasons for denial exist, Commerce is postponing the final determination until no later than 135 days after the date of the publication of the *Preliminary Determination,* and extending the provisional measures from a four-month period to a period of not more than six months. Accordingly, Commerce will issue its final determination no later than December 4, 2020.

Notice to Interested Parties

This notice is issued and published pursuant to section 735(a)(2) of the Act and 19 CFR 351.210(g).

Dated: August 13, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2020–18155 Filed 8–18–20; 8:45 am]

BILLING CODE 3510–DS–P

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[1] *See 4th Tier Cigarettes from the Republic of Korea: Initiation of Less-Than-Fair-Value Investigation,* 85 FR 2390 (January 15, 2020).

[2] *See 4th Tier Cigarettes from the Republic of Korea: Preliminary Affirmative Determination of Sales at Less Than Fair Value, and Preliminary Negative Determination of Critical Circumstances,* 85 FR 44281 (July 22, 2020) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum.

[3] *See* KT&G's Letter, ''4th Tier Cigarettes from the Republic of Korea: Request for Postponement of Final Determination,'' dated July 22, 2020; and KT&G's Letter, ''4th Tier Cigarettes from the Republic of Korea: Request to Extend Provisional Measures Period,'' dated July 28, 2020.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–301–803]

Citric Acid and Certain Citrate Salts From Colombia: Preliminary Results of Antidumping Duty Administrative Review; 2018–2019

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) preliminarily determines that sales of citric acid and certain citrate salts (citric acid) from Colombia were made by Sucroal S.A. (Sucroal), the sole mandatory respondent, at less than normal value (NV) during the period of review (POR), January 8, 2018 through June 30, 2019. Interested parties are invited to comment on these preliminary results.

DATES: Applicable August 19, 2020.

FOR FURTHER INFORMATION CONTACT: Eric Greynolds, 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) 482–6071.

SUPPLEMENTARY INFORMATION:

Background

On July 25, 2018, Commerce published the *Citric Acid Order* in the **Federal Register**.[1] On September 9, 2019, pursuant to section 751(a)(1) of the Tariff Act of 1930, as amended (the Act), Commerce initiated an administrative review of the *Citric Acid Order* covering Sucroal.[2] On March 16, 2020, we extended the deadline for the preliminary results to July 30, 2020.[3] On April 24, 2020, Commerce tolled all deadlines in administrative reviews by 50 days.[4] On July 21, 2020, Commerce tolled all deadlines in administrative reviews by an additional 60 days.[5] The deadline for the preliminary results of this review is now November 17, 2020.

For a complete description of the events that followed the initiation of this review, *see* the Preliminary Decision Memorandum.[6]

Scope of the *Order*

The merchandise covered by this order includes all grades and granulation sizes of citric acid, sodium citrate, and potassium citrate in their unblended forms, whether dry or in solution, and regardless of packaging type. The scope also includes blends of citric acid, sodium citrate, and potassium citrate; as well as blends with other ingredients, such as sugar, where the unblended form(s) of citric acid, sodium citrate, and potassium citrate constitute 40 percent or more, by weight, of the blend.

Citric acid and sodium citrate are classifiable under 2918.14.0000 and 2918.15.1000 of the Harmonized Tariff Schedule of the United States (HTSUS), respectively. Potassium citrate and crude calcium citrate are classifiable under 2918.15.5000 and, if included in a mixture or blend, 3824.99.9295 of the HTSUS. Blends that include citric acid, sodium citrate, and potassium citrate are classifiable under 3824.99.9295 of the HTSUS. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise is dispositive. For a full description of the scope of the *Order, see* the Preliminary Decision Memorandum.

Methodology

Commerce is conducting this review in accordance with section 751(a)(1)(B) of the Act. Export prices were calculated in accordance with section 772(a) 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. 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). A complete version of the Preliminary Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn/index.html.* The signed Preliminary Decision Memorandum and the electronic version of the Preliminary Decision Memorandum are identical in content. A list of topics discussed in the Preliminary Decision Memorandum is attached as an Appendix to this notice.

Preliminary Results of the Review

As a result of this review, we preliminarily determine the following weighted-average dumping margin exists for the POR:

Exporter/producer	Estimated weighted-average dumping margin (percent)
Sucroal S.A.	4.59

Assessment Rate

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. If the weighted-average dumping margin for Sucroal is not zero or *de minimis* (*i.e.,* less than 0.5 percent), we will calculate importer-specific *ad valorem* antidumping duty assessment rates based on the ratio of the total amount of dumping calculated for the importer's examined sales to the total entered value of those same sales in accordance with 19 CFR 351.212(b)(1).[7] We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review when the importer-specific assessment rate calculated in the final results of this review is above *de minimis.* Where either the respondent's weighted-average dumping margin is zero or *de minimis,* or an importer-specific assessment 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, where applicable.

In accordance with Commerce's ''automatic assessment'' practice, for entries of subject merchandise during the POR produced by each respondent which did not know that its merchandise was destined for the United States, we will instruct CBP to liquidate entries not reviewed at the all-others rate of 28.48 percent if there is no

[1] *See Citric Acid and Certain Citrate Salts from Belgium, Colombia and Thailand: Antidumping Duty Orders,* 83 FR 35214 (July 25, 2018) (*Citric Acid Order*).

[2] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 84 FR 47248 (September 9, 2019).

[3] *See* Memorandum, ''Citric Acid from Colombia: Extension of Time Limit for Preliminary Results of Antidumping Duty Administrative Review; 2018/2019,'' dated March 16, 2020.

[4] *See* Memorandum, ''Tolling of Deadlines for Antidumping and Countervailing Duty Administrative Reviews in Response to Operational Adjustments Due to COVID–19,'' dated April 24, 2020.

[5] *See* Memorandum, ''Tolling of Deadlines for Antidumping and Countervailing Duty Administrative Reviews,'' dated July 21, 2020.

[6] *See* Memorandum, ''Decision Memorandum for the Preliminary Results of Antidumping Duty Administrative Review: Citric Acid and Certain Salts, 2018–2019,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[7] In these preliminary results, Commerce applied the assessment rate calculation method adopted in *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings; Final Modification,* 77 FR 8101 (February 14, 2012).

rate for the intermediate company(ies) involved in the transaction. We intend to issue instructions to CBP 15 days after publication of the final results of this review.[8]

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the notice of final results of administrative review for all shipments of citric acid from Colombia entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results, as provided by section 751(a)(2) of the Act: (1) The cash deposit rate for Sucroal will be equal to the dumping margin established in the final results of this review, except if the ultimate rate is *de minimis* within the meaning of 19 CFR 351.106(c)(1), in which case the cash deposit rates will be zero; (2) for merchandise exported by producers or exporters not covered in this administrative review but covered in a prior segment of the proceeding, 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 producer or exporter participated; (3) if the exporter is not a firm covered in this review, a prior review, or the original less-than-fair-value investigation but the producer is, then the cash deposit rate will be the rate established for the most recently completed segment of the proceeding for the producer of the merchandise; and (4) the cash deposit rate for all other producers or exporters will continue to be 28.48 percent, the all-others rate established in the antidumping duty investigation.[9] These cash deposit requirements, when imposed, shall remain in effect until further notice.

Disclosure and Public Comment

Commerce intends to disclose to the parties to the proceeding the calculations performed in connection with these preliminary results to interested parties within five days of publication of this notice.[10]

Interested parties may submit case briefs to Commerce in response to these preliminary results no later than 30 days after the publication of this notice.[11] Rebuttal briefs, limited to issues raised in the case briefs, may be filed no later than seven days after the date for filing case briefs.[12] 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.[13] Case and rebuttal briefs should be filed using ACCESS.[14] Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[15]

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 request for a hearing must be received successfully in its entirety by ACCESS by 5 p.m. Eastern Time within 30 days after the date of publication of this notice.[16] Hearing requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. Issues raised in the hearing will be limited to issues raised in the briefs. If a request for a hearing is made, Commerce intends to hold the hearing at a date and time to be determined.[17]

Commerce intends to issue the final results of this administrative review, including the results of our analysis of the issues raised in any written briefs, not later than 120 days after the date of publication of these preliminary results in the **Federal Register**, unless otherwise extended.[18]

Notification to Importers

This notice also 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 review period. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

Notification to Interested Parties

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.213(h)(1).

Dated: August 10, 2020.

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. Discussion of the Methodology
V. Recommendation

[FR Doc. 2020–18154 Filed 8–18–20; 8:45 am]

BILLING CODE 3510–DS–P

[8] *See* 19 CFR 356.8(a).

[9] *See Citric Acid Order.*

[10] *See* 19 CFR 351.224(b).

[11] *See* 19 CFR 351.309(c)(1)(ii).

[12] *See* 19 CFR 351.309(d)(1) and (2); *see also Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19,* 85 FR 17006 (March 26, 2020); and *Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020).

[13] *See* 19 CFR 351.309(c)(2) and (d)(2) and 19 CFR 351.303 (for general filing requirements).

[14] *See generally* 19 CFR 351.303.

[15] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020).

[16] *See* 19 CFR 351.310(c); *see also* 19 CFR 351.303(b)(1).

[17] *See* 19 CFR 351.310(c).

[18] *See* section 751(a)(3)(A) of the Act.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–489–501]

Welded Carbon Steel Standard Pipe and Tube Products From Turkey: Notice of Court Decision Not in Harmony With Amended Final Results of Review; Amended Final Results of Administrative Review of the Antidumping Duty Order on Welded Carbon Steel Standard Pipe and Tube Products From the Republic of Turkey, 2014–2015

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: On July 28, 2020, the U.S. Court of International Trade (CIT) sustained the Department of Commerce (Commerce)'s third remand redetermination pertaining to the administrative review of welded carbon steel standard pipe and tube products (welded pipe and tube) from the Republic of Turkey (Turkey) covering the period of review (POR) May 1, 2014 through April 30, 2015. Commerce is notifying the public that the CIT's final judgment is not in harmony with the amended final results of the administrative review, and that Commerce is amending the weighted-average dumping margin for Toscelik Profil ve Sac Endustrisi A.S. (Toscelik).

DATES: Applicable August 7, 2020.

FOR FURTHER INFORMATION CONTACT: Michael J. Heaney, AD/CVD Operations, Office VI, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4475.

SUPPLEMENTARY INFORMATION:

Background

On December 20, 2016, Commerce published the *Final Results* in the 2014–2015 administrative review of welded pipe and tube from Turkey, in which Commerce calculated a weighted-average dumping margin of 1.91 percent.[1] After correcting ministerial errors contained in the *Final Results,* on February 17, 2017, Commerce published the *Amended Final Results,* and calculated a revised weighted-average dumping margin of 3.40 percent for Toscelik.[2]

Toscelik and the JMC Steel Group (a domestic interested party) appealed Commerce's *Final Results,* as amended by the *Amended Final Results,* to the CIT. On June 6, 2018, the CIT issued its *First Remand Order,* directing Commerce to: (1) Reconsider the calculation of Toscelik's duty drawback adjustment; and (2) provide further explanation for granting Toscelik a circumstance-of-sale adjustment for warehousing expenses.[3] On October 4, 2018, Commerce submitted its final results of redetermination, recalculating Toscelik's duty drawback adjustment, under respectful protest,[4] and providing further explanation for granting a circumstance-of-sale adjustment for warehousing expenses.[5]

On April 1, 2019, the CIT issued its *Second Remand Order,* sustaining Commerce's explanation of Toscelik's circumstance-of-sale for adjustment for warehousing expenses, but remanding Commerce's modified calculation of Toscelik's duty drawback adjustment.[6] In particular, the CIT found that Commerce's additional circumstance-of-sale adjustment to correct a perceived imbalance in Toscelik's dumping margin calculation ''negates the statutory duty drawback adjustment that Toscelik earned by exporting its finished product to the United States and impinges on the agency's ability to make a fair comparison.''[7] On May 30, 2019, Commerce submitted its second final results of redetermination, recalculating Toscelik's duty drawback adjustment, including a circumstance-of-sale adjustment to account for the imbalance between the amount of import duties included in U.S. price as a result of the duty drawback adjustment and the amount of import duties reflected in normal value.[8]

On December 18, 2019, in its *Third Remand Order,* the CIT ordered Commerce to recalculate normal value without making a circumstance-of-sale adjustment related to the duty drawback adjustment made to U.S. price.[9] On March 13, 2020, in the third results of redetermination, Commerce granted Toscelik a duty drawback adjustment, without making a circumstance-of-sale adjustment to account for the imbalance between the U.S. duty drawback adjustment and the amount of import duties reflected in normal value.[10] Additionally, Commerce added an imputed cost for import duties to the cost of production.[11] This amount is based on Toscelik's cost of manufacturing during the POR for pipe and tube and was calculated as the ratio of the total amount of Toscelik's exempted import duties and its cost of manufacturing during the POR. On July 28, 2020, the CIT sustained Commerce's third results of redetermination, and entered final judgment.[12]

Timken Notice

In its decision in *Timken,*[13] as clarified by *Diamond Sawblades,*[14] the Court of Appeals for the Federal Circuit held that, pursuant to section 516A of the Tariff Act of 1930, as amended (the Act), Commerce must publish a notice of court decision that is not ''in harmony'' with a Commerce determination and must suspend liquidation of entries pending a ''conclusive'' court decision. The CIT's July 28, 2020, final judgment constitutes a final decision of the CIT that is not in harmony with Commerce's *Amended Final Results.*[15] Thus, this notice is published in fulfillment of the publication requirements of *Timken* and section 516A of the Act.

Amended Final Results of Review

Because there is now a final court judgment, Commerce is amending its *Amended Final Results* with respect to Toscelik as follows:

Exporter or producer	Weighted-average dumping margin (percent)
Toscelik Profil ve Sac Endustrisi A.S.	0.00

Cash Deposit Requirements

Because Toscelik has a superseding cash deposit rate, *i.e.,* there have been final results published in a subsequent administrative review for Toscelik, this notice will not affect the current cash deposit rate for Toscelik.

Liquidation of Suspended Entries

If the CIT's final judgment is not appealed, or if appealed and upheld, because Toscelik's amended weighted-average dumping margin is zero percent, Commerce will instruct CBP to terminate the suspension of liquidation, and to liquidate and to assess duties at a rate of zero for entries during the POR that were produced and exported by Toscelik.

Consistent with Commerce's assessment practice, for entries of subject merchandise during the POR produced by Toscelik for which Toscelik did not know that the merchandise was destined for the United States, we will instruct CBP to liquidate unreviewed entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.[16]

Lastly, at this time, Commerce remains enjoined by Court order from liquidating entries that: (1) Were the subject of the administrative determination published in the *Final Results,* as amended by the *Amended Final Results;*[17] (2) were produced and/

[1] *See Welded Carbon Steel Standard Pipe and Tube Products from Turkey: Final Results of Antidumping Administrative Review; 2014–2015,* 81 FR 92785 (December 20, 2016) (*Final Results*), and accompanying Issues and Decision Memorandum.

[2] *See Welded Carbon Steel Standard Pipe and Tube Products from Turkey: Amended Final Results of Antidumping Duty Administrative Review; 2014–2015,* 82 FR 11002 (February 17, 2017) (*Amended Final Results*).

[3] *See Toscelik Profil ve Sac Endustrisi A.S.* v. *United States,* 321 F. Supp. 3d 1270 (CIT 2018) (*First Remand Order*) at 17–18.

[4] *See Viraj Group, Ltd.* v. *United States,* 343 F.3d 1371 (Fed. Cir. 2003).

[5] *See* Final Results of Redetermination Pursuant to Court Remand, *Toscelik Profil ve Sac Endustrisi A.S.* v. *United States,* Court No. 17–00018, Slip Op. 18–66 (CIT June 6, 2018).

[6] *See Toscelik Profil ve Sac Endustrisi A.S.* v. *United States,* 375 F. Supp. 3d 1312 (CIT 2019) (*Second Remand Order*).

[7] *See Second Remand Order,* 375 F. Supp. 3d at 1316.

[8] *See* Final Results of Redetermination Pursuant to Court Remand, *Toscelik Profil ve Sac Endustrisi A.S.* v. *United States,* Court No. 17–00018, Slip Op. 19–41 (CIT April 1, 2019) (Second Redetermination).

[9] *See Toscelik Profil ve Sac Endustrisi A.S.* v. *United States,* 415 F. Supp. 3d 1395 (CIT 2019) (*Third Remand Order*).

[10] *See* Final Results of Redetermination Pursuant to Court Remand, *Toscelik Profil ve Sac Endustrisi A.S.* v. *United States,* Court No. 17–00018, Slip Op. 19–166 (CIT December 18, 2019) (Third Redetermination).

[11] *Id.*

[12] *See Toscelik Profil ve Sac Endustrisi A.S.* v. *United States,* Court No., 17–00018, Slip Op. 20–105 (CIT July 28, 2020) (CIT Final Judgment).

[13] *See Timken Co.* v. *United States,* 893 F.2d 337 (Fed. Cir. 1990) (*Timken*).

[14] *See Diamond Sawblades Manufacturers Coalition* v. *United States,* 626 F.3d 1374 (Fed. Cir. 2010) (*Diamond Sawblades*).

[15] *See* CIT Final Judgment.

[16] For a full discussion of this practice, *see Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

[17] *See Final Results,* 81 FR at 92785; *see also Amended Final Results,* 82 FR at 11002.

or exported by any of the following: Toscelik Profil ve Sac Endustrisi A.S.; Tosyali Dis Ticaret A.S.; Tubeco Pipe and Steel Corporation; and Toscelik Metal Ticaret A.S.; (3) were entered, or were withdrawn from warehouse, for consumption on or after May 1, 2014 through and including April 30, 2015; and (4) remain unliquidated as of 5:00 p.m. Eastern Time on February 17, 2017.

Notification to Interested Parties

This notice is issued and published in accordance with sections 516A(c)(1) and (e), 751(a) and 777(i) of the Act.

Dated: August 13, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2020–18156 Filed 8–18–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–119]

Certain Vertical Shaft Engines Between 225cc and 999cc, and Parts Thereof, From the People's Republic of China: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Preliminary Affirmative Determination of Critical Circumstances, Postponement of Final Determination, and Extension of Provisional Measures

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) preliminarily determines that certain vertical shaft engines between 225cc and 999cc, and parts thereof (vertical shaft engines) from the People's Republic of China (China) are being, or are likely to be, sold in the United States at less than fair value (LTFV). The period of investigation is July 1, 2019 through December 31, 2019. Interested parties are invited to comment on this preliminary determination.

DATES: Applicable August 19, 2020.

FOR FURTHER INFORMATION CONTACT: Leo Ayala or Alex Cipolla, AD/CVD Operations, Office VII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–3945 or (202) 482–4956, respectively.

SUPPLEMENTARY INFORMATION:

Background

This preliminary determination is made in accordance with section 733(b) of the Tariff Act of 1930, as amended (the Act). Commerce published the notice of initiation of this investigation on February 18, 2020.[1] On June 2, 2020, Commerce postponed the preliminary determination of this investigation, and the revised deadline is now August 12, 2020.[2] For a complete description of the events that followed the initiation of this investigation, *see* the Preliminary Decision Memorandum.[3] A list of topics included in the Preliminary Decision Memorandum is included as Appendix II to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn/.* The signed and the electronic versions of the Preliminary Decision Memorandum are identical in content.

Scope of the Investigation

The products covered by this investigation are vertical shaft engines from China. For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

In accordance with the preamble to Commerce's regulations,[4] the *Initiation Notice* set aside a period of time for parties to raise issues regarding product coverage (scope).[5] Certain interested parties commented on the scope of the investigation as it appeared in the *Initiation Notice.* For a summary of the product coverage comments and rebuttal responses submitted to the record for this investigation, and accompanying discussion and analysis of all comments timely received, *see* the Preliminary Scope Decision Memorandum.[6] Commerce is not preliminarily modifying the scope language as it appeared in the *Initiation Notice.*

Methodology

Commerce is conducting this investigation in accordance with section 731 of the Act. Commerce has calculated export prices in accordance with section 772(a) of the Act. In addition, Commerce has calculated constructed export prices in accordance with section 772(b) of the Act. Because China is a non-market economy, within the meaning of section 771(18) of the Act, Commerce has calculated normal value in accordance with section 773(c) of the Act. Furthermore, pursuant to section 776(a) and (b) of the Act, Commerce has preliminarily relied upon facts otherwise available, with adverse inferences, with respect to the China-wide entity. For a full description of the methodology underlying Commerce's preliminary determination, *see* the Preliminary Decision Memorandum.

Preliminary Affirmative Determination of Critical Circumstances

In accordance with section 733(e) of the Act and 19 CFR 351.206, Commerce preliminarily determines that critical circumstances exist with respect to imports of vertical shaft engines from China for: Loncin Motor Co., Ltd. (Loncin); Chongqing Zongshen General Power Machine Co., Ltd. (Zongshen); the separate rate companies, and the China-wide entity. For a full description of the methodology and results of Commerce's critical circumstances analysis, *see* the Preliminary Decision Memorandum.

Combination Rates

In the *Initiation Notice,*[7] Commerce stated that it would calculate producer/exporter combination rates for the respondents that are eligible for a separate rate in this investigation. Policy Bulletin 05.1 describes this practice.[8]

[1] *See Certain Vertical Shaft Engines Between 223cc and 999cc, and Parts Thereof from the People's Republic of China: Initiation of Antidumping Duty Investigation,* 85 FR 8809 (February 18, 2020) (*Initiation Notice*), and accompanying AD Initiation Checklist.

[2] *See Certain Vertical Shaft Engines Between 225cc and 999cc, and Parts Thereof from the People's Republic of China: Postponement of Preliminary Determination in the Antidumping Duty Investigation,* 85 FR 33622 (June 2, 2020).

[3] *See* Memorandum, ''Certain Vertical Shaft Engines Between 225cc and 999cc, and Parts Thereof from the People's Republic of China: Decision Memorandum for the Preliminary Affirmative Determination of Sales at Less Than Fair Value and Preliminary Affirmative Critical Circumstances Determination,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[4] *See Antidumping Duties; Countervailing Duties, Final Rule,* 62 FR 27296, 27323 (May 19, 1997).

[5] *See Initiation Notice.*

[6] *See* Memorandum, ''Certain Vertical Shaft Engines Between 223cc and 999cc, and Parts Thereof from the People's Republic of China: Scope Comments Decision Memorandum for the Preliminary Determination'' dated June 4, 2020 (Preliminary Scope Decision Memorandum).

[7] *See Initiation Notice,* 85 FR at 8813.

[8] *See* Enforcement and Compliance's Policy Bulletin No. 05.1, regarding, ''Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations involving Non-Market

Continued

Preliminary Determination

Commerce preliminarily determines that the following estimated weighted-average dumping margins exist:

Producer	Exporter	Estimated weighted-average dumping margin (percent)	Cash deposit rate (adjusted for export subsidy offset) (percent)
Loncin Motor Co., Ltd	Loncin Motor Co., Ltd	219.07	206.82
Chongqing Zongshen General Power Machine Co., Ltd.	Chongqing Zongshen General Power Machine Co., Ltd.	401.14	380.46
Chongqing Rato Technology Co., Ltd	Chongqing Rato Technology Co., Ltd	326.17	308.64
Jialing-Honda Motors Co., Ltd	Jialing-Honda Motors Co., Ltd	326.17	308.64
Yamaha Motor Powered Products Jiangsu Co., Ltd	Yamaha Motor Powered Products Jiangsu Co., Ltd	326.17	308.64
China-Wide Entity		543.18	530.93

Suspension of Liquidation

In accordance with section 733(d)(2) of the Act, Commerce will direct U.S. Customs and Border Protection (CBP) to suspend liquidation of subject merchandise as described in the scope of the investigation section entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**, as discussed below. Further, pursuant to section 733(d)(1)(B) of the Act and 19 CFR 351.205(d), Commerce will instruct CBP to require a cash deposit equal to the weighted average amount by which normal value exceeds U.S. price, as indicated in the chart above as follows: (1) For the producer/exporter combinations listed in the table above, the cash deposit rate is equal to the estimated weighted-average dumping margin listed for that combination in the table; (2) for all combinations of Chinese producers/exporters of merchandise under consideration that have not established eligibility for their own separate rates, the cash deposit rate will be equal to the estimated weighted-average dumping margin established for the China-wide entity; and (3) for all third-county exporters of merchandise under consideration not listed in the table above, the cash deposit rate is the cash deposit rate applicable to the Chinese producer/exporter combination (or China-wide entity) that supplied that third-country exporter.

Section 733(e)(2) of the Act provides that, given an affirmative determination of critical circumstances, any suspension of liquidation shall apply to unliquidated entries of merchandise entered, or withdrawn from warehouse, for consumption on or after the later of: (a) The date which is 90 days before the date on which the suspension of liquidation was first ordered; or (b) the date on which notice of initiation of the investigation was published. Commerce preliminarily finds that critical circumstances exist for Loncin, Zongshen, all separate rate companies, and the China-wide entity. In accordance with section 733(e)(2)(A) of the Act, the suspension of liquidation shall apply to all unliquidated entries of merchandise from Loncin, Zongshen, all separate rate companies, and the China-wide entity that were entered, or withdrawn from warehouse, for consumption on or after the date which is 90 days before the publication of this notice.

To determine the cash deposit rate, Commerce normally adjusts the estimated weighted-average dumping margin by the amount of domestic subsidy pass-through and export subsidies determined in a companion CVD proceeding when CVD provisional measures are in effect. As explained in the Preliminary Decision Memorandum, Commerce has made a preliminary affirmative determination not to grant a domestic subsidy pass-through. However, we have granted export subsidy offsets. Specifically, Commerce has offset the calculated estimated weighted-average dumping margin by the appropriate export subsidy rate(s). Any such, adjusted rates may be found in the Preliminary Determination section's chart of estimated weighted-average dumping margins above.

Should provisional measures in the companion CVD investigation expire prior to the expiration of provisional measures in this LTFV investigation, Commerce will direct CBP to begin collecting cash deposits at a rate equal to the estimated weighted-average dumping margins calculated in this preliminary determination unadjusted for the export subsidies at the time the CVD provisional measures expire.

These suspension of liquidation instructions will remain in effect until further notice.

Disclosure

Commerce intends to disclose to interested parties the calculations performed in connection with this preliminary determination within five days of its public announcement or, if there is no public announcement, within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

Verification

As provided in section 782(i)(1) of the Act, Commerce intends to verify the information relied upon in making its final determination.

Public Comment

Case briefs or other written comments for all non-scope issues may be submitted to Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS) no later than seven days after the date on which the final verification report is issued in this proceeding, and rebuttal briefs, limited to issues raised in case briefs, may be submitted no later than seven days after the deadline date for case briefs.[9] Case briefs or other written comments on scope issues may be submitted no later than 30 days after the publication of this preliminary determination in the **Federal Register**, and rebuttal briefs, limited to issues raised in the case briefs, may be

Economy Countries,'' (April 5, 2005) (Policy Bulletin 05.1), available on Commerce's website at *http://enforcement.trade.gov/policy/bull05-1.pdf.*

[9] *See* 19 CFR 351.309(c)–(d); *see also* 19 CFR 351.303 (for general filing requirements).

submitted no later than seven days after the deadline for the case briefs. For any briefs filed on scope issues, parties must file separate and identical documents on the record for the concurrent CVD investigations. 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.[10] This summary should be limited to five pages total, including footnotes.

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, limited to issues raised in the case and rebuttal briefs, must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, within 30 days after the date of publication of this notice. Requests should contain the party's name, address, and telephone number, the number of participants, whether any participant is a foreign national, and a list of the issues to be discussed. If a request for a hearing is made, Commerce intends to hold the hearing at a time and date to be determined. Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date.

Parties must file their case and rebuttal briefs, and any requests for a hearing, electronically using Commerce's electronic records system, ACCESS.[11] Electronically filed documents must be received successfully in their entirety by 5:00 p.m. Eastern Time,[12] on the due dates established above. Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[13]

Postponement of Final Determination and Extension of Provisional Measures

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise, or in the event of a negative preliminary determination, a request for such postponement is made by the petitioners. Pursuant to 19 CFR 351.210(e)(2), Commerce requires that requests by respondents for postponement of a final antidumping determination be accompanied by a request for extension of provisional measures from a four-month period to a period not more than six months in duration.

Pursuant to 19 CFR 351.210(e), Loncin requested that Commerce postpone the final determination and extend provisional measures to a period not more than six months in duration.[14] In accordance with section 735(a)(2)(A) of the Act and 19 CFR 351.210(b)(2)(ii), because: (1) The preliminary determination is affirmative; (2) the requesting exporter accounts for a significant proportion of exports of the subject merchandise; and (3) no compelling reasons for denial exist, Commerce is postponing the final determination and extending the provisional measures from a four-month period to a period not greater than six months. Accordingly, Commerce's final determination will be issued no later than 135 days after the date of publication of this preliminary determination.

International Trade Commission Notification

In accordance with section 733(f) of the Act, Commerce will notify the International Trade Commission (ITC) of its preliminary determination of sales at LTFV. If the final determination is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after the final determination whether imports of the subject merchandise are materially injuring, or threaten material injury to, the U.S. industry.

Notification to Interested Parties

This determination is issued and published in accordance with sections 733(f) and 777(i)(1) of the Act and 19 CFR 351.205(c).

Dated: August 12, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix I

Scope of the Investigation

The merchandise covered by this investigation consists of spark-ignited, non-road, vertical shaft engines, whether finished or unfinished, whether assembled or unassembled, primarily for riding lawn mowers and zero-tum radius lawn mowers. Engines meeting this physical description may also be for other non-hand-held outdoor power equipment such as, including but not limited to, tow-behind brush mowers, grinders, and vertical shaft generators. The subject engines are spark ignition, single or multiple cylinder, air cooled, internal combustion engines with vertical power take off shafts with a minimum displacement of 225 cubic centimeters (cc) and a maximum displacement of 999cc. Typically, engines with displacements of this size generate gross power of between 6.7 kilowatts (kw) to 42 kw.

Engines covered by this scope normally must comply with and be certified under Environmental Protection Agency (EPA) air pollution controls title 40, chapter I, subchapter U, part 1054 of the Code of Federal Regulations standards for small non-road spark-ignition engines and equipment. Engines that otherwise meet the physical description of the scope but are not certified under 40 CFR part 1054 and are not certified under other parts of subchapter U of the EPA air pollution controls are not excluded from the scope of this proceeding. Engines that may be certified under both 40 CFR part 1054 as well as other parts of subchapter U remain subject to the scope of this proceeding.

For purposes of this investigation, an unfinished engine covers at a minimum a sub-assembly comprised of, but not limited to, the following components: Crankcase, crankshaft, camshaft, piston(s), and connecting rod(s). Importation of these components together, whether assembled or unassembled, and whether or not accompanied by additional components such as an oil pan, manifold, cylinder head(s), valve train, or valve cover(s), constitutes an unfinished engine for purposes of this investigation. The inclusion of other products such as spark plugs fitted into the cylinder head or electrical devices (*e.g.,* ignition modules, ignition coils) for synchronizing with the motor to supply tension current does not remove the product from the scope. The inclusion of any other components not identified as comprising the unfinished engine subassembly in a third country does not remove the engine from the scope.

The engines subject to this investigation are typically classified in the Harmonized Tariff Schedule of the United States (HTSUS) at subheadings: 8407.90.1020, 8407.90.1060, and 8407.90.1080. The engine subassemblies that are subject to this investigation enter under HTSUS 8409.91.9990. Engines subject to this investigation may also enter under HTSUS 8407.90.9060 and 8407.90.9080. The HTSUS subheadings are provided for convenience and customs purposes only, and the written description of the merchandise under investigation is dispositive.

Appendix II

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
A. Initiation and Case History

[10] *See* 19 CFR 351.309(c)(2) and (d)(2).

[11] *See* 19 CFR 351.303(b)(2)(i).

[12] *See* 19 CFR 351.303(b)(1).

[13] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020).

[14] *See* Loncin's Letter, ''Loncin Request for Postponement of Final Determination and Extension of Provisional Measures Period: Antidumping Duty Investigation on Certain Vertical Shaft Engines from the People's Republic of China (A–570–119),'' dated August 10, 2020.

B. Postponement of Preliminary Determination
III. Period of Investigation
IV. Scope Comments
V. Scope of the Investigation
VI. Discussion of the Methodology
A. Non-Market Economy
B. Surrogate Country
C. Separate Rates
D. Separate Rate Recipients
E. Companies Not Receiving Separate Rates
F. Margin for the Separate Rate Companies
G. Combination Rates
H. The China-wide Entity
I. Date of Sale
J. Fair Value Comparisons
K. U.S. Prices
L. Value Added Tax (VAT)
M. Normal Value
VII. Currency Conversion
VIII. Adjustments Adjustments Under Section 777A(f) of the Act
IX. Adjustments to Cash Deposit Rates for Export Subsidies
X. Preliminary Affirmative Determination of Critical Circumstances
XI. ITC Notification
XII. Recommendation

[FR Doc. 2020–18157 Filed 8–18–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–028]

Anti-Circumvention Inquiry of Antidumping Duty Order on Hydrofluorocarbon Blends From the People's Republic of China—HFC Components: Final Determination Not To Include Within the Scope of the Order

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) determines not to include hydrofluorocarbon (HFC) components R–32 (difluoromethane), R–125 (pentafluoroethane), and R–143a (1,1,1,-trifluoroethane), imported into the United States from the People's Republic of China (China), within the scope of the antidumping duty (AD) order on HFC blends from the China.

DATES: Applicable August 19, 2020.

FOR FURTHER INFORMATION CONTACT: Benjamin Luberda or Melissa Kinter, AD/CVD Operations, Office II, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–2185 or (202) 482–1413, respectively.

SUPPLEMENTARY INFORMATION:

Background

On April 10, 2020, Commerce published the *Preliminary Determination* [1] of circumvention of the antidumping duty order on HFC blends from China with respect to HFC components R–32, R–125, and R–143a that are imported from China and further processed into HFC blends subject to the *Order.*[2] A summary of the events that occurred since Commerce published the *Preliminary Determination* are discussed in the Issues and Decision Memorandum.[3] The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *http://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn/.* The signed and electronic versions of the Issues and Decision Memorandum are identical in content.

Scope of the Order

The products subject to the *Order* are HFC blends. HFC blends covered by the scope are R–404A, a zeotropic mixture consisting of 52 percent 1,1,1 Trifluoroethane, 44 percent Pentafluoroethane, and 4 percent 1,1,1,2-Tetrafluoroethane; R–407A, a zeotropic mixture of 20 percent Difluoromethane, 40 percent Pentafluoroethane, and 40 percent 1,1,1,2-Tetrafluoroethane; R–407C, a zeotropic mixture of 23 percent Difluoromethane, 25 percent Pentafluoroethane, and 52 percent 1,1,1,2-Tetrafluoroethane; R–410A, a zeotropic mixture of 50 percent Difluoromethane and 50 percent Pentafluoroethane; and R–507A, an azeotropic mixture of 50 percent Pentafluoroethane and 50 percent 1,1,1-Trifluoroethane also known as R–507. The foregoing percentages are nominal percentages by weight. Actual percentages of single component refrigerants by weight may vary by plus or minus two percent points from the nominal percentage identified above.[4]

Any blend that includes an HFC component other than R–32, R–125, R–143a, or R–134a is excluded from the scope of the *Order.*

Excluded from the *Order* are blends of refrigerant chemicals that include products other than HFCs, such as blends including chlorofluorocarbons (CFCs), hydrochlorofluorocarbons (HCFCs), hydrocarbons (HCs), or hydrofluoroolefins (HFOs).

Also excluded from the *Order* are patented HFC blends, including, but not limited to, ISCEON® blends, including MO99™ (R–438A), MO79 (R–422A), MO59 (R–417A), MO49Plus™ (R–437A) and MO29™ (R–4 22D), Genetron® Performax™ LT (R–407F), Choice® R–421A, and Choice® R–421B.

HFC blends covered by the scope of the *Order* are currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) at subheadings 3824.78.0020 and 3824.78.0050. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope is dispositive.[5]

Merchandise Subject to the Anti-Circumvention Inquiry

The anti-circumvention inquiry covers imports of HFC components R–32 (difluoromethane), R–125 (pentafluoroethane), and R–143a (1,1,1-trifluoroethane) from China that are further processed in the United States to create an HFC blend that would be subject to the *Order.*[6]

Final Determination

In the *Preliminary Determination,* we determined that imports of HFC components R–32, R–125, and R–143a

[1] *See Hydrofluorocarbon Blends from the People's Republic of China: Affirmative Preliminary Determination of Circumvention of the Antidumping Duty Order for HFC Components; and Extension of the Time Limit for Final Determination,* 85 FR 20248 (April 10, 2020) (*Preliminary Determination*).

[2] *See Hydrofluorocarbon Blends from the People's Republic of China: Antidumping Duty Order,* 81 FR 55436 (August 19, 2016) (*Order*).

[3] *See* Memorandum, ''Final Issues and Decision Memorandum for Anti-Circumvention Inquiry of the Antidumping Duty Order on Hydrofluorocarbon Blends from the People's Republic of China: HFC Components,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[4] R–404A is sold under various trade names, including Forane® 404A, Genetron® 404A, Solkane® 404A, Klea® 404A, and Suva®404A. R–407A is sold under various trade names, including Forane® 407A, Solkane® 407A, Klea®407A, and Suva®407A. R–407C is sold under various trade names, including Forane® 407C, Genetron® 407C, Solkane® 407C, Klea® 407C and Suva® 407C. R–410A is sold under various trade names, including EcoFluor R410, Forane® 410A, Genetron® R410A and AZ–20, Solkane® 410A, Klea® 410A, Suva® 410A, and Puron®. R–507A is sold under various trade names, including Forane® 507, Solkane® 507, Klea®507, Genetron®AZ–50, and Suva®507. R–32 is sold under various trade names, including Solkane®32, Forane®32, and Klea®32. R–125 is sold under various trade names, including Solkane®125, Klea®125, Genetron®125, and Forane®125. R–143a is sold under various trade names, including Solkane®143a, Genetron®143a, and Forane®125.

[5] *See Order.*

[6] As detailed in the ''Scope of the *Order*'' section of this notice, the *Order* covers five HFC blends (*i.e.,* R–404A, R–407A, R–407C, R–410A, and R–507/R–507A).

from China were circumventing the *Order.* Specifically, we determined that imports of HFC components R–32, R–125, and R–143a from China are being finished and sold in the United States pursuant to the statutory and regulatory criteria laid out in section 781(a) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.225(g). We based our *Preliminary Determination* upon record evidence submitted by the petitioners,[7] Arkema,[8] BMP,[9] National Refrigerants, Inc., T.T. International Co., Ltd., Zhejiang Quzhou Juxin Fluorine Chemical Co., Ltd., Zhejiang Sanmei Chemical Ind. Co., Ltd., and other interested parties. For a complete discussion of the evidence which led to our preliminary determination, *see* the *Preliminary Determination.*

Subsequently, on July 6, 2020, the United States International Trade Commission (ITC), pursuant to section 781(e)(3) of the Act, informed Commerce that it believed that an affirmative final determination by Commerce on HFC components from China would raise a significant injury issue.[10] Specifically, the ITC stated in its written advice:

> {T}he {ITC} believes a final determination by Commerce that HFC components from China are covered by the scope of the HFC blends from China antidumping duty order under the anti-circumvention provisions of the statute would be inconsistent with the {ITC}'s final determination in its original HFCs investigation that the domestic HFC component industry in the United States was not materially injured or threatened with material injury by imports of those same components from China.[11]

Based on the ITC's advice, we determine that the merchandise subject to this anti-circumvention inquiry should not be included within the scope of the *Order.* Thus, for the final determination, we have determined not to include HFC components R–32 (difluoromethane), R–125 (pentafluoroethane), and R–143a (1,1,1-trifluoroethane) from China that are further processed in the United States to produce subject HFC blends to be within the scope of the *Order.*

Discontinuation of Suspension of Liquidation

As a result of this determination, and consistent with 19 CFR 351.225(l)(3), we intend to direct U.S. Customs and Border Protection to discontinue suspension of liquidation and to refund all cash deposits of estimated antidumping duties for unliquidated entries of merchandise subject to this inquiry that are entered, or withdrawn from warehouse, for consumption on or after June 18, 2019, the date of initiation of this anti-circumvention inquiry.[12]

Notification Regarding Administrative Protective Order

This notice also serves as a reminder to parties subject to the administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

Notification to Interested Parties

We are issuing and publishing this notice in accordance with sections 781(a) of the Act and 19 CFR 351.225(f)(4)–(5).

Dated: August 13, 2020.

Joseph A. Laroski Jr.,

Deputy Assistant Secretary for Policy and Negotiations.

Appendix

List of Topics Discussed in the Issues and Decision Memorandum

I. Summary
II. Background
III. Merchandise Subject to the Anti-Circumvention Inquiry
IV. Scope of the Order
V. Discussion of the Issues
  A. Legal Framework
  B. Relevant Factual Background
  C. Arguments from Interested Parties
  D. Commerce's Position
VI. Recommendation

[FR Doc. 2020–18158 Filed 8–18–20; 8:45 am]

BILLING CODE 3510–DS–P

[7] The petitioner in this anti-circumvention inquiry is the American HFC Coalition, which is comprised of the following companies: Arkema, Inc. (Arkema); The Chemours Company FC LLC; Honeywell International Inc.; and Mexichem Fluor Inc.

[8] In addition to its membership in the American HFC Coalition, Arkema was selected as one of the mandatory respondents in this inquiry. *See* Memorandum, ''Anti-Circumvention Inquiry of the Antidumping Duty Order on Hydrofluorocarbon Blends from the People's Republic of China: Hydrofluorocarbon Components—Respondent Selection,'' dated December 18, 2019.

[9] BMP USA, Inc., iGas USA Inc., Assured Comfort A/C Inc., BMP International, Inc., LM Supply Inc., and Cool Master U.S.A., L.L.C. (collectively, BMP).

[10] *See* ITC's Letter, ''Anticircumvention Inquiry of the Antidumping Duty Order on Hydrofluorocarbon Blends from the People's Republic of China, A–570–028; HFC Components from China,'' dated July 6, 2020.

[11] *Id.*

[12] *See Hydrofluorocarbon Blends from the People's Republic of China: Initiation of Anti-Circumvention Inquiry of Antidumping Duty Order; Components,* 84 FR 28273, 28275 (June 18, 2019).

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Southeast Region Family of Forms

AGENCY: National Oceanic & Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of Information Collection; request for comment.

SUMMARY: The Department of Commerce, in accordance with the Paperwork Reduction Act of 1995 (PRA), invites the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps to assess the impact of information collection requirements and minimize the public's reporting burden. The purpose of this notice is to allow for 60 days of public comment preceding submission of the collection to OMB.

DATES: To ensure consideration, comments regarding this proposed information collection must be received by October 19, 2020.

ADDRESSES: Interested persons are invited to submit written comments to Adrienne Thomas, NOAA PRA Officer, at *adrienne.thomas@noaa.gov.* Please reference OMB Control Number ''0648–0016'' in the subject line of your comments. Do not submit confidential business information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or specific questions related to collection activities should be directed to Rich Malinowski, National Marine Fisheries Service (NMFS), Sustainable Fisheries Division, 263 13th Avenue S, St. Petersburg, Florida 33701, phone: (727) 824–5305, email: *rich.malinowski@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for an extension and revision of a current information collection.

Participants in most federally managed fisheries in the NMFS Southeast Region are currently required to keep and submit catch and effort logbooks from their fishing trips. A subset of fishermen on these vessels also provides information on the species and quantities of fish, shellfish, marine turtles, and marine mammals that are

caught and discarded or have interacted with the fishing gear. A subset of fishermen on these vessels also provides information about dockside prices, trip operating costs, and annual fixed costs.

The data are used for scientific analyses that support critical conservation and management decisions made by national and international fishery management organizations. Interaction reports are needed for fishery management planning and to help protect endangered species and marine mammals. Price and cost data will be used in analyses of the economic effects of proposed and existing regulations.

Final rules implementing requirements under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) will require an owner or operator of a vessel with a Federal charter vessel/headboat permit for Gulf of Mexico (Gulf) reef fish, Gulf coastal migratory pelagic (CMP) species, Atlantic CMP species, Atlantic dolphin and wahoo, or South Atlantic snapper-grouper to submit an electronic fishing report (also referred to as an electronic logbook) for each fishing trip (85 FR 10331, February 24, 2020, and 85 FR 44005, July 21, 2020). NMFS is designing and plans to implement an intercept survey in 2021 to support and validate the electronic logbooks submitted for the Gulf and Atlantic reporting programs. These survey data are required to carry out provisions of the Magnuson-Stevens Act (16 U.S.C. 1801 *et seq.*), as amended, regarding conservation and management of fishery resources.

The survey would intercept captains (respondents) of federally-permitted charter vessels and headboats (for-hire vessels) in the aforementioned fisheries at verified landing locations that are randomly selected in Gulf and Atlantic coastal counties to obtain information after that day's fishing activity has occurred. The intercept survey is not a census of all electronically reported logbooks but instead would use random sampling to select landing locations for port samplers to gather a representative sample. Respondents would be asked about vessel information, time and type of fishing, the number of anglers, and details of catch. Catch information would include species identification and number of fish. Length and weight measurements of species retained on fishing trips may also be collected if time allows.

The purpose of the intercept survey is to validate the electronic logbooks submitted through the Gulf and Atlantic for-hire reporting programs, the information collections for which are approved under OMB Control Number 0648–0016. The data collected from the intercept survey would be used to estimate non-reporting of fishing trips and reporting errors. Data from the intercept survey would be analyzed through statistical methods to provide accurate estimates of the total catch and effort. Without the intercept survey, the electronic logbook results would be left unchecked and could be erroneous due to no adjustments for non-reporting and misreporting. Erroneous fisheries information could mislead management and lead to inappropriate or unnecessary regulations or lead to lack thereof when needed.

The total for-hire catch and effort estimates obtained from the survey, as well as from the Gulf and Atlantic for-hire reporting programs are intended to be used on an ongoing basis by NMFS, regional fishery management councils, interstate marine fisheries commissions, and state natural resource agencies to develop, implement, and monitor fishery management programs, per statutory requirements of the Magnuson-Stevens Act. Catch and effort statistics are fundamental for assessing the influence of fishing on any fish stock. Accurate estimates of the quantities taken, fishing effort, and both the seasonal and geographic distributions of the catch and effort are required for the development of regional management policies and plans.

II. Method of Collection

The information is submitted on paper forms and electronic transmissions. Logbooks are completed daily and submitted on either a per trip, weekly, or monthly basis, depending on the fishery. Fixed costs are submitted on an annual basis. Other information is submitted on a per trip basis.

For the proposed intercept survey, information would be collected through in-person interviews at verified landing locations.

III. Data

OMB Control Number: 0648–0016.

Form Number(s): None.

Type of Review: Regular submission—extension and revision of a current information collection.

Affected Public: Businesses or other for-profit organizations; individuals.

Estimated Number of Respondents: 6,971.

Estimated Time Per Response: Annual fixed-cost report, 45 minutes; Colombian fishery logbook, 18 minutes; discard logbook, 15 minutes; headboat, charter vessel, golden crab, reef fish-mackerel, economic cost per trip, wreckfish, and shrimp logbooks, 10 minutes; no-fishing report for golden crab, reef fish-mackerel, charter vessels, wreckfish and Colombian fisheries, 2 minutes; installation of a vessel monitoring unit, 5 hours; landing location request and power-down exemption request, 5 minutes; trip declaration, 2 minutes; and proposed intercept survey, 15 minutes.

Estimated Total Annual Burden Hours: 69,752.

Estimated Total Annual Cost to Public: $1,706,211 in record-keeping or reporting cost.

Respondent's Obligation: Mandatory.

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

IV. Request for Comments

NMFS is soliciting public comments to: (a) Evaluate whether the proposed information collection is necessary for the proper functions of the Department, including whether the information will have practical utility; (b) Evaluate the accuracy of the time and cost burden estimates for this proposed collection, including the validity of the methodology and assumptions used; (c) Evaluate ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Comments that you submit in response to this notice are a matter of public record. NMFS will include or summarize each comment in our request to OMB to approve this information collection request. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment, including your personal identifying information, may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, NMFS cannot guarantee that will occur.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2020–18182 Filed 8–18–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Nomination Process for National Marine Sanctuaries

The Department of Commerce 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. We invite the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. Public comments were previously requested via the **Federal Register** on March 11, 2020, during a 60-day comment period. This notice allows for an additional 30 days for public comments.

Agency: National Oceanic and Atmospheric Administration.

Title: Nomination Process for National Marine Sanctuaries.

OMB Control Number: 0648–0682.

Form Number(s): None.

Type of Request: Regular submission, extension of a current information collection.

Number of Respondents: 5.

Average Hours per Response: 115 hours per nomination and 8 hours for additional information.

Total Annual Burden Hours: 591.

Needs and Uses: This request is for an extension of an existing information collection necessary to provide the American public an opportunity to nominate marine areas which the National Oceanic and Atmospheric Administration (NOAA) may consider for designation as a national marine sanctuary, under the National Marine Sanctuaries Act. This sanctuary nomination process, as finalized on June 13, 2014 (79 FR 33851), accepts proposals generated and driven by local and regional community groups and coalitions; these groups are responsible for submitting all information in support of their respective nominations. NOAA began accepting new sanctuary nominations in 2014, after an OMB Control Number for this information collection was confirmed.

Affected Public: Business or other for-profit organizations; Not-for-profit institutions; State, Local, or Tribal government; Federal government.

Frequency: Once, with follow-up requests for more information possible.

Respondent's Obligation: Voluntary.

Legal Authority: 16 U.S.C. 1431 *et seq.*

This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view the Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the collection or the OMB Control Number 0648–0682.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2020–18060 Filed 8–18–20; 8:45 am]

BILLING CODE 3510–NK–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Emergency Beacon Registrations

AGENCY: National Oceanic & Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of Information Collection, request for comment.

SUMMARY: The Department of Commerce, in accordance with the Paperwork Reduction Act of 1995 (PRA), invites the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. The purpose of this notice is to allow for 60 days of public comment preceding submission of the collection to OMB.

DATES: To ensure consideration, comments regarding this proposed information collection must be received on or before October 19, 2020.

ADDRESSES: Interested persons are invited to submit written comments to Adrienne Thomas, NOAA PRA Officer, at *Adrienne.thomas@noaa.gov.* Please reference OMB Control Number 0648–0295 in the subject line of your comments. Do not submit Confidential Business Information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or specific questions related to collection activities should be directed to LT Aaron D. Colohan, Operations Support Officer, NOAA/NESDIS/SARSAT, NSOF. E/SPO53 4231 Suitland Rd., Suitland, MD 20746, (301–817–4757), *OPS.SARSAT@NOAA.GOV.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for extension of a currently approved information collection.

The United States, Canada, France, and Russia operate the Search and Rescue Satellite-Aided Tracking (COSPAS/SARSAT), a satellite system with equipment that can detect and locate ships, aircraft and individuals in distress if an emergency radio beacon is being carried. This system is used to detect digitally encoded signals in the 406.000–406.100 MHz range, coming from these emergency beacons. The 406.000–406.100 MHz beacons transmit a unique identifier, making possible the ability to combine previously collected data associated with that beacon and transmit this vital data along with the beacon's position to the appropriate rescue coordination center.

Persons buying 406.000–406.100 MHz emergency radio beacons are required to register them with NOAA prior to installation. These requirements are contained in Federal Communications Commission (FCC) regulations at *47 CFR 80.1061, 47 CFR 87.199* and *47 CFR 95.1402.*

The registration data is used to facilitate a rescue and to suppress the costly consequences of false alarms, which if unsuppressed would initiate the launch of a rescue mission and thereby deplete limited resources and possibly result in the loss of lives. This is accomplished through the use of the data provided to the rescue forces from the beacon registration database maintained by the NOAA's United States Mission Control Center (USMCC) for Search and Rescue, to contact the distressed person(s) or alternate party via a phone call or radio broadcast. Other data provides rescuers with descriptive material of the element in distress. The registration information must be kept up-to-date.

Four registration forms are used. The EPIRB (Emergency Position Indicating Radio Beacon) form is used for nautical

beacons. The ELT (Emergency Locator Transmitter) form is used for aircraft beacons. The PLB (Personal Locator Beacon) is used to register portable beacons carried by individuals. Ship Security Alerting System (SSAS) beacons are carried aboard ships, are similar to EPIRBs and are used in the event of an emergency situation such as piracy or terrorism.

II. Method of Collection

Information will be collected: Paper format, electronically (internet).

III. Data

OMB Control Number: 0648–0295.
Form Number(s): None.
Type of Review: Regular submission, Extension of a currently approved collection.
Affected Public: Individuals or households, business or other for-profit organizations; not-for-profit institutions; State, local, or tribal government.
Estimated Number of Respondents: 258,362.
Estimated Time per Response: 15 minutes.
Estimated Total Annual Burden Hours: 64,590.
Estimated Total Annual Cost to Public: $31,000.
Respondent's Obligation: Mandatory.
Legal Authority: Title 47 of the CFR, Parts 80, 87, and 95.

IV. Request for Comments

We are soliciting public comments to permit the Department/Bureau to: (a) Evaluate whether the proposed information collection is necessary for the proper functions of the Department, including whether the information will have practical utility; (b) Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used; (c) Evaluate ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2020–18184 Filed 8–18–20; 8:45 am]

BILLING CODE 3510–HR–P

COMMODITY FUTURES TRADING COMMISSION

Agency Information Collection Activities: Notice of Intent To Renew Collection 3038–0103, Ownership and Control Reports, Forms 102/102S, 40/40S, and 71 (Trader and Account Identification Reports)

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice.

SUMMARY: The Commodity Futures Trading Commission (''CFTC'' or ''Commission'') is announcing an opportunity for public comment on the proposed renewal of the collection of certain information by the agency. Under the Paperwork Reduction Act (''PRA''), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information and to allow 60 days for public comment. This notice solicits comments in connection with information collection requirements under certain rules and related forms (the ''final rules'') that the Commission adopted to enhance its identification of futures and swap market participants.

DATES: Comments must be submitted on or before October 19, 2020.

ADDRESSES: You may submit comments, identified by OMB Control No. 3038–0103, by any of the following methods:

- The Agency's website, at *http://comments.cftc.gov/.* Follow the instructions for submitting comments through the website.
- *Mail:* Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.
- *Hand Delivery/Courier:* Same as Mail above.

Please submit your comments using only one of these methods and identify that it is for the renewal of Collection Number 3038–0103. All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to *https://www.cftc.gov.*

FOR FURTHER INFORMATION CONTACT: David Aron, Special Counsel, Division of Market Oversight, at 202–418–6621 or *daron@cftc.gov,* and refer to OMB Control No 3038–0103.

SUPPLEMENTARY INFORMATION: Under the PRA, 44 U.S.C. 3501 *et seq.,* Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of Information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3 and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA, 44 U.S.C. 3506(c)(2)(A), requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information before submitting the collection to OMB for approval. To comply with this requirement, the CFTC is publishing notice of the proposed collection of information listed below. 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.

Title: Ownership and Control Reports, Forms 102/102S, 40/40S, and 71 (Trader and Account Identification Reports) (OMB Control No. 3038–0103). This is a request for extension of a currently approved information collection.

Abstract: The final rules [1] created new information collection requirements via §§ 17.01, 18.04, 18.05, and 20.5. Specifically, § 17.01 provides for the filing of Form 102A, Form 102B and Form 71, as follows:

- Pursuant to § 17.01(a), futures commission merchants (''FCMs''), clearing members, and foreign brokers shall identify new special accounts to the Commission on Form 102A;
- pursuant to § 17.01(b), clearing members shall identify volume threshold accounts to the Commission on Form 102B; and
- pursuant to § 17.01(c), omnibus volume threshold account originators and omnibus reportable sub-account originators shall identify reportable sub-accounts to the Commission on Form 71 when requested via a special call by the Commission or its designee.

Additional reporting requirements arise from § 18.04, which results in the collection of information via Form 40

[1] See Commission, Final Rule: Ownership and Control Reports, Forms 102/102S, 40/40S, and 71, 78 FR 69178 (November 18, 2013). Terms used herein and not otherwise defined herein shall have the meaning assigned to such terms in the final rules or in the Commission's regulations.

from and regarding traders who own, hold, or control reportable positions; volume threshold account controllers; persons who own volume threshold accounts; reportable sub-account controllers; and persons who own reportable sub-accounts.

Reporting requirements also arise from § 20.5(a), which requires all reporting entities to submit Form 102S for swap counterparty or customer consolidated accounts with reportable positions. In addition, § 20.5(b) requires every person subject to books or records under current § 20.6 to complete a 40S filing after a special call upon such person by the Commission.

In addition to the reporting requirements summarized above, § 18.05 imposes recordkeeping requirements upon: (1) Traders who own, hold, or control a reportable futures or options on futures position; (2) volume threshold account controllers; (3) persons who own volume threshold accounts; (4) reportable sub-account controllers; and (5) persons who own reportable sub-accounts.

With respect to the collection of information, the CFTC invites comments on:

- Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have a practical use;
- The accuracy of the Commission's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Ways to enhance the quality, usefulness, and clarity of the information to be collected; and
- Ways to minimize the burden of 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.

You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the procedures established in § 145.9 of the Commission's regulations.[2]

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from *http://www.cftc.gov* that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the Information Collection Request will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

Burden Statement: The Commission estimates the burden of this collection of information as follows:

- Form 102A
  Estimated Number of Respondents: 260.
  Estimated Average Burden Hours Per Respondent: 106.
  Estimated Total Annual Burden Hours: 27,560.
- Form 102B
  Estimated Number of Respondents: 175.
  Estimated Average Burden Hours Per Respondent: 106.
  Estimated Total Annual Burden Hours: 18,550.
- Form 71
  Estimated Number of Respondents: 762.
  Estimated Average Annual Burden Hours Per Respondent: 8.
  Estimated Total Annual Burden Hours: 6,096.
- Form 40 (arising from Form 102A)
  Estimated Number of Annual Responses: 5250.
  Estimated Average Burden Per Response: 5.
  Estimated Total Annual Burden Hours: 26,250.
- Form 40 (arising from Form 102B and Form 71)
  Estimated Number of Annual Responses: 18,920.
  Estimated Average Burden Per Response: 5.
  Estimated Total Annual Burden Hours: 94,600.
- Form 102S
  Estimated Annual Number of Respondents: 39.
  Estimated Average Burden Hours Per Respondent: 106.
  Estimated Total Annual Burden Hours: 4134.
- Form 40S
  Estimated Number of Annual Responses: 2,508.
  Estimated Average Burden Per Response: 5.
  Estimated Total Annual Burden Hours: 12,540.
- § 18.05 Recordkeeping burden
  Estimated Number of Annual Responses: 53.
  Estimated Average Burden Per Response: 5.
  Estimated Total Annual Burden Hours: 265.

Total Burden Hours for the Collection: 189,995.

(Authority: 44 U.S.C. 3501 *et seq.*)

Dated: August 13, 2020.

Robert Sidman,

Deputy Secretary of the Commission.

[FR Doc. 2020–18118 Filed 8–18–20; 8:45 am]

BILLING CODE 6351–01–P

[2] 17 CFR 145.9.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP20–493–000]

Tennessee Gas Pipeline Company, L.L.C.; Notice of Intent To Prepare an Environmental Assessment for the Proposed East 300 Upgrade Project and Request for Comments on Environmental Issues

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental assessment (EA) that will discuss the environmental impacts of the East 300 Upgrade Project involving construction and operation of facilities by Tennessee Gas Pipeline Company, L.L.C. (Tennessee) in Susquehanna County, Pennsylvania and Sussex and Passaic Counties, New Jersey. The Commission will use this EA in its decision-making process to determine whether the project is in the public convenience and necessity.

This notice announces the opening of the scoping process the Commission will use to gather input from the public and interested agencies about issues regarding the project. The National Environmental Policy Act (NEPA) requires the Commission to take into account the environmental impacts that could result from its action whenever it considers the issuance of a Certificate of Public Convenience and Necessity. NEPA also requires the Commission to discover concerns the public may have about proposals. This process is referred to as ''scoping.'' The main goal of the scoping process is to focus the analysis in the EA on the important environmental issues. By this notice, the Commission requests public comments on the scope of issues to address in the EA. To ensure that your comments are timely and properly recorded, please submit your comments so that the Commission receives them in Washington, DC on or before 5:00 p.m.

Eastern Time on September 14, 2020. Comments may be submitted in written form. Further details on how to submit comments are provided in the Public Participation section of this notice.

You can make a difference by submitting your specific comments or concerns about the project. Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. Your input will help the Commission staff determine what issues they need to evaluate in the EA. Commission staff will consider all written comments during the preparation of the EA.

If you sent comments on this project to the Commission before the opening of this docket on June 30, 2020, you will need to file those comments in Docket No. CP20–493–000 to ensure they are considered as part of this proceeding.

This notice is being sent to the Commission's current environmental mailing list for this project. State and local government representatives should notify their constituents of this proposed project and encourage them to comment on their areas of concern.

If you are a landowner receiving this notice, a pipeline company representative may contact you about the acquisition of an easement to construct, operate, and maintain the proposed facilities. The company would seek to negotiate a mutually acceptable easement agreement. You are not required to enter into an agreement. However, if the Commission approves the project, the Natural Gas Act conveys the right of eminent domain to the company. Therefore, if you and the company do not reach an easement agreement, the pipeline company could initiate condemnation proceedings in court. In such instances, compensation would be determined by a judge in accordance with state law.

Tennessee provided landowners with a fact sheet prepared by the FERC entitled An Interstate Natural Gas Facility On My Land? What Do I Need To Know? which addresses a number of typically asked questions, including the use of eminent domain and how to participate in the Commission's proceedings. This fact sheet along with other landowner topics of interest are available for viewing on the FERC website (*www.ferc.gov*) under the Natural Gas Overview or Landowner Topics link.

Public Participation

The Commission offers a free service called eSubscription which makes it easy to stay informed of all issuances and submittals regarding the dockets/projects to which you subscribe. These instant email notifications are the fastest way to receive notification and provide a link to the document files which can reduce the amount of time you spend researching proceedings. Go to *https://www.ferc.gov/ferc-online/overview* to register for eSubscription.

For your convenience, there are three methods you can use to submit your comments to the Commission. The Commission encourages electronic filing of comments and has staff available to assist you at (866) 208–3676 or *FercOnlineSupport@ferc.gov.* Please carefully follow these instructions so that your comments are properly recorded.

(1) You can file your comments electronically using the eComment feature, which is located on the Commission's website (*www.ferc.gov*) under the link to FERC Online. Using eComment is an easy method for submitting brief, text-only comments on a project;

(2) You can file your comments electronically by using the eFiling feature, which is located on the Commission's website (*www.ferc.gov*) under the link to FERC Online. With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on eRegister. You will be asked to select the type of filing you are making; a comment on a particular project is considered a Comment on a Filing; or

(3) You can file a paper copy of your comments by mailing them to the Commission. Be sure to reference the project docket number (CP20–493–000) on your letter. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, MD 20852.

Information about FERC's environmental review process can be found on the FERC website (*www.ferc.gov*) under the natural gas Landowner Topics link. In addition, Tennessee has created a project-specific website with additional information at *https://www.kindermorgan.com/pages/business/gas_pipelines/east/east300upgrade/.*

Please note this is not your only public input opportunity; please refer to the review process flow chart in appendix 1.[1]

Summary of the Proposed Project

Tennessee proposes to construct and operate a new compressor station in the Township of Milford in Passaic County, New Jersey and modify two compressor stations in Susquehanna County, Pennsylvania and Sussex County, New Jersey, respectively. The East 300 Upgrade Project would provide about 115 million standard cubic feet of natural gas per day to Consolidated Edison Company of New York, Inc. (Consolidated Edison). According to Tennessee, the East 300 Upgrade Project would help eliminate capacity constraints in Consilidated Edison's service region and ensure that Consolidated Edison's residential, commercial, and industrial customers are able to meet their heating and cooling needs.

The East 300 Upgrade Project would consist of the following facilities:

- One Solar Taurus 70 turbine with an International Organization for Standardization (ISO) rating of 11,107 horsepower and auxiliary facilities and appurtenances, including additional cooling equipment and filter separators at Tennessee's existing Compressor Station 321 in Susquehanna County, Pennsylvania;
- one Solar Titan 130 turbine with an ISO rating of 20,500 horsepower and auxiliary facilities and appurtenances, including additional cooling equipment and filter separators at existing Compressor Station 325 in Sussex County, New Jersey; and
- one new electric-driven compressor station (''Compressor Station 327'') and various appurtenances and auxiliary facilities along Tennessee's existing 300 Line in the Township of West Milford in Passaic County, New Jersey.

The general location of the project facilities is shown in appendix 2.

Land Requirements for Construction

Construction of the proposed facilities would disturb about 82 acres of land. Following construction, Tennessee would maintain about 22 acres for permanent operation of the project's facilities; the remaining acreage would be restored and revert to former uses.

[1] The appendices referenced in this notice will not appear in the **Federal Register**. Copies of the appendices were sent to all those receiving this notice in the mail and are available at *www.ferc.gov* using the link called eLibrary or from the Commission's Public Reference Room, 888 First Street NE, Washington, DC 20426, or call (202) 502–8371. For instructions on connecting to eLibrary, refer to the last page of this notice.

The EA Process

The EA will discuss impacts that could occur as a result of the construction and operation of the proposed project under these general headings:

- Geology, groundwater, and soils;
- surface water resources and wetlands;
- vegetation and wildlife and threatened and endangered species;
- cultural resources;
- socioeconomics;
- land use and visual resources;
- air quality and noise;
- public safety; and
- cumulative impacts

Commission staff will also evaluate reasonable alternatives to the proposed project or portions of the project and make recommendations on how to lessen or avoid impacts on the various resource areas.

The EA will present Commission staff's independent analysis of the issues. The EA will be available in electronic format in the public record through eLibrary [2] and the Commission's natural gas environmental documents web page (*https://www.ferc.gov/industries-data/natural-gas/environment/environmental-documents*). If eSubscribed, you will receive instant email notification when the EA is issued. The EA may be issued for an allotted public comment period. Commission staff will consider all comments on the EA before making recommendations to the Commission. To ensure Commission staff have the opportunity to address your comments, please carefully follow the instructions in the Public Participation section, beginning on page 2.

With this notice, the Commission is asking agencies with jurisdiction by law and/or special expertise with respect to the environmental issues of this project to formally cooperate in the preparation of the EA.[3] Agencies that would like to request cooperating agency status should follow the instructions for filing comments provided under the Public Participation section of this notice.

Consultation Under Section 106 of the National Historic Preservation Act

In accordance with the Advisory Council on Historic Preservation's implementing regulations for section 106 of the National Historic Preservation Act, the Commission is using this notice to initiate consultation with the New Jersey and Pennsylvania State Historic Preservation Offices, and to solicit their views and those of other government agencies, interested Indian tribes, and the public on the project's potential effects on historic properties.[4] The EA for this project will document findings on the impacts on historic properties and summarize the status of consultations under section 106.

Environmental Mailing List

The environmental mailing list includes: Federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American Tribes; other interested parties; and local libraries and newspapers. This list also includes all affected landowners (as defined in the Commission's regulations) who are potential right-of-way grantors, whose property may be used temporarily for project purposes, or who own homes within certain distances of aboveground facilities, and anyone who submits comments on the project and includes a mailing address with their comments. Commission staff will update the environmental mailing list as the analysis proceeds to ensure that Commission notices related to this environmental review are sent to all individuals, organizations, and government entities interested in and/or potentially affected by the proposed project.

If the Commission issues the EA for an allotted public comment period, a *Notice of Availability* of the EA will be sent to the environmental mailing list and will provide instructions to access the electronic document on the FERC's website (*www.ferc.gov*). If you need to make changes to your name/address, or if you would like to remove your name from the mailing list, please return the attached Mailing List Update Form (appendix 3).

Additional Information

Additional information about the project is available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC website at *www.ferc.gov* using the eLibrary link. Click on the eLibrary link, click on General Search and enter the docket number in the Docket Number field, excluding the last three digits (*i.e.,* CP20–493). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or (866) 208–3676, or for TTY, contact (202) 502–8659. The eLibrary link also provides access to the texts of all formal documents issued by the Commission, such as orders, notices, and rulemakings.

Public virtual sessions or site visits will be posted on the Commission's calendar located at *https://www.ferc.gov/news-events/events* along with other related information.

Dated: August 13, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–18140 Filed 8–18–20; 8:45 am]

BILLING CODE 6717–01–P

[2] For instructions on connecting to eLibrary, refer to the last page of this notice.

[3] The Council on Environmental Quality regulations addressing cooperating agency responsibilities are at Title 40, Code of Federal Regulations, Part 1501.6.

[4] The Advisory Council on Historic Preservation's regulations are at Title 36, Code of Federal Regulations, Part 800. Those regulations define historic properties as any prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the National Register of Historic Places.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC20–85–000.
Applicants: Entergy Texas, Inc.
Description: Application for Authorization Under Section 203 of the Federal Power Act of Entergy Texas, Inc.
Filed Date: 7/30/20.
Accession Number: 20200730–5263.
Comments Due: 5 p.m. ET 9/28/20.

Docket Numbers: EC20–88–000.
Applicants: Tonopah Solar Energy, LLC.
Description: Application for Authorization Under Section 203 of the Federal Power Act, et al. of Tonopah Solar Energy, LLC.
Filed Date: 8/12/20.
Accession Number: 20200812–5188.
Comments Due: 5 p.m. ET 9/2/20.

Docket Numbers: EC20–89–000.
Applicants: Baldwin Wind, LLC, Baldwin Wind Energy, LLC, Day County Wind, LLC, Day County Wind I, LLC, Gray County Wind Energy, LLC, Gray County Wind, LLC, High Majestic Wind Energy Center, LLC, High Majestic Wind I, LLC, Minco Wind, LLC, Minco Wind I, LLC, FPL Energy Cowboy Wind, LLC, Weatherford Wind, LLC.
Description: Application for Authorization Under Section 203 of the Federal Power Act, et al. of Baldwin Wind, LLC, et al.
Filed Date: 8/12/20.
Accession Number: 20200812–5189.
Comments Due: 5 p.m. ET 9/2/20.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER19–467–005.
Applicants: New York Independent System Operator, Inc.
Description: Compliance filing: Compliance to set effective date under ER19–467–000, et al, related to ESR model to be effective 8/26/2020.
Filed Date: 8/12/20.
Accession Number: 20200812–5152.
Comments Due: 5 p.m. ET 9/2/20.

Docket Numbers: ER19–2745–002.
Applicants: New Creek Wind LLC.
Description: Compliance filing: New Creek Wind, LLC Compliance Filing Under Docket No. ER19–2745 to be effective 11/4/2019.
Filed Date: 8/13/20.
Accession Number: 20200813–5071.
Comments Due: 5 p.m. ET 9/3/20.

Docket Numbers: ER20–1696–001.
Applicants: New York Independent System Operator, Inc.
Description: Compliance filing: Compliance to set effective date for ESR provisions to be effective 8/26/2020.
Filed Date: 8/12/20.
Accession Number: 20200812–5150.
Comments Due: 5 p.m. ET 9/2/20.

Docket Numbers: ER20–1847–001.
Applicants: PJM Interconnection, L.L.C.
Description: Compliance filing: Compliance Filing per the Commission's 7/19/2020 order re: Docket No. ER20–1847 to be effective 4/23/2020.
Filed Date: 8/13/20.
Accession Number: 20200813–5078.
Comments Due: 5 p.m. ET 9/3/20.

Docket Numbers: ER20–1851–001.
Applicants: Whitetail Solar 3, LLC.
Description: Tariff Amendment: Deficiency Filing for Whitetail Solar 3 Reactive Rate Schedule to be effective 7/18/2020.
Filed Date: 8/12/20.
Accession Number: 20200812–5153.
Comments Due: 5 p.m. ET 9/2/20.

Docket Numbers: ER20–1863–000.
Applicants: Ingenco Wholesale Power, L.L.C.
Description: Report Filing: Deficiency Filing #2 for Ingenco Reactive Rate Schedule to be effective N/A.
Filed Date: 8/10/20.
Accession Number: 20200810–5168.
Comments Due: 5 p.m. ET 8/31/20.

Docket Numbers: ER20–2113–001.
Applicants: New York Independent System Operator, Inc.
Description: Compliance filing: Compliance filing to set effective date for ESR provisions to be effective 8/26/2020.
Filed Date: 8/12/20.
Accession Number: 20200812–5155.
Comments Due: 5 p.m. ET 9/2/20.

Docket Numbers: ER20–2164–001.
Applicants: H.A. Wagner LLC.
Description: Tariff Amendment: Amendment to Market-Based Rate Tariff Revision Filing to be effective 6/26/2020.
Filed Date: 8/13/20.
Accession Number: 20200813–5082.
Comments Due: 5 p.m. ET 9/3/20.

Docket Numbers: ER20–2165–001.
Applicants: LMBE Project Company LLC.
Description: Tariff Amendment: Amendment to Market-Based Rate Tariff Revision Filing to be effective 6/26/2020.
Filed Date: 8/13/20.
Accession Number: 20200813–5081.
Comments Due: 5 p.m. ET 9/3/20.

Docket Numbers: ER20–2656–000.
Applicants: Midcontinent Independent System Operator, Inc., Republic Transmission, LLC.
Description: § 205(d) Rate Filing: 2020–08–13_Republic Transmission Regulatory Asset Filing to be effective 10/13/2020.
Filed Date: 8/13/20.
Accession Number: 20200813–5023.
Comments Due: 5 p.m. ET 9/3/20.

Docket Numbers: ER20–2657–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Amendment to WMPA, Service Agreement No. 5314; Queue No. AE1–081 to be effective 2/17/2019.
Filed Date: 8/13/20.
Accession Number: 20200813–5037.
Comments Due: 5 p.m. ET 9/3/20.

Docket Numbers: ER20–2658–000.
Applicants: PacifiCorp.
Description: § 205(d) Rate Filing: BPA Kennewick Mobile REDI Communications Agr to be effective 8/30/2020.
Filed Date: 8/13/20.
Accession Number: 20200813–5068.
Comments Due: 5 p.m. ET 9/3/20.

Docket Numbers: ER20–2659–000.
Applicants: Public Service Company of New Mexico.
Description: § 205(d) Rate Filing: PNM–EL Cabo Attachment A–1 to be effective 7/14/2020.
Filed Date: 8/13/20.
Accession Number: 20200813–5085.
Comments Due: 5 p.m. ET 9/3/20.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by 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: August 13, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–18138 Filed 8–18–20; 8:45 am]

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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Effectiveness of Exempt Wholesale Generator Status

Harmony Florida Solar, LLC	EG20–146–000
Taylor Creek Solar, LLC	EG20–147–000
Chicot Solar, LLC	EG20–148–000
Minco Wind I, LLC	EG20–149–000
Ponderosa Wind, LLC	EG20–150–000
Sky Global Power Two LLC	EG20–151–000
Day County Wind I, LLC	EG20–152–000
Baldwin Wind Energy, LLC	EG20–153–000
Weatherford Wind, LLC	EG20–154–000
High Majestic Wind I, LLC	EG20–155–000
Soldier Creek Wind, LLC	EG20–156–000
El Campo Wind, LLC	EG20–157–000
Wagyu Solar, LLC	EG20–158–000

Cubico Wagyu Lessee, LLC	EG20–159–000
Desert Harvest, LLC	EG20–160–000
Desert Harvest II LLC	EG20–161–000
Maverick Solar, LLC	EG20–162–000
Maverick Solar 4, LLC	EG20–163–000
Gray County Wind, LLC	EG20–164–000
Oliver Wind I, LLC	EG20–165–000
Tehachapi Plains Wind, LLC	EG20–166–000
Wheatridge Wind Energy, LLC	EG20–167–000
Wheatridge Wind II, LLC	EG20–168–000
Helios 5 MT, LLC	EG20–169–000
Cedar Springs Wind III, LLC	EG20–170–000
Cedar Springs Wind, LLC	EG20–171–000
Cedar Springs Transmission LLC	EG20–172–000
Calpine Northeast Development, LLC	EG20–174–000
Cerro Gordo Wind, LLC	EG20–175–000

Take notice that during the month of July 2020, the status of the above-captioned entities as Exempt Wholesale Generators Companies became effective by operation of the Commission's regulations. 18 CFR 366.7(a) (2019).

Dated: August 13, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–18141 Filed 8–18–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Number: PR20–55–003.

Applicants: The East Ohio Gas Company.

Description: Tariff filing per 284.123(b),(e)/: Amend Operating Statement of The East Ohio Gas Company 4–30–2020 to be effective 4/1/2020.

Filed Date: 8/13/2020.

Accession Number: 202008135024.

Comments/Protests Due: 5 p.m. ET 8/25/2020.

Docket Numbers: RP20–1093–000.

Applicants: Southern Natural Gas Company, L.L.C.

Description: § 4(d) Rate Filing: Spire Negotiated Rate to be effective 10/1/2020.

Filed Date: 8/13/20.

Accession Number: 20200813–5017.

Comments Due: 5 p.m. ET 8/25/20.

Docket Numbers: RP20–1094–000.

Applicants: Trunkline Gas Company, LLC.

Description: § 4(d) Rate Filing: Reservation Charge Crediting Clarification to be effective 9/13/2020.

Filed Date: 8/13/20.

Accession Number: 20200813–5031.

Comments Due: 5 p.m. ET 8/25/20.

Docket Numbers: RP20–1095–000.

Applicants: Northern Natural Gas Company.

Description: § 4(d) Rate Filing: 20200813 Carlton Flow Obligation to be effective 11/1/2020.

Filed Date: 8/13/20.

Accession Number: 20200813–5036.

Comments Due: 5 p.m. ET 8/25/20.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified date(s). Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: August 13, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–18139 Filed 8–18–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER20–2622–000]

Wilmot Energy Center, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced Wilmot Energy Center, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is September 2, 2020.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the

Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://ferc.gov*) using the eLibrary link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Dated: August 13, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–18143 Filed 8–18–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER20–2654–000]

Clear Power LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced Clear Power LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is September 2, 2020.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://ferc.gov*) using the eLibrary link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Dated: August 13, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–18145 Filed 8–18–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER20–2648–000]

Northern Divide Wind, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Northern Divide Wind, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is September 2, 2020.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://ferc.gov*) using the eLibrary link. Enter

the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Dated: August 13, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–18144 Filed 8–18–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL20–64–000]

IIF US Holding 2 GP, LLC; Notice of Petition for Declaratory Order

Take notice that on August 12, 2020, pursuant to Rule 207(a)(2) of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 CFR 385.207(a)(2) (2019), IIF US Holding 2 GP, LLC (Petitioner), filed a declaratory order petition requesting an exemption of certain of Petitioner's subsidiary companies, that are holding companies following Petitioner's acquisition of a traditional public utility with a franchised electric service territory, all as more fully explained in the petition.

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. Anyone filing a motion to intervene or protest must serve a copy of that document on the Petitioner.

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 on-line 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.

Comment Date: 5:00 p.m. Eastern time on September 11, 2020.

Dated: August 13, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–18142 Filed 8–18–20; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–10013–79–OA]

Notification of a Public Meeting of the Science Advisory Board; Reduced-Form Tools Review Panel

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) Science Advisory Board (SAB) Staff Office announces a public teleconferences of the SAB Reduced-Form Tools Review Panel (RFT Review Panel) to discuss the Panel's draft report on EPA's October 2019 report: ''Evaluating Reduced Form Tools for Estimating Air Quality Benefits.''

DATES: The public virtual meeting of the Science Advisory Board RFT Review Panel will be held on Thursday, September 10, 2020, from 12:00 noon to 5:00 p.m. (Eastern Time).

ADDRESSES: The meeting will be conducted virtually by video and telephone.

FOR FURTHER INFORMATION CONTACT: Any member of the public who wants further information concerning the public teleconferences may contact Dr. Suhair Shallal, Designated Federal Officer (DFO), via telephone/voice mail (202) 564–2059, or email at *shallal.suhair@epa.gov.* General information concerning the SAB can be found on the EPA website at *http://www.epa.gov/sab.*

SUPPLEMENTARY INFORMATION: *Background:* The SAB was established pursuant to the Environmental Research, Development, and Demonstration Authorization Act (ERDDAA), codified at 42 U.S.C. 4365, to provide independent scientific and technical advice to the EPA Administrator on the scientific and technical basis for agency positions and regulations. The SAB is a Federal Advisory Committee chartered under the Federal Advisory Committee Act (FACA), 5 U.S.C., App. 2. The SAB will comply with the provisions of FACA and all appropriate SAB Staff Office procedural policies. Pursuant to FACA and EPA policy, notice is hereby given that the SAB Reduced-Form Tools Review Panel (RFT Review Panel) will hold a public virtual teleconference to discuss their draft report on the review of EPA's Evaluation of Reduced Form Tools for Estimating Air Quality Benefits. The SAB RFT Review Panel has developed a draft report with comments on the appropriateness of the framework developed and outlined in the report for evaluating the use of Reduced-Form Tools to generate estimates of monetized health benefits compared with those that rely on full-form air quality and health benefits models to inform the cost-benefit analyses of major regulatory actions. The RFT Review Panel will meet to discuss and finalize their draft report.

Technical Contacts: Any technical questions concerning EPA's document titled *Evaluating Reduced-Form Tools for Estimating Air Quality Benefits* should be directed to Dr. Erika Sasser (*sasser.erika@epa.gov*).

Availability of Meeting Materials: Prior to the virtual meeting, the agenda and other meeting materials will be placed on the SAB website at *http://epa.gov/sab.*

Procedures for Providing Public Input: Public comment for consideration by EPA's federal advisory committees and panels has a different purpose from public comment provided to EPA program offices. Therefore, the process for submitting comments to a federal advisory committee is different from the process used to submit comments to an EPA program office.

Federal advisory committees and panels, including scientific advisory committees, provide independent advice to the EPA. Members of the public can submit relevant comments pertaining to the committee's charge or meeting materials. Input from the public to the SAB RFT Review Panel will have the most impact if it provides specific scientific or technical information or analysis for the SAB RFT Review Panel to consider or if it relates to the clarity or accuracy of the technical information.

Members of the public wishing to provide comment should contact the DFO directly.

Oral Statements: In general, individuals or groups requesting an oral presentation at a public teleconference will be limited to three minutes. Persons interested in providing oral statements on September 10, 2020, should contact Dr. Sue Shallal, DFO, via email at the contact information noted above by September 3, 2020, to be placed on the list of registered speakers.

Written Statements: Written statements will be accepted throughout the advisory process; however, for timely consideration by SAB RFT Review Panel members, statements should be received in the SAB Staff Office by September 3, 2020, for consideration at the public teleconference(s). Written statements should be supplied to the DFO via email at the contact information above. Submitters are requested to provide a signed and unsigned version of each document because the SAB Staff Office does not publish documents with signatures on its websites. Members of the public should be aware that their personal contact information, if included in any written comments, may be posted to the SAB website. Copyrighted material will not be posted without explicit permission of the copyright holder.

Accessibility: For information on access or services for individuals with disabilities, please contact Dr. Shallal at the phone number or email address noted above, preferably at least ten days prior to the meeting, to give the EPA as much time as possible to process your request.

V. Khanna Johnston,

Deputy Director, EPA Science Advisory Board Staff Office.

[FR Doc. 2020–18059 Filed 8–18–20; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[IB Docket No. 16–185; DA 20–749; FRS 17013]

First Meeting of the World Radiocommunication Conference Advisory Committee

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: In accordance with the Federal Advisory Committee Act, this notice advises interested persons that the first meeting of the World Radiocommunication Conference Advisory Committee (WAC) will be held on August 25, 2020. Due to exceptional circumstances, the Advisory Committee meeting will be convened as a virtual meeting with remote participation only. This first meeting will focus on WAC processes, among others, the final charter, committee structure including the appointed chairmen and vice-chairmen, and the working method guidance.

DATES: August 25, 2020; 11:00 a.m. EDT

ADDRESSES: *www.fcc.gov/live*

FOR FURTHER INFORMATION CONTACT: Dante Ibarra, Designated Federal Official, World Radiocommunication Conference Advisory Committee, FCC International Bureau, Global Strategy and Negotiation Division, at *Dante.Ibarra@fcc.gov,* (202) 418–0610 or *WRC-23@fcc.gov.*

SUPPLEMENTARY INFORMATION: The FCC established the Advisory Committee to provide advice, technical support and recommendations relating to the preparation of United States proposals and positions for the 2023 World Radiocommunication Conference (WRC–23).

In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, this notice advises interested persons of the first meeting of the Advisory Committee. Additional information regarding the Advisory Committee is available on the Advisory Committee's website, *www.fcc.gov/wrc-23.* The virtual meeting is open to the public. The meeting will be broadcast live with open captioning over the internet from the FCC Live web page at *www.fcc.gov/live.* There will be audience participation available; send live questions to *livequestions@fcc.gov* only during this meeting.

The proposed agenda for the first meeting is as follows:

Agenda

First Meeting of the World Radiocommunication Conference Advisory Committee

Federal Communications Commission

August 25, 2020; 11:00 a.m. EDT

1. Opening Remarks
2. Approval of Agenda
3. Chartering of the Committee/ Structure and Chairs/Working Method Guidance/IWG Processes
4. FCC Presentation on Federal Advisory Committee Rules
5. Update on NTIA's WRC–23 Preparatory Efforts
6. Future Meetings
7. Other Business

Federal Communications Commission.

Troy Tanner,

Deputy Chief, International Bureau.

[FR Doc. 2020–18167 Filed 8–18–20; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[DA 20–862; FRS 17003]

Announcement of Next Meeting of the Consumer Advisory Committee

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: In accordance with the Federal Advisory Committee Act, this notice announces the next meeting date, time, and agenda of the Federal Communications Commission's (FCC or Commission) Consumer Advisory Committee (hereinafter the ''Committee''). The Committee will hold this upcoming meeting remotely via live internet link on the Commission's website. The Consumer Advisory Committee is a federal advisory committee under the Federal Advisory Committee Act.

DATES: September 25, 2020, beginning at 10:30 a.m.

ADDRESSES: The Meeting will be held via conference call and available to the public at *http://www.fcc.gov/live.*

FOR FURTHER INFORMATION CONTACT: Scott Marshall, Designated Federal Officer, FCC Consumer Advisory Committee, Consumer and Governmental Affairs Bureau, Federal Communications Commission, 445 12th St. SW, Washington, DC 20554; phone: 202–418–2809 (voice or Relay); email: *scott.marshall@fcc.gov*; or Gregory V. Haledjian, Deputy Designated Federal Officer, FCC Consumer Advisory Committee, Consumer and Governmental Affairs Bureau, Federal Communications Commission, 445 12th St. SW, Washington, DC 20554; phone: 202–418–7440; email: *gregory.haledjian@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Public Notice DA 20–862, released August 11, 2020, announcing the Agenda, Date, and Time of the Committee's next meeting.

Proposed Agenda: At its September 25, 2020 meeting, the Committee will receive briefings from FCC staff on recent Commission activities and will discuss upcoming developments of interest to consumers. The Committee will hold this upcoming meeting remotely via live internet link. This meeting is open to members of the

general public and has been moved to a wholly electronic format due to the COVID–19 pandemic. The meeting can be viewed live, by the public, at *http://www.fcc.gov/live.* The public may also follow a summary of the meeting on *Twitter @fcc* or via the Commission's Facebook page at *www.facebook.com/fcc.* Members of the public may submit any questions that arise during the meeting to *livequestions@fcc.gov.* Open captioning will be provided for the live stream. Other reasonable accommodations for people with disabilities are available upon request. 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 FCC's Consumer and Governmental Affairs Bureau at 202–418–0530 (voice).

To obtain further information about the Committee, consult the Committee's web page at: *www.fcc.gov/consumer-advisory-committee,* or contact: Scott Marshall, Designated Federal Officer, Consumer and Governmental Affairs Bureau, Federal Communications Commission, 445 12th St. SW, Washington, DC 20554; phone: 202–418–2809 (voice or Relay); email: *scott.marshall@fcc.gov;* or Gregory V. Haledjian, Deputy Designated Federal Officer, Consumer and Governmental Affairs Bureau, Federal Communications Commission, 445 12th St. SW, Washington, DC 20554; phone: 202–418–7440; email: *gregory.haledjian@fcc.gov.* Comments to the Committee may be submitted through the Designated Federal Officer or the Deputy Designated Federal Officer at the above email addresses.

Federal Communications Commission.

Gregory Haledjian,

Legal Advisor, Consumer and Governmental Affairs Bureau.

[FR Doc. 2020–18079 Filed 8–18–20; 8:45 am]

BILLING CODE P

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of the filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments, relevant information, or documents regarding the agreements to the Secretary by email at *Secretary@fmc.gov,* or by mail, Federal Maritime Commission, Washington, DC 20573. Comments will be most helpful to the Commission if received within 12 days of the date this notice appears in the **Federal Register**. Copies of agreements are available through the Commission's website (*www.fmc.gov*) or by contacting the Office of Agreements at (202)–523–5793 or *tradeanalysis@fmc.gov.*

Agreement No.: 012293–008.

Agreement Name: Maersk/MSC Vessel Sharing Agreement.

Parties: Maersk A/S and MSC Mediterranean Shipping Company S.A.

Filing Party: Wayne Rohde; Cozen O'Connor.

Synopsis: The amendment revises Article 5.1(a) to update the number of vessels operated by the parties in the U.S. trades and to increase the maximum number of vessels the parties are authorized to operate under the Agreement. The parties request expedited review.

Proposed Effective Date: 9/26/2020.

Location: https://www2.fmc.gov/FMC.Agreements.Web/Public/AgreementHistory/153.

Dated: August 14, 2020.

Rachel E. Dickon,

Secretary.

[FR Doc. 2020–18159 Filed 8–18–20; 8:45 am]

BILLING CODE 6730–02–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 public portions of 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(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* 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 September 18, 2020.

A. Federal Reserve Bank of Dallas (Robert L. Triplett III, Senior Vice President) 2200 North Pearl Street, Dallas, Texas 75201–2272:

1. *Greenback Fincorp, Inc., Austin, Texas;* to become a bank holding company by acquiring Austin Capital Bank SSB, Austin, Texas.

Board of Governors of the Federal Reserve System, August 14, 2020.

Yao-Chin Chao,

Assistant Secretary of the Board.

[FR Doc. 2020–18149 Filed 8–18–20; 8:45 am]

BILLING CODE P

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

Joint Federal Retirement Thrift Investment Board Member and Employee Thrift Advisory Council Meeting

August 24, 2020, 10:00 a.m.

Telephonic

Board Meeting Agenda

Open Session

1. Approval of the July 27, 2020 Board Meeting Minutes
2. Monthly Reports
   (a) Participant Activity Report
   (b) Investment Performance
   (c) Legislative Report
3. Quarterly Reports
   (d) Metrics
4. Participant Survey Report
5. Office of Communication & Education Annual Report

Contact Person for More Information: Kimberly Weaver, Director, Office of External Affairs, (202) 942–1640.

Supplementary Information: Dial-in (listen only) information: Number: 1–877–446–3914, Code: 4856948.

Dated: August 13, 2020.

Megan Grumbine,

General Counsel, Federal Retirement Thrift Investment Board.

[FR Doc. 2020–18122 Filed 8–18–20; 8:45 am]

BILLING CODE 6760–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Docket No. NIOSH 339]

Advisory Board on Radiation and Worker Health (ABRWH), National Institute for Occupational Safety and Health (NIOSH)

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice of meeting and request for comment.

SUMMARY: In accordance with the Federal Advisory Committee Act, the CDC, announces the following meeting of the Advisory Board on Radiation and Worker Health (ABRWH). This meeting is open to the public, limited only by the ports available. The audio conference line has 150 ports for callers. The public is welcome to submit written comments in advance of the meeting, to the contact person below. Written comments received in advance of the meeting will be included in the official record of the meeting. The public is also welcome to listen to the meeting by joining the teleconference (information below).

DATES: The meeting will be held on October 27, 2020 from 11:00 a.m. to 1:00 p.m., EDT.

Written comments must be received on or before October 20, 2020. Docket number NIOSH–339, will close on October 20, 2020.

ADDRESSES: You may submit comments, identified by Docket No. NIOSH–339 by the following method listed below. CDC does not accept comment by email.

- *Mail:* Docket number NIOSH–339 c/o Sherri Diana, NIOSH Docket Office, National Institute for Occupational Safety and Health, 1090 Tusculum Avenue, MS C–34, Cincinnati, Ohio 45226.

Instructions: All submissions received must include the Agency name and Docket Number. All relevant comments received will be posted without change to *https://www.cdc.gov/niosh/docket/default.html,* including any personal information provided. For access to the docket to read background documents or comments received, go to *https://www.cdc.gov/niosh/docket/default.html.*

FOR FURTHER INFORMATION CONTACT: Rashaun Roberts, Ph.D., Designated Federal Officer, NIOSH, CDC, 1090 Tusculum Avenue, Mailstop C–24, Cincinnati, Ohio 45226, Telephone (513) 533–6800, Toll Free 1(800)CDC–INFO, Email *ocas@cdc.gov.*

SUPPLEMENTARY INFORMATION:

Background: The Advisory Board was established under the Energy Employees Occupational Illness Compensation Program Act of 2000 to advise the President on a variety of policy and technical functions required to implement and effectively manage the new compensation program. Key functions of the Advisory Board include providing advice on the development of probability of causation guidelines which have been promulgated by the Department of Health and Human Services (HHS) as a final rule, advice on methods of dose reconstruction which have also been promulgated by HHS as a final rule, advice on the scientific validity and quality of dose estimation and reconstruction efforts being performed for purposes of the compensation program, and advice on petitions to add classes of workers to the Special Exposure Cohort (SEC). In December 2000, the President delegated responsibility for funding, staffing, and operating the Advisory Board to HHS, which subsequently delegated this authority to the CDC. NIOSH implements this responsibility for CDC.

The Advisory Board's charter was issued on August 3, 2001, renewed at appropriate intervals, rechartered on March 22, 2020, and will terminate on March 22, 2022.

Purpose: This Advisory Board is charged with (a) providing advice to the Secretary, HHS, on the development of guidelines under Executive Order 13179; (b) providing advice to the Secretary, HHS, on the scientific validity and quality of dose reconstruction efforts performed for this program; and (c) upon request by the Secretary, HHS, advising the Secretary on whether there is a class of employees at any Department of Energy facility who were exposed to radiation but for whom it is not feasible to estimate their radiation dose, and on whether there is reasonable likelihood that such radiation doses may have endangered the health of members of this class.

Matters To Be Considered: The agenda will include discussions on: Work Group and Subcommittee Reports; Update on the Status of SEC Petitions; Plans for the December 2020 Advisory Board Meeting; and Advisory Board Correspondence. Agenda items are subject to change as priorities dictate.

Meeting Information: Audio Conference Call via FTS Conferencing. The USA toll-free dial-in number is 1–866–659–0537; the pass code is 9933701.

Public Participation

Comments received are part of the public record and are subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure. If you include your name, contact information, or other information that identifies you in the body of your comments, that information will be on public display. CDC will review all submissions and may choose to redact, or withhold, submissions containing private or proprietary information such as Social Security numbers, medical information, inappropriate language, or duplicate/near duplicate examples of a mass-mail campaign. CDC will carefully consider all comments submitted into the docket. CDC does not accept comment by email.

Written Public Comment: Written comments will also be accepted from those unable to attend the public session per the instructions provided in the address section above. Written comments received in advance of the meeting will be included in the official record of the meeting.

The Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2020–18162 Filed 8–18–20; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Board of Scientific Counselors, National Center for Health Statistics (BSC, NCHS); Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Board of Scientific Counselors, National Center for Health Statistics (BSC, NCHS); September 17, 2020, from 9:30 a.m. to 3:00 p.m., EDT, and September 18, 2020, from 9:00 a.m. to 11:30 a.m., EDT, in the original FRN. The teleconference access is

https://www.cdc.gov/nchs/about/bsc/bsc_meetings.htm which was published in the **Federal Register** on July 31, 2020, Volume 85, Number 148, page 46121.

The meeting is being amended to change the meeting time and should read as follows:

DATES: The meeting will be held on September 17, 2020, from 11:00 a.m. to 4:30 p.m., EDT and September 18, 2020, from 11:00 a.m. to 2:15 p.m., EDT.

The meeting is open to the public.

FOR FURTHER INFORMATION CONTACT: Sayeedha Uddin, M.D., M.P.H., Executive Secretary, NCHS/CDC, Board of Scientific Counselors, 3311 Toledo Road, Room 2627, Hyattsville, Maryland 20782, telephone (301) 458–4303, email *SUddin@cdc.gov.*

The Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2020–18160 Filed 8–18–20; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Lead Exposure and Prevention Advisory Committee (LEPAC)

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, the CDC announces the following meeting for the Lead Exposure and Prevention Advisory Committee (LEPAC). This meeting is open to the public by teleconference but advance registration by October 16, 2020 is needed to receive the information to join the meeting. The registration link is *https://rossstrategic.zoom.us/webinar/register/WN_QsgX-UlJS02mWW8Kn8SUmg.* The public comment period is scheduled on October 30, 2020 from 1:30 p.m. until 1:45 p.m. Individuals wishing to make a comment during the public comment period, please email your name, organization, and phone number by October 16, 2020 to *LEPAC@cdc.gov.*

DATES: The meeting will be held on October 30, 2020, from 9:00 a.m. to 4:30 p.m., EDT.

ADDRESSES: Register in advance at *https://rossstrategic.zoom.us/webinar/register/WN_QsgX-UlJS02mWW8Kn8SUmg* to receive information to join the meeting.

FOR FURTHER INFORMATION CONTACT: Ms. Perri Ruckart, M.P.H., Designated Federal Officer, National Center for Environmental Health, CDC, 4770 Buford Highway, Atlanta, GA 30341, Telephone: 770–488–3300; email address *pruckart@cdc.gov.*

SUPPLEMENTARY INFORMATION:

Purpose: The Lead Exposure and Prevention Advisory Committee was established under Section 2203 of Public Law 114–322, the Water Infrastructure Improvements for the Nation Act; 42 U.S.C. 300j–27, Registry for Lead Exposure and Advisory Committee. The Secretary, Department of Health and Human Services (HHS) and by delegation, the Director, CDC and Administrator, NCEH/ATSDR, are authorized under Section 2203 of Public Law 114–322 (42 U.S.C. 300j–27) to review research and Federal programs and services related to lead poisoning and to identify effective services and best practices for addressing and preventing lead exposure in communities.

The LEPAC is charged with providing advice and guidance to the Secretary, HHS, and the Director, CDC and Administrator, ATSDR, on the: (1) Review of Federal programs and services available to individual communities exposed to lead; (2) review current research on lead exposure to identify additional research needs; (3) review and identify best practices, or the need for best practices regarding lead screening and the prevention of lead poisoning; (4) identify effective services, including services relating to healthcare, education, and nutrition for individuals and communities affected by lead exposure and lead poisoning, including in consultation with, as appropriate, the lead exposure registry as established in Section 2203(b) of Public Law 114–322; and (5) undertake any other review or activities that the Secretary determines to be appropriate.

Matters To Be Considered: The agenda will include discussions on the 2018 Federal Lead Action Plan; COVID–19 and CDC lead surveillance, lead laboratory methods; U.S. Housing and Urban Development's (HUD) role in lead poisoning prevention; an update from CDC's blood lead reference value workgroup; and a discussion on effective services and best practices regarding lead screening and lead poisoning prevention and research gaps. Agenda items are subject to change as priorities dictate. The Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2020–18161 Filed 8–18–20; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Community Living

[OMB No. 0985–0004]

Agency Information Collection Activities; Proposed Collection; Comment Request; Title III Supplemental Form to Financial Status Report (SF–425)

AGENCY: Administration for Community Living, HHS.

ACTION: Notice.

SUMMARY: The Administration for Community Living (ACL) is announcing an opportunity for the public to comment on the proposed collection of information listed above. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish a notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the Proposed Extension without Change and solicits comments on the information collection requirements related to Title III Supplemental Form to Financial Status Report (SF–425).

DATES: Comments on the collection of information must be submitted electronically by 11:59 p.m. (EST) or postmarked by October 19, 2020.

ADDRESSES: Submit electronic comments on the collection of information to: Alice Kelsey. Submit written comments on the collection of information to Administration for

Community Living, Washington, DC 20201, Attention: Alice Kelsey.

FOR FURTHER INFORMATION CONTACT: Alice Kelsey, Administration for Community Living, Washington, DC 20201, (202) 795–7342, *Alice.Kelsey@ACL.hhs.gov*.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in the PRA and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, ACL is publishing a notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, ACL invites comments on our burden estimates or any other aspect of this collection of information, including:

(1) Whether the proposed collection of information is necessary for the proper performance of ACL's functions, including whether the information will have practical utility;

(2) the accuracy of ACL's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used to determine burden estimates;

(3) ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques when appropriate, and other forms of information technology.

The Title III Supplemental Form to the Financial Status Report (SF–425) is used by ACL/AoA for all grantees to obtain a more detailed understanding of how projects funded under Title III of the Older Americans Act (OAA) of 1965, as amended, are being administered, and to ensure compliance with legislative requirements, pertinent Federal regulations and other applicable instructions and guidelines issued by the ACL. The level of data detail necessary is not available through the SF–425 form. The Supplemental Form provides necessary details on non-federal required match, administration expenditures, and Long Term Care Ombudsman expenditures. The proposed data collection tools are on the ACL website for review and public comment, please visit *https://www.acl.gov/about-acl/public-input.*

Estimated Program Burden: ACL estimates the burden associated with this collection of information as follows: 56 State Units on Aging (SUA) respond semi-annually which have an average estimated burden of 2 hours per grantee for a total of 224 hours annually.

Respondent/data collection activity	Number of respondents	Responses per respondent	Hours per response	Annual burden hours
Title III Supplemental Form to the Financial Status Report	56	2	2	224
Total	56	2	2	224

Dated: August 13, 2020.

Lance Robertson,

ACL Administrator and Assistant Secretary for Aging.

[FR Doc. 2020–18110 Filed 8–18–20; 8:45 am]

BILLING CODE 4154–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Community Living

Agency Information Collection Activities; Proposed Collection; Comment Request; Certification of Maintenance of Effort for Title III and Certification of Long Term Care Ombudsman Program Expenditures, OMB# 0985–0009

AGENCY: Administration for Community Living, HHS.

ACTION: Notice.

SUMMARY: The Administration for Community Living (ACL) is announcing an opportunity for the public to comment on the proposed collection of information listed above. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish a notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the Proposed Revision and solicits comments on the information collection requirements related to Certification of Maintenance of Effort for Title III and Certification of Long Term Care Ombudsman Program Expenditures.

DATES: Comments on the collection of information must be submitted electronically by 11:59 p.m. (EST) or postmarked by October 19, 2020.

ADDRESSES: Submit electronic comments on the collection of information to: Alice Kelsey Submit written comments on the collection of information to Administration for Community Living, Washington, DC 20201, Attention: Alice Kelsey.

FOR FURTHER INFORMATION CONTACT: Alice Kelsey, Administration for Community Living, Washington, DC 20201, (202) 795–7342 *Alice.Kelsey@acl.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in the PRA and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, ACL is publishing a notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, ACL invites comments on our burden estimates or any other aspect of this collection of information, including:

(1) Whether the proposed collection of information is necessary for the proper performance of ACL's functions, including whether the information will have practical utility;

(2) the accuracy of ACL's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used to determine burden estimates;

(3) ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques when appropriate, and other forms of information technology.

The Certification of Maintenance of Effort under Title III and Certification of Long-Term Care Ombudsman (LTCO) Program Expenditures provide statutorily required information regarding each state's contribution to programs funded under the Older Americans Act and compliance with legislative requirements, pertinent Federal regulations, and other applicable instructions and guidelines issued by ACL. This information will be used for Federal oversight of Title III Programs and Long Term Care Ombudsman Program expenditures.

The proposed data collection tools are located on the ACL website, please visit for review and comment on this information collection. *https://www.acl.gov/about-acl/public-input.*

Estimated Program Burden

ACL estimates the burden associated with this collection of information as follows: 56 State Agencies on Aging respond annually, and it takes each agency an average of one half (.5) hour per State agency per year to complete each form for a total of twenty-eight hours for all state agencies annually. The half hour estimate is based on prior years' experience with States in completing these forms.

Respondent/data collection activity	Number of respondents	Responses per respondent	Hours per response	Annual burden hours
Certification on Maintenance of Effort under Title III	56	1	.5	28
Certification of Long-Term Care Ombudsman Program Expenditures	56	1	.5	28
Total	112	2	1	56

Dated: August 13, 2020.

Lance Robertson,

ACL Administrator and Assistant Secretary for Aging.

[FR Doc. 2020–18111 Filed 8–18–20; 8:45 am]

BILLING CODE 4154–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2020–N–0025]

Availability of FDA Statement Added to the Docket for Public Meeting Related to Cosmetic Products Containing Talc

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or we) is announcing the availability of a statement added to the docket for the public meeting entitled ''Testing Methods for Asbestos in Talc and Cosmetic Products Containing Talc'' to address information provided in connection with the public meeting. FDA held the public meeting on February 4, 2020, to discuss and obtain scientific data and information on topics related to cosmetic products with talc as an ingredient, specifically, testing methodologies, terminology, and criteria that could be applied to characterize and measure asbestos and other potentially harmful elongate mineral particles (EMPs) that may be present as contaminants in such products. The meeting included presentations by members of an interagency working group (the Interagency Working Group on Asbestos in Consumer Products or IWGACP).

FOR FURTHER INFORMATION CONTACT: Deborah Smegal, Office of Cosmetics and Colors, Center for Food Safety and Applied Nutrition, Food and Drug Administration, 5100 Campus Dr., College Park, MD 20740, 240–402–1130.

SUPPLEMENTARY INFORMATION:

I. Background

We opened a public docket and held a public meeting on February 4, 2020, to discuss and obtain scientific data and information on topics related to cosmetic products with talc as an ingredient, specifically, testing methodologies, terminology, and criteria that could be applied to characterize and measure asbestos and other potentially harmful EMPs that may be present as contaminants in such products. The meeting included presentations by members of an interagency working group (IWGACP).

As part of the meeting materials, FDA made available an Executive Summary titled ''Preliminary Recommendations on Testing Methods for Asbestos in Talc and Consumer Products Containing Talc'' by the IWGACP. Neither the Executive Summary nor any of the presentations at the public meeting by members of the IWGACP represent proposed or preliminary recommendations or policies of FDA or any other Federal Agency.

Recently, we have been made aware of concerns that some external parties may consider the Executive Summary to be FDA recommendations. As a result, we are announcing the availability of a statement in the public docket to address information provided in connection with the public meeting. We have also added corresponding content on FDA's web page for cosmetics and talc (*https://www.fda.gov/cosmetics/cosmetic-ingredients/talc*).

These updates are intended to clarify that the Executive Summary and related presentations at the public meeting were meant solely to solicit scientific feedback on the issues raised and should not be used for any other purpose. FDA and members of the IWGACP continue to evaluate the scientific literature and public feedback to the docket. FDA does not have any recommendations at this time. Should FDA decide to develop recommendations with respect to standards or testing methods for asbestos in talc, as a result of the information it received as part of the public meeting and comments to the public docket or otherwise, it would issue draft guidance for public comment. Likewise, FDA would propose any related regulations through a public notice and comment process.

II. Electronic Access

Persons with access to the internet may obtain an electronic version of the document at either *https://www.fda.gov/cosmetics/cosmetic-ingredients/talc* or *https:/www.regulations.gov.*

Dated: August 14, 2020.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2020–18181 Filed 8–18–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2020–D–0276]

Compliance Policy for the Quantity of Bioavailability and Bioequivalence Samples Retained Under 21 CFR 320.38(c); Guidance for Industry; Availability

AGENCY: Food and Drug Administration, Health and Human Services (HHS).

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a final guidance for industry entitled ''Compliance Policy for the Quantity of Bioavailability and Bioequivalence Samples Retained Under 21 CFR 320.38(c).'' This guidance describes FDA's policy concerning the conditions under which the Agency generally does not intend to take regulatory action against an applicant or a contract research organization (CRO) that retains less than the quantity of reserve samples (that is, samples of the test article and reference standard that were used in bioavailability (BA) or bioequivalence (BE) testing) required in our regulations. FDA developed this guidance in light of technological advances in FDA's ability to test retention samples and in response to communications from applicants and CROs requesting to retain a lower quantity of these reserve samples.

DATES: The announcement of the guidance is published in the **Federal Register** on August 19, 2020.

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–2020–D–0276 for ''Compliance Policy for the Quantity of Bioavailability and Bioequivalence Samples Retained Under 21 CFR 320.38(c).'' 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.govinfo.gov/content/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 this guidance to the Office of Communications, 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 two self-addressed adhesive labels to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

FOR FURTHER INFORMATION CONTACT: Melissa Mannion, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Silver Spring, MD 20993, 301–796–2747, *Melissa.Mannion@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a guidance for industry entitled ''Compliance Policy for the Quantity of Bioavailability and Bioequivalence Samples Retained Under 21 CFR 320.38(c).'' The Agency is issuing this guidance consistent with good guidance practices (GGP) regulations (21 CFR 10.115) and is implementing this guidance without prior public comment because FDA has determined that prior public participation is not feasible or appropriate as public comment would not affect the specifications of FDA's testing of retention samples (§ 10.115(g)(2)). FDA has made this determination under § 10.115(g)(2) because, with technological advances, the reduced quantity of reserve samples is now sufficient for FDA testing; this reduced quantity will provide a less burdensome approach for applicants and CROs but remains consistent with the Agency's mission to ensure public health. Although this guidance

document is immediately in effect, it remains subject to comment in accordance with FDA's GGP regulation and FDA will consider all comments received and revise the guidance document as appropriate (§ 10.115(g)(3)).

On November 8, 1990, we issued an interim rule that amended, in relevant part, part 320 (21 CFR 320) by adding a requirement to retain reserve samples of drug products (that is, samples of the drug products that were used to conduct BA or BE studies) for a specified period and, when specifically requested, to release the reserve samples to us. The interim rule was intended to help ensure BE between generic drugs and their reference listed drugs and to help us investigate possible fraud in BA and BE testing. After consideration of public comments, we published a final rule in the **Federal Register** on April 28, 1993 (58 FR 25918).

In the final rule, 21 CFR 320.38 and 320.63 require a new drug application or abbreviated new drug application applicant (or its CRO) to retain reserve samples of the test article and reference standard that were used in conducting any in vivo BA and in vivo or in vitro BE study that supports the approval of an application or supplemental application. Specifically, § 320.38(c) requires these applicants (or their CROs) to retain a quantity of the test article and reference standard that were used in BA or BE testing that is at least five times the amount of product required for release testing.

Section 320.38(c) requires that reserve samples of the test article and reference standard used in a BA or BE study are of a sufficient quantity to perform five times all of the release tests required in the application or supplemental application. Since the final rule was issued in 1993, technological advances in our ability to test these products have led to test methods that are less destructive and more sensitive, allowing us to detect the identity and composition of the test article and reference standard with smaller volumes of samples. Consistent with these developments, FDA has received communications from applicants and CROs requesting to retain a lower quantity of the reserve samples.

In light of these technological advances, this guidance discusses the conditions under which we do not generally intend to take regulatory action against an applicant or CRO that retains an appropriate reduced quantity of reserve samples of the test article and reference standard that were used in its BA or BE testing.

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 ''Compliance Policy for the Quantity of Bioavailability and Bioequivalence Samples Retained Under 21 CFR 320.38(c).'' 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. 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. 3501–3521). The collections of information in 21 CFR parts 312 and 314 have been approved under OMB control numbers 0910–0014 and 0910–0001, respectively. The collections of information in part 320 for ''Investigational New Drug Safety Reporting Requirements for Human Drug and Biological Products and Safety Reporting Requirements for Bioavailability and Bioequivalence Studies in Humans'' have been approved under OMB control number 0910–0672. The recordkeeping requirement for CGMP sample retention in 21 CFR 211.170 has been approved under OMB control number 0910–0139.

III. Electronic Access

Persons with access to the internet may obtain the guidance at either *https://www.fda.gov/drugs/guidance-compliance-regulatory-information/guidances-drugs* or *https://www.regulations.gov.* Use the FDA website listed in the previous sentence to find the most current version of the guidance.

Dated: August 10, 2020.

Lowell J. Schiller,

Principal Associate Commissioner for Policy.

[FR Doc. 2020–17798 Filed 8–18–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Findings of Research Misconduct

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: Findings of research misconduct have been made against Anil K. Jaiswal, Ph.D. (Respondent), former professor, Department of Pharmacology, University of Maryland at Baltimore, School of Medicine (UMB). Dr. Jaiswal engaged in research misconduct in research supported by U.S. Public Health Service (PHS) funds, specifically National Cancer Institute (NCI), National Institutes of Health (NIH), grants R01 CA062483 and R01 CA081057; National Institute of Environmental Health Sciences (NIEHS), NIH, grants R01 ES007943, R01 ES012265, and R01 ES021483; and National Institute of General Medical Sciences (NIGMS), NIH, grant R01 GM047466. The administrative actions, including debarment for a period of three (3) years, were implemented beginning on July 21, 2020, and are detailed below.

FOR FURTHER INFORMATION CONTACT: Elisabeth A. Handley, Director, Office of Research Integrity, 1101 Wootton Parkway, Suite 240, Rockville, MD 20852, (240) 453–8200.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the Office of Research Integrity (ORI) has taken final action in the following case:

Anil K. Jaiswal, Ph.D., University of Maryland at Baltimore, School of Medicine: Based on an investigation conducted by UMB and additional analysis conducted by ORI in its oversight review, ORI found that Dr. Anil K. Jaiswal, former professor, Department of Pharmacology, UMB, engaged in research misconduct in research supported by PHS funds, specifically NCI, NIH, grants R01 CA062483 and R01 CA081057; NIEHS, NIH, grants R01 ES007943, R01 ES012265, and R01 ES021483; and NIGMS, NIH, grant R01 GM047466. ORI found that Respondent intentionally, knowingly, or recklessly: (a) Used random blank background sections of film or empty boxes to falsely represent or fabricate western blot analyses; (b) used manipulated images to generate and report falsified data in figures; and (c) used mislabeled images to falsely report data in figures. Respondent's research misconduct occurred in the following four (4) funded PHS grant applications, four (4) unfunded PHS grant applications, and six (6) PHS-supported published papers:

- NCI, NIH grant application R01 CA081057–11, Mechanisms of Bioreductive Drugs Activation (unfunded)
- NIEHS, NIH grant application R01 ES007943–10, Prevention of Quinone Toxicity and Mutagenicity (funded).
- NIEHS, NIH grant application R01 ES007943–15, Prevention of Quinone Toxicity and Mutagenicity (unfunded).

• NIEHS, NIH grant application R01 ES007943–15A1, Prevention of Quinone Toxicity and Mutagenicity (funded).

• NIEHS, NIH grant application R01 ES012265–07, Role and Regulation of INrf2 (funded).

• NIEHS, NIH grant application R01 ES021483–01, Quinone Oxidoreductases and Mammary Toxicity/Carcinogenicity (unfunded).

• NIGMS, NIH grant application R01 GM047466–20, Regulation of NAD(P)H:Quinone Oxydoreductases (unfunded).

• NIGMS, NIH grant application R01 GM047466–20A1, Regulation of NAD(P)H:Quinone Oxydoreductases (funded).

• Overlapping signal sequences control nuclear localization and endoplasmic reticulum retention of GRP58. *Biochem Biophys Res Commun.* 2008 Dec 12;377(2):407–12 (hereafter referred to as ''*BBRC* 2008''). Retraction in: *Biochem Biophys Res Commun.* 2018 Jun 27; 501(3):826.

• Disruption of the NAD(P)H:quinone oxidoreductase 1 (NQO1) gene in mice causes myelogenous hyperplasia. *Cancer Res* 2002 Jun 1;62(11):3030–6 (hereafter referred to as ''*Cancer Res* 2002''). Retraction in: *Cancer Res* 2018 Nov 15;78(22):6526.

• Deficiency of NRH:quinone oxidoreductase 2 increases susceptibility to 7,12-dimethylbenz(a)anthracene and benzo(a)pyrene-induced skin carcinogenesis. *Cancer Res* 2004 Sep 1;64(17):5925–8 (hereafter referred to as ''*Cancer Res* 2004'').

• Nuclear import and export signals in control of Nrf2. *J Biol Chem.* 2005 Aug 12;280(32):29158–68; Epub 2005 May 17 (hereafter referred to as ''*JBC* 2005''). Retraction in: *J Biol Chem.* 2017 Feb 3;292(5):2052.

• Quinone oxidoreductases in protection against myelogenous hyperplasia and benzene toxicity. *Chem Biol Interact.* 2005 May 30;153–154:147–57 (hereafter referred to as *Chem Biol Interact.* 2005'').

• Low and high dose UVB regulation of transcription factor NF–E2-related factor 2. *Cancer Res* 2006 Sep 1;66(17):8421–9 (hereafter referred to as ''*Cancer Res* 2006''). Retraction in: *Cancer Res* 2018 Nov 1;78(21):6346.

Specifically, ORI found by a preponderance of the evidence that Respondent engaged in research misconduct by intentionally, knowingly, or recklessly:

• Using a random blank background section of a film for PHS grant application R01 CA081057–11, Figure 8D (top panel), to falsely report that human kidney carcinoma 293 expressing vector (293–V) did not express the Flag-Nrf2 protein, regardless of treatment condition (control, tetracycline, tetracycline + tert-butyl hydroquinone).

• using a random blank background section of a film for PHS grant application R01 CA081057–11, Figure 9B (right-side, top panel), to falsely report that human kidney carcinoma 293 expressing vector (293–V) did not express the Flag-Nrf2 protein, regardless of treatment condition (control, etoposide, tetracycline + etoposide, tetracycline + tert-butyl hydroquinone + etoposide).

• using empty boxes drawn in PowerPoint in PHS grant application R01 GM047466–20A1, Figure 5 (left-side, third and fourth LDH panels), to falsify or fabricate the absence of LDH protein expression in human fibroblast and mouse skin keratinocytes when exposed to 0 to 20 J/m² UVB.

• using empty boxes drawn in PowerPoint in *Cancer Res* 2006, Figures 2A (middle panel on left; and lower panel on right) and 2D (lower panel), to falsely show that there was an absence of Lamin B and LDH protein expression.

• using a manipulated image in which the background was digitally added to falsely show the expression of p53, in wild type and $NQO2^{-/-}$ mice skin exposed to acetone, 800 nmol of benzo(a)pyrene (''BP800'') or 1600 nmol of benzo(a)pyrene (''BP1600'') dissolved in acetone in PHS grant application R01 ES007943–10, Figure 10 (right side, top panel); in PHS grant application R01 ES007943–15, Figure 4C (top panel); and in *Cancer Res* 2004, Figure 2 (top panel).

• using an image that had been cropped, vertically stretched, and horizontally flipped to falsely show that wild-type mouse keratinocytes that express NQO1 were used in PHS grant application R01 ES007943–15, Figure 9A (seventh panel on left), and PHS grant application R01 ES007943–15A1, Figure 6A (seventh panel on the left).

• using an image that masked bands in *BBRC* 2008, Figures 1D (top panel on left) and 1E (bottom panel on left), to falsely report figures, which showed:

—That in HCT116 cells transfected with NLS deficient GRP58DNLS–V5, the nuclear localization of GRP58 is completely abrogated when in fact the contrast was changed to conceal the expression

—the effect of putative NLS sequence on nuclear localization of GRP58 in HCT116 cells transfected with pcDNA–V5 plasmids for GRP58–WT or GRP58–NLS K–A mutant when in fact blots showing the control condition, Lamin B, were concealed by changing the contrast

• using an image that had been horizontally flipped and stretched, with contrast enhanced to falsify Cyp1A1 data in *BBRC* 2008, Figure 4A (bottom panel on left), to falsely report a figure that showed HCT116 cells transfected with pcDNA–GRP58–WT–V5 or pcDNA–GRP58-ΔER–V5 showed increased expression in the endoplasmic reticulum when the original data showed increased expression in the cytosolic fraction.

• using a vertically flipped image in *BBRC* 2008, Figure 4B (top panel), to falsely report a figure that showed HCT116 cells transfected with GRP58 NLS/ER DD (combined deletion of NLS and ER regions) is not expressed in the endoplasmic reticulum or the nuclear fraction but only in the cytosolic fraction.

• using a manipulated image in which the contrast and brightness had been enhanced in *JBC* 2005, Figure 4B, to falsely report a figure that showed reduced protein expression of LDH and Lamin B.

• using the image in Figure 9 (top right) in PHS grant application R01 ES012265–07 to falsely represent reverse immunoprecipitation of Hepa-1 cell extract with anti-INrf2 and anti-PGAM5L antibodies and reusing the same image, after being flipped horizontally, in Figure 12 (top right) of the same application to falsely represent the same experiment as with anti-Flag and pICln antibodies.

• falsifying reported results in Figure 9 (upper panel) in PHS grant application R01 ES021483–01 as representing *in vitro* translation of two proteins (BRCA1 and NQO1), showing that NQO1 stabilizes BRCA1 against 20S proteasomal degradation, by falsely using bands labeled NQO1 from a cell lysate experiment on the original film, flipping them horizontally, enhancing the contrast to obscure one band (BRCA1+20S), and falsely relabeling the resulting panel as BRCA1.

• using bands labeled as β-actin from a cell lysate experiment on the original film, cutting out two of the bands, falsely labeling them as having been incubated with 20S + NQO1 or 20S + NQO1 + NADH, and falsely relabeling the resulting panel as NQO1 in PHS grant application R01 ES021483–01, Figure 9 (lower panel).

• using a sample with a molecular weight of 80–85kD to falsely represent P-Akt-Thr308, which should have a molecular weight of 60kD, in PHS grant applications R01 GM047466–20 and R01 GM047466–20A1, Figure 4 (first panel).

• using samples appearing in two different films, one labeled as PP2A (with a molecular weight of 75kD) and the other labeled as Akt S473 to falsely represent PP2A (with a molecular weight of 35kD) in PHS grant applications R01 GM047466–20 and R01 GM047466–20A1, Figure 4 (sixth panel).

• using protein bands from a film dated 8/25/2000 showing the expression of NQO1 in wild-type mouse liver and bone marrow to falsely represent a figure labeled instead as the expression of NQO1 in the bone marrow of wild type and NQO1 heterozygous mice in *Cancer Res* 2002, Figure 1A, and *Chem Biol Interact.* 2005, Figure 2B.

• using a single blot of protein bands to falsely represent western blots exhibiting the expression of three different proteins (p53, p73, and tubulin) in *Cancer Res* 2002, Figure 7A.

Dr. Jaiswal entered into a Voluntary Exclusion Agreement (Agreement) and agreed to the following:

(1) Respondent agreed to exclude himself voluntarily for a period of three (3) years beginning on July 21, 2020, from any contracting or subcontracting with any agency of the United States Government and from eligibility for or involvement in nonprocurement programs of the United States Government referred to as ''covered transactions'' pursuant to HHS's Implementation (2 CFR part 376) of OMB Guidelines to Agencies on Governmentwide Debarment and Suspension, 2 CFR part 180 (collectively the ''Debarment Regulations'');

(2) Respondent agreed to exclude himself voluntarily from serving in any advisory capacity to PHS including, but not limited to, service on any PHS advisory committee, board, and/or peer review committee, or as a consultant for a period of three (3) years, beginning on July 21, 2020; and

(3) as a condition of the Agreement, Respondent will request that the following papers be corrected or retracted in accordance with 42 CFR 93.407(a)(1) and 93.411(b):

• *Cancer Res* 2004 Sep 1;64(17):5925–8

• *Chem Biol Interact.* 2005 May 30;153–154:147–57

Respondent will copy ORI and the Research Integrity Officer at UMB on the correspondence.

Dated: August 14, 2020.

Elisabeth A. Handley,

Director, Office of Research Integrity, Office of the Assistant Secretary for Health.

[FR Doc. 2020–18137 Filed 8–18–20; 8:45 am]

BILLING CODE 4150–31–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Special Emphasis Panel; SEP–6: Research Answers to NCI Provocative Questions.

Date: September 28, 2020.

Time: 12:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W124, Rockville, MD 20850 (Telephone Conference Call).

Contact Person: Eun Ah Cho, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, 7W124, Rockville, MD 20850, 240–276–6342, *choe@mail.nih.gov*.

Name of Committee: National Cancer Institute Special Emphasis Panel; SEP–2: Research Answers to NCI Provocative Questions.

Date: September 28, 2020.

Time: 12:00 p.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W104, Rockville, MD 20850 (Telephone Conference Call).

Contact Person: David G. Ransom, Ph.D., Chief, Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W104, Rockville, MD 20850, 240–276–6351, *david.ransom@nih.gov*.

Name of Committee: National Cancer Institute Special Emphasis Panel; Research Projects in Cancer Systems Biology.

Date: October 9, 2020.

Time: 10:30 a.m. to 3:30 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 Special Emphasis Panel; SEP–9: NCI Clinical and Translational R21 and Omnibus R03 Review.

Date: October 15, 2020

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W640, Rockville, MD 20850 (Telephone Conference Call).

Contact Person: Saejeong J. Kim, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W640, Rockville, MD 20850, 240–276–7684, *saejeong.kim@nih.gov*.

Name of Committee: National Cancer Institute Special Emphasis Panel; Biospecimen Science Technologies for Basic and Clinical Cancer Research.

Date: October 20, 2020.

Time: 12:00 p.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W104, Rockville, MD 20850 (Telephone Conference Call).

Contact Person: David G. Ransom, Ph.D., Chief, Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W104, Rockville, MD 20850, 240–276–6351, *david.ransom@nih.gov*.

Name of Committee: National Cancer Institute Special Emphasis Panel; SEP–9: Research Answers to NCI Provocative Questions.

Date: October 27, 2020.

Time: 11:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W116, Rockville, MD 20850 (Telephone Conference Call).

Contact Person: Klaus B. Piontek, Ph.D., Scientific Review Officer, Research Programs Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W116, Rockville, MD 20850, 240–276–5413, *klaus.piontek@nih.gov*.

Name of Committee: National Cancer Institute Special Emphasis Panel; SEP–10: NCI Clinical and Translational R21 and Omnibus R03 Review.

Date: October 28, 2020.

Time: 9:30 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.*

(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: August 14, 2020.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–18164 Filed 8–18–20; 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; NIAID Clinical Trial Planning Grant (R34) and Implementation Cooperative Agreement (U01).

Date: September 30, 2020.

Time: 12:30 p.m. to 3:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G41, Rockville, MD 20892 (Virtual Meeting).

Contact Person: Kelly L. Hudspeth, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G41, Rockville, MD 20852, 240–669–5067, *kelly.hudspeth@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: August 13, 2020.

Tyeshia M. Roberson,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–18131 Filed 8–18–20; 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, Emergency Awards: Rapid Investigation of Severe Acute Respiratory Syndrome, Coronavirus 2 (SARS–CoV–2) and Coronavirus Disease 2019 (COVID–19) (R21, R01 Clinical Trials Not Allowed).

Date: September 10, 2020.

Time: 10:00 a.m. to 2:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3E62, Rockville, MD 20892 (Telephone Conference Call).

Contact Person: Ruth S. Grossman, DDS, Scientific Review Officer, Office Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3AN12J, Bethesda, MD 20892, *grossmanrs@mail.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: August 13, 2020.

Tyeshia M. Roberson,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–18133 Filed 8–18–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; 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 Child Health and Human Development Initial Review Group; Developmental Biology Subcommittee.

Date: October 12, 2020.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: 7610–B Rockledge Drive, Bethesda, MD 20817 (Virtual Meeting).

Contact Person: Cathy J. Wedeen, Ph.D., Scientific Review Officer, Division of Scientific Review, OD, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, DHHS, 6100 Executive Blvd., Room 5B01–G, Bethesda, MD 20892, 301–435–6878, *wedeenc@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: August 13, 2020.

Ronald J. Livingston, Jr.,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–18056 Filed 8–18–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Library of Medicine; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Literature Selection Technical Review Committee, October 22–23, 2020, 8:30 a.m. to 5:00 p.m., video assisted meeting, which was published in the **Federal Register** on August 5, 2020, 85 FR 151, Page 47391.

This notice is being amended to change the meeting dates from October 22–23, 2020 to October 21–22, 2020. This meeting will be a video assisted meeting. The videocast link is *https://videocast.nih.gov/.*

Dated: August 13, 2020.

Ronald J. Livingston, Jr.,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–18057 Filed 8–18–20; 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 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 contract proposals, 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; Preclinical Services for HIV Therapeutics (Task Area G).

Date: September 2, 2020.

Time: 9:00 a.m. to 12:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G33, Rockville, MD 20892 (Telephone Conference Call).

Contact Person: David C. Chang, Ph.D., Scientific Review Officer, Scientific Review Program, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G33, Rockville, MD 20852, (301) 594–4218, *changdac@mail.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: August 13, 2020.

Tyeshia M. Roberson,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–18132 Filed 8–18–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Center for Substance Abuse Treatment

Notice of Meeting

Notice is hereby given of the meeting on September 22, 2020 of the Substance Abuse and Mental Health Services Administration's (SAMHSA) Center for Substance Abuse Treatment (CSAT) National Advisory Council (NAC).

The meeting is open to the public and can be accessed remotely via WebEx and telephone only. It will include consideration of minutes from the SAMHSA CSAT NAC meeting of March 26, 2020; an update on CSAT activities; a discussion on SAMHSA's Strategic Plan; a discussion on SAMHSA's response to prevent suicide due to the COVID–19 Pandemic; and a discussion on the latest findings from the National Survey on Drug Use and Health (NSDUH).

Interested persons may present data, information, or views, orally or in writing, on issues pending before the Council. Written submissions should be forwarded to the contact person on or before September 15, 2020. Oral presentations from the public will be scheduled at the conclusion of the meeting. Individuals interested in making oral presentations must notify the contact person on or before September 15, 2020. Up to five minutes will be allotted for each presentation.

Registration is required to participate during this meeting. To attend virtually, or to obtain the call-in number and access code, submit written or brief oral comments, or request special accommodations for persons with disabilities, please register on-line at *http://snacregister.samhsa.gov/MeetingList.aspx,* or communicate with the contact person.

Meeting information and a roster of Council members may be obtained by accessing the SAMHSA Committee website at *http://www.samhsa.gov/about-us/advisory-councils/csat-national-advisory-council* or the contact person.

Council Name: SAMHSA's Center for Substance Abuse Treatment National Advisory Council.

Date/Time/Type: September 22, 2020, 1:00 p.m.–6:00 p.m. EDT, Open.

Place: SAMHSA, 5600 Fishers Lane, Rockville, Maryland 20857.

Contact: Tracy Goss, Designated Federal Officer, CSAT National Advisory Council, 5600 Fishers Lane, Rockville, Maryland 20857 (mail), Telephone: (240) 276–0759, Email: *tracy.goss@samhsa.hhs.gov.*

Authority: Public Law 92–463

Dated: August 13, 2020.

Carlos Castillo,

Committee Management Officer, SAMHSA.

[FR Doc. 2020–18117 Filed 8–18–20; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2020–0318]

Gulf of Mexico Area Maritime Security Advisory Committee (AMSC)

AGENCY: Coast Guard, DHS.

ACTION: Solicitation for membership.

SUMMARY: This notice requests individuals interested in serving on the Gulf of Mexico Area Maritime Security Advisory Committee (AMSC) submit their applications for membership to the Federal Maritime Security Coordinator (FMSC) Eighth Coast Guard District. The Committee assists the FMSC, Eighth District, in developing, reviewing, and updating the Area Maritime Security Plan for their area of responsibility.

DATES: Requests for membership should reach the U.S. Coast Guard FMSC Eighth Coast Guard District on September 18, 2020.

ADDRESSES: Applications for membership should be submitted to the FMSC at the following address: Commander, Eighth Coast Guard District, Attn: Mr. Nick Parham, Gulf Mexico AMSC Executive Secretary, Hale Boggs Federal Building, 500 Poydras St., Suite 1341, New Orleans, LA 70130.

FOR FURTHER INFORMATION CONTACT: For questions about submitting an

application or about the AMSC in general, contact Mr. Nick Parham, Gulf of Mexico AMSC Executive Secretary, Phone: (504) 671–2044.

SUPPLEMENTARY INFORMATION:

Authority

Section 102 of the Maritime Transportation Security Act (MTSA) of 2002 (Pub. L. 107–295) added section 70112 to Title 46 of the U.S. Code, and authorized the Secretary of the Department in which the Coast Guard is operating to establish Area Maritime Security Advisory Committees for any port area of the United States. (See 33 U.S.C. 1226; 46 U.S.C. 70112; 33 CFR 1.05–1, 6.01; Department of Homeland Security Delegation No. 0170.1). The MTSA includes a provision exempting these AMSCs from the Federal Advisory Committee Act (FACA), Public Law 92–436, 86 Stat. 470 (5 U.S.C. App.2).

Gulf of Mexico AMSC Mission

The AMSCs shall assist the Federal Maritime Security Coordinator in the development, review, update, and exercising of the AMS Plan for their area of responsibility. Such matters may include, but are not limited to: Identifying critical port infrastructure and operations; Identifying risks (threats, vulnerabilities, and consequences); Determining mitigation strategies and implementation methods; Developing strategies to facilitate the recovery of the MTS after a Transportation Security Incident; Developing and describing the process to continually evaluate overall port security by considering consequences and vulnerabilities, how they may change over time, and what additional mitigation strategies can be applied; and Providing advice to, and assisting the Federal Maritime Security Coordinator in developing and maintaining the Area Maritime Security Plan.

The Gulf of Mexico Area Maritime Security Committee was chartered by the Commander, Eighth Coast Guard District to study and consider issues related to security in the Gulf of Mexico, in addition to reviewing the proposed Area Maritime Security Plan and serving as a link to communicating threats to waterway users in the Gulf of Mexico and identifying and quantifying those threats. It serves to protect the Gulf of Mexico through improved security procedures and communication and as a forum to coordinate security procedures to decrease the vulnerability of resources in the Gulf of Mexico. It shall serve as an interface between regulators and industry and will assist governmental agencies to implement policies and procedures to improve security in the Gulf of Mexico. Details regarding the specific objectives of the Gulf Area Maritime Security Committee can be found in the charter.

AMSC Composition

The composition of an AMSC, to include the Gulf of Mexico AMSC, is prescribed under 33 CFR 103.305. Pursuant to that regulation, members may be selected from the Federal, Territorial, or Tribal government; the State government and political subdivisions of the State; local public safety, crisis management, and emergency response agencies; law enforcement and security organizations; maritime industry, including labor; other port stakeholders having a special competence in maritime security; and port stakeholders affected by security practices and policies. Members of the AMSC should have at least five years of experience related to maritime or port security operations.

AMSC Membership

The Gulf of Mexico AMSC has seven members. We are seeking to fill two vacancies with this solicitation:

Vice-Chairperson: The Vice Chairperson will act as Chairperson in the absence or incapacity of the Chairperson, or in the event of a vacancy in the office of the Chairperson. The ideal candidate for this position will have more than ten years of experience in security and/or emergency operations management with a significant amount of time spent working in the Gulf of Mexico or similar operational environments.

Co-Chairperson (Planning and Exercises Subcommittee): This subcommittee assists in the management of the Area Maritime Security Training and Exercise Program requirements. They will collaborate on the needed type and scope of the required annual exercises, and support the Homeland Security Exercise and Evaluation Program (HSEEP). This sub-committee also provides vetting for the development, revision, and approval of revisions of the Gulf of Mexico Area Maritime Security Plan. The ideal candidate for this position will have more than ten years of experience in emergency management planning for a maritime company or energy exploration and production company working in the Gulf of Mexico or similar operating environment.

Applicants may be required to pass an appropriate security background check prior to appointment to the committee. Members' terms of office will be for five years; however, a member is eligible to serve additional terms of office. Members will not receive any salary or other compensation for their service on an AMSC. In support of the USCG policy on gender and ethnic diversity, we encourage qualified women and members of minority groups to apply.

D. Request for Applications

Those seeking membership are not required to submit formal applications to the local FMSC; however, because we do have an obligation to ensure that a specific number of members have the prerequisite maritime security experience, we encourage the submission of resumes highlighting experience in the maritime and security industries.

The Department of Homeland Security does not discriminate in selection of Committee members on the basis of race, color, religion, sex, national origin, political affiliation, sexual orientation, gender identity, marital status, disability and genetic information, age, membership in an employee organization, or other non-merit factor. The Department of Homeland Security strives to achieve a widely diverse candidate pool for all of its recruitment actions.

Dated: August 3, 2020.

John P. Nadeau,

Rear Admiral, U.S. Coast Guard, Federal Maritime Security Coordinator—Gulf of Mexico.

[FR Doc. 2020–18105 Filed 8–18–20; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4510–DR; Docket ID FEMA–2020–0001]

Hawaii; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, Homeland Security (DHS).

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Hawaii (FEMA–4510–DR), dated April 1, 2020, and related determinations.

DATES: This amendment was issued July 27, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Hawaii is hereby amended to include Individual Assistance limited to the Crisis Counseling Program for those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of April 1, 2020.

Individual Assistance limited to the Crisis Counseling Program for all areas in the State of Hawaii (already designated for emergency protective measures [Category B] not authorized under other Federal statutes, including direct Federal assistance).

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–18061 Filed 8–18–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–3527–EM; Docket ID FEMA–2020–0001]

Louisiana; Amendment No. 1 to Notice of an Emergency Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of an emergency declaration for the State of Louisiana (FEMA–3527–EM), dated June 7, 2020, and related determinations.

DATES: This amendment was issued July 27, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident period for this emergency is closed effective June 9, 2020.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–18076 Filed 8–18–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–3530–EM; Docket ID FEMA–2020–0001]

Texas; Amendment No. 1 to Notice of an Emergency Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of an emergency declaration for the State of Texas (FEMA–3530–EM), dated July 26, 2020, and related determinations.

DATES: This amendment was issued August 6, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident period for this emergency is closed effective July 31, 2020.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–18066 Filed 8–18–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–3529–EM; Docket ID FEMA–2020–0001]

Hawaii; Amendment No. 1 to Notice of an Emergency Declaration

AGENCY: Federal Emergency Management Agency, Homeland Security (DHS).

ACTION: Notice.

SUMMARY: This notice amends the notice of an emergency declaration for the State of Hawaii (FEMA–3529–EM), dated July 25, 2020, and related determinations.

DATES: This amendment was issued August 7, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident period for this emergency is closed effective July 27, 2020.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance

(Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–18063 Filed 8–18–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4546–DR; Docket ID FEMA–2020–0001]

Alabama; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Alabama (FEMA–4546–DR), dated May 21, 2020, and related determinations.

DATES: This amendment was issued July 31, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Alabama is hereby amended to include the following area among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of May 21, 2020.

Blount County for Public Assistance.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–18064 Filed 8–18–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–3531–EM; Docket ID FEMA–2020–0001]

Virgin Islands; Amendment No. 1 to Notice of an Emergency Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of an emergency declaration for the territory of the U.S. Virgin Islands (FEMA–3531–EM), dated July 29, 2020, and related determinations.

DATES: This amendment was issued August 6, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident period for this emergency is closed effective July 31, 2020.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–18062 Filed 8–18–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–3532–EM; Docket ID FEMA–2020–0001]

Puerto Rico; Amendment No. 1 to Notice of an Emergency Declaration

AGENCY: Federal Emergency Management Agency, Homeland Security (DHS).

ACTION: Notice.

SUMMARY: This notice amends the notice of an emergency declaration for the Commonwealth of Puerto Rico (FEMA–3532–EM), dated July 29, 2020, and related determinations.

DATES: This amendment was issued August 6, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident period for this emergency is closed effective July 31, 2020.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–18065 Filed 8–18–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[201A2100DD/AAKC001030/A0A501010.999900253G]

Indian Gaming; Approval of Tribal-State Class III Gaming Compact in the State of South Dakota

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: This notice publishes the approval of the Gaming Compact (Compact) between the Standing Rock Sioux Tribe (Tribe) and the State of South Dakota (State).

DATES: The compact takes effect on August 19, 2020.

FOR FURTHER INFORMATION CONTACT: Ms. Paula L. Hart, Director, Office of Indian Gaming, Office of the Deputy Assistant Secretary—Policy and Economic Development, Washington, DC 20240, (202) 219–4066.

SUPPLEMENTARY INFORMATION: Under section 11 of the Indian Gaming Regulatory Act (IGRA), Public Law 100–497, 25 U.S.C. 2701 *et seq.,* the Secretary of the Interior shall publish in the **Federal Register** notice of approved Tribal-State compacts for the purpose of engaging in Class III gaming activities on Indian lands. As required by 25 CFR 293.4, all compacts and amendments are subject to review and approval by the Secretary.

The Compact increases the number of slot machines the Tribe may operate, specifies one gaming location in Corson County, South Dakota, increases the maximum bet allowance, and specifies a rate for the Tribe to reimburse the State for its expenses incurred in performing its responsibilities under the compact. The Compact has a three-year duration that may renew for additional three-year terms upon written agreement of the parties. The Compact is approved.

Tara Sweeney,

Assistant Secretary—Indian Affairs.

[FR Doc. 2020–18080 Filed 8–18–20; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 17–20]

Morning Star Pharmacy & Medical Supply 1; Decision And Order

The Drug Enforcement Administration (hereinafter, DEA or Government) served Morning Star Pharmacy & Medical Supply 1 (hereinafter, Respondent Pharmacy) with an Order to Show Cause (hereinafter, OSC) seeking to revoke DEA Certificate of Registration Number FM 3950070 (hereinafter, registration). Administrative Law Judge Exhibit (hereinafter, ALJX) 1 (OSC). In response to the OSC, Respondent Pharmacy submitted a timely request for a hearing before Administrative Law Judge (hereinafter, ALJ) Charles Wm. Dorman. ALJX 2. The hearing was held in Dallas, Texas from July 17–19, 2017.

On October 31, 2017, the ALJ issued a Recommended Rulings, Findings of Fact, Conclusions of Law, and Decision (hereinafter, ''Recommended Decision'' or ''RD''), which recommended that I revoke Respondent Pharmacy's registration and that I deny any pending application for renewal or modification of Respondent Pharmacy's registration. Respondent Pharmacy filed Exceptions to the Recommended Decision, and the record was forwarded to me for final agency action.

Having considered the record in its entirety, including Respondent Pharmacy's Exceptions, I agree with the RD that the record established, by substantial evidence, that Respondent Pharmacy's continued registration is inconsistent with the public interest. I further agree with the RD that Respondent Pharmacy failed to accept responsibility for its failures to meet the responsibilities of a registrant and that Respondent Pharmacy did not present adequate evidence of mitigation or remedial measures. Accordingly, I conclude that the appropriate sanctions are (1) for Respondent Pharmacy's DEA registration to be revoked; and (2) for any pending application by Respondent Pharmacy to modify or renew its registration be denied.

I. ALLEGATIONS

The Government alleged that Respondent Pharmacy has violated various federal and state laws related to controlled substances.

1. Ijeoma Amadi (hereinafter, Ms. Amadi) employed her husband, Dr. Emmanuel Amadi (hereinafter, Dr. Amadi), as a pharmacist at Respondent Pharmacy, in violation of 21 CFR 1301.76(a). Having surrendered two DEA registrations, Dr. Amadi is ineligible for employment in a capacity where he has access to controlled substances absent a waiver from the DEA. ALJX 1, at 2. Though Ms. Amadi wrote to the DEA in July 2015 to ask for a waiver, her request was denied and, by continuing to employ Dr. Amadi at Respondent Pharmacy, Respondent Pharmacy remains in ongoing violation of 21 CFR 1301.76(a).

2. Ms. Amadi also employed Dr. Amadi as a pharmacist at a second pharmacy she owned, Morning Star Pharmacy located in Cedar Hill, Texas (hereinafter, Cedar Hill), in violation of 21 CFR 1301.76(a). *Id.* at 2.

3. Between August 2014 and May 2015, pharmacists at Respondent Pharmacy and Cedar Hill filled over 200 controlled substance prescriptions outside the usual course of professional practice, in violation of 21 CFR § 1306.06, and in contravention of their ''corresponding responsibility'' under 21 CFR 1306.04(a). *Id.* at 2.

4. Between August 2014 and June 2015, pharmacists at Respondent Pharmacy and Cedar Hill, including Dr. Amadi, failed to comply with the above federal laws and were also in violation of the following federal and state laws relating to controlled substances, 21 U.S.C. 823(f)(4); Tex. Health & Safety Code § 481.074(a); Tex. Health & Safety Code § 481.128; and 22 Tex. Admin. Code § 291.33(c)(2). Additionally, Respondent Pharmacy engaged in conduct that demonstrates negative experience in its dispensing with respect to controlled substances. *Id.* at 3–4 (citing 21 U.S.C. 823(f)(2)). Specifically, the OSC alleged that Respondent Pharmacy filled prescriptions that lacked required information and/or that contained two or more of the following red flags, without resolving those red flags: (1) Prescriptions for highly abused controlled substances such as hydrocodone,[1] alprazolam, promethazine with codeine, and carisoprodol; (2) prescriptions written to individuals who travelled long distances and/or unusual routes to obtain their prescriptions and fill them at Respondent Pharmacy or Cedar Hill; (3) prescriptions from individuals obtaining the same or similar combinations of controlled substances from the same small number of providers; (4) prescriptions for highly abused drug cocktails, such as hydrocodone and alprazolam, hydrocodone and promethazine with codeine, and hydrocodone and carisoprodol; and (5) prescriptions for controlled substances which were purchased with cash. Respondent Pharmacy also failed to document specific information as legally required on either the hard-copies of the prescriptions or in the pharmacy's electronic patient profiles. *Id.* at 3–7.

5. Respondent Pharmacy failed to provide an initial inventory of controlled substances, in violation of 21 U.S.C. 827(a)(1) and 21 CFR 1304.11(b). *Id.* at 7.

6. Respondent Pharmacy failed to document the date it received approximately 80 different shipments of controlled substances on its invoices, in violation of 21 U.S.C. 827(a)(3) and 21 CFR 1304.21(d). *Id.* at 7.

[1] All of the referenced prescriptions for hydrocodone are actually for hydrocodone/APAP, which is hydrocodone plus acetaminophen.

7. Respondent Pharmacy, as a purchaser of controlled substances, failed to document the date and number of items received on four DEA 222 Order Forms, in violation of 21 U.S.C. 828(a) and 21 CFR 1305.05(a).[2] *Id.* at 7.

8. Respondent Pharmacy, as a purchaser of controlled substances, authorized one or more individuals to issue orders for controlled substances on its behalf without executing a power of attorney for each such individual, in violation of 21 CFR 1305.05(a). *Id.* at 7.

II. Findings of Fact

A. DEA Registration

Respondent Pharmacy is registered with the DEA as a retail pharmacy authorized to handle controlled substances in schedules II–V under DEA Registration number FM3950070 at 2700 W. Pleasant Run Road, Suite W250, Lancaster, Texas 75146.

Respondent Pharmacy is owned by a corporation called COIF–SOE, Inc., which in turn is owned by Ms. Amadi.[3] RD, at 13. COIF–SOE, Inc. also owned Cedar Hill, which was previously registered with the DEA as a retail pharmacy authorized to handle controlled substances in schedules II–V under DEA Registration No. FM3343960. *Id.* at 14. The Cedar Hill registration was surrendered on June 16, 2015. *Id.* In December 2015, Ms. Amadi changed the point of contact with the DEA for Respondent Pharmacy from herself to Dr. Amadi. GX 17, at 1.

B. Government's Case

The Government presented its case through the testimony of four witnesses. First, the Government presented the testimony of a Diversion Investigator (hereinafter, Investigator One) who also testified as a rebuttal witness. Hearing Transcript (hereinafter, Tr.) 27–214, 754–59. Investigator One has served as a Diversion Investigator with the DEA for 18 years. *Id.* at 28–29. Investigator One testified about the DEA investigation of Respondent Pharmacy and Cedar Hill, the inspections of Respondent Pharmacy and Cedar Hill on June 16, 2015, *id.* at 32, 57, and the audit she conducted of two controlled substances at Respondent Pharmacy, *id.* at 116–22. Investigator One also testified concerning Dr. Amadi's surrender of the DEA registration for Cedar Hill, *id.* at 98–104, 205–06, 759, and Dr. Amadi's surrender of a DEA registration for Bestaid Pharmacy in 2011, a pharmacy that Dr. Amadi owned, *id.* at 90–92, 194–95, 754–58.

I agree with the ALJ's finding that Investigator One's testimony was credible. RD, at 7.

The Government next presented the testimony of its expert, Amy Witte, Pharm.D. (hereinafter, Dr. Witte). Tr. 215–99, 330–454, 725–53. After Respondent Pharmacy's counsel conducted *voir dire* examination of Dr. Witte, he stated that he had no objection to Dr. Witte's qualifications. *Id.* at 227. Dr. Witte was then accepted as an ''[e]xpert in the field of pharmacy in the state of Texas.'' *Id.*

Dr. Witte presented testimony concerning what a pharmacist practicing in Texas is required to do before filling a prescription for a controlled substance. *Id.* at 227–29. In addition, she testified about those circumstances that may give rise to a red flag, which a pharmacist would need to resolve before filling a prescription for a controlled substance. *E.g., id.* at 229–34, 242, 250. She also provided testimony based upon her review of Government Exhibits 2–10, which were copies of prescriptions and prescription fill labels from Respondent Pharmacy and Cedar Hill and the patient profiles Respondent Pharmacy produced in response to a Government subpoena, and the ''updated'' patient profiles Respondent Pharmacy provided before the hearing. Dr. Witte rendered her opinion as to whether filling various prescriptions in those exhibits fell below the minimum standard of practice of pharmacy in Texas and whether filling those prescriptions was within the usual course of professional practice of pharmacists in Texas. *See, e.g.,* Tr. 256–57.

The ALJ found Dr. Witte's testimony to be credible, RD, at 8, and I agree.

The Government's third witness was another Diversion Investigator (hereinafter, Investigator Two), who participated in the inspection of Respondent Pharmacy and delivering the OSC to Respondent Pharmacy. Tr. 457–88. Investigator Two testified that she has been a Diversion Investigator with the DEA for 12 years. *Id.* at 458. She testified about the process of a registrant voluntarily surrendering a DEA registration. *Id.* at 459–60. She also provided testimony concerning Dr. Amadi's surrender of the Bestaid Pharmacy registration in 2011 and the Cedar Hill registration in 2015, having witnessed both surrenders. *Id.* at 459–68, 470–73, 478–88.

I agree with the ALJ's finding that Investigator Two's testimony was credible. RD, at 8.

The Government's final witness was Emmanuel Amadi, Pharm.D (hereinafter, Dr. Amadi). Dr. Amadi was also called as a witness by Respondent Pharmacy. An assessment of his credibility is contained under the discussion of Respondent Pharmacy's case.

C. Respondent Pharmacy's Case

Respondent Pharmacy presented its case through the testimony of two witnesses. The first witness Respondent Pharmacy called was Dr. Amadi. Tr. 490–632. Dr. Amadi received his pharmacy degree from Temple University, and he has been a pharmacist since 2008. *Id.* at 492. Dr. Amadi presented testimony about his background, education, and employment. *Id.* at 492–98, 512, 518. Dr. Amadi also testified concerning: His employment duties at Respondent Pharmacy; his interaction with the DEA concerning his surrender of two pharmacy registrations, Bestaid and Cedar Hill; his production of Respondent Pharmacy's records in response to a DEA subpoena; and his resolution of red flags associated with prescriptions that Respondent Pharmacy filled. *Id.* at 512–22, 531–37, 564–69, 571–601, 606–09, 620–21. The ALJ found, however, and I agree, that there were ''numerous aspects of Dr. Amadi's testimony that stretched the limits of belief.'' RD, at 9.

In his Recommended Decision, the ALJ detailed a number of credibility issues in Dr. Amadi's testimony that included internal inconsistencies, inconsistencies with documented evidence, and conflicts with the credible testimony of other witness.[4] Having reviewed the record, including the hearing transcripts, I agree with the ALJ that Dr. Amadi's testimony was riddled with inconsistencies and merits only limited belief. I adopt the ALJ's findings regarding Dr. Amadi's credibility and summarize them here. RD, at 9–13.

First, Dr. Amadi testified that he did not talk to Ms. Amadi, the owner of Respondent Pharmacy and Cedar Hill, before he surrendered the registration

[2] As discussed, *infra* III.B.3.b, the federal regulation that the Government cited in support of this allegation is unrelated to the requirement to document the date and number of items received on a DEA 222 Form.

[3] Although the parties stipulated that COIF–SOE, Inc. is owned by Ms. Amadi and Stephen Amadi, the documentary evidence does not indicate that Stephen Amadi is an owner. *See* RD, at 13–14; GX 19, at 14; GX 12, at 1 (waiver application to DEA in which Ms. Amadi refers to Respondent Pharmacy as ''my pharmacy''). However, whether COIF–SOE is owned solely by Ms. Amadi or jointly by Ms. Amadi and Stephen Amadi is irrelevant to my ultimate finding in this matter.

[4] The ALJ noted that he detailed only ''a few of the examples that could be given'' of Dr. Amadi's ''shifting testimony and [ ] inconsistencies.'' RD, at 13.

for Cedar Hill,[5] and that he did not even have the authority to interact with the DEA concerning Cedar Hill. Tr. 512, 517. His testimony stands in stark contrast to that of Investigator One, who testified that Dr. Amadi called Ms. Amadi, and put Investigator One on the phone to speak with Ms. Amadi, who told Investigator One that Dr. Amadi ''could take care of anything regarding the pharmacy.'' *Id.* at 103. Unlike Dr. Amadi, Investigator One had no problem recalling that Dr. Amadi contacted Ms. Amadi, *id.* at 102–03, and Investigator One's testimony was further corroborated by Investigator Two, *id.* at 467–68, 484–85.

Dr. Amadi also testified that although he was the pharmacist-in-charge of Respondent Pharmacy, his duties were limited to ''do[ing] all the paperwork and direct[ing] the affairs of the pharmacy.'' *Id.* at 518. He also testified that he did not fill any prescriptions for controlled substances at Respondent Pharmacy. *Id.* at 519. He explained that he simply entered information about those prescriptions in Respondent Pharmacy's computer system for the pharmacist who had the authority to fill the prescriptions. *Id.* Yet, Dr. Amadi testified rather extensively about how he did the clinical review of the prescriptions to determine whether the prescriptions should be filled and how he resolved the red flags of the prescriptions that were presented to Respondent Pharmacy. *Id.* at 521–22, 564–621. The ALJ gave no credence to this testimony, and I agree. First, Dr. Amadi's description of what he did as the pharmacist-in-charge of Respondent Pharmacy is inconsistent with the duties of a pharmacist-in-charge. In essence, Dr. Amadi testified that he was the pharmacist-in-charge, except he really was not a pharmacist. It is the pharmacist's responsibility to perform the clinical review and to resolve red flags before the pharmacist fills a prescription for a controlled substance. Dr. Amadi's testimony is also undercut by the documentary evidence. The operational standards issued by the Texas State Board of Pharmacy require the ''*dispensing* pharmacist'' to put his or her initials on the prescription fill sticker. *See* 22 Tex. Admin. Code § 291.33(c)(7)(A)(iv) (2020) (emphasis added).[6] Dr. Amadi's initials appear on the fill sticker on almost every prescription contained in Government Exhibits 2–9. His signature also appears as the ''pharmacist'' on numerous hard-copy prescriptions that contained a signature block for the pharmacist. *See* GX 4, at 4, 8, 10, 16; GX 6, at 2, 7, 10, 12; GX 7, at 17, 20, 21; GX 8, at 5, 14, 16, 20.[7] Clearly, Dr. Amadi was filling prescriptions for controlled substances at Respondent Pharmacy.

Dr. Amadi testified that he would call a prescriber's office when a patient presented a prescription with a red flag to Respondent Pharmacy, Tr. 567, but his testimony on these matters contained a number of inconsistencies. For example, for one of the subject patients, Dr. Amadi testified that there were no red flags on the prescriptions, yet he also testified that he called the prescriber. *Id.* at 564–67. This testimony is inconsistent. If there were no red flags, there would have been no reason to call the prescribing doctor. Dr. Amadi was also equivocal on how he handled prescriptions for drug cocktails, such as hydrocodone and alprazolam. He testified that Respondent Pharmacy knew that prescriptions for drug cocktails had a ''potential for abuse,'' and therefore, Respondent Pharmacy was ''sure'' to contact the doctor before filling such prescriptions. *Id.* at 571. However, almost immediately after providing that testimony, Dr. Amadi stated that a prescription for alprazolam along with a prescription for a opioid was ''not necessarily'' a red flag and that he did not consider it to be a red flag if a person were to fill one of those two prescriptions on one day and return the following day to fill the other prescription. *Id.* at 571–72. Again, this represents an inconsistency in his testimony. Dr. Amadi also testified that if a patient lived outside of the local geographic area, he would question the prescription, *id.* at 591, but this testimony was contradicted by the documentary evidence, which displayed no indication that Dr. Amadi investigated prescriptions presented by such individuals, *see id.* at 588–89, 612, 617; GX 4, at 4. Finally, Dr. Amadi's testimony regarding how he investigated and documented the resolution of red flags presented further inconsistencies, including testimony regarding calling prescribers that was both internally inconsistent and conflicted with documentary evidence. *See* Tr. 573–81; RX A, at 27. *See also,* Tr. 620–21; RX A, at 1.

Dr. Amadi also provided an explanation for the differences in the content of the patient profiles contained in the Government's Exhibits with the content of the patient profiles contained in Respondent Pharmacy's Exhibits. Tr. 531–33, 537. He testified that, although the profiles in Respondent Pharmacy's Exhibits were not printed until May 25, 2017, the information was in the Respondent Pharmacy's computer system prior to 2017. *Id.* at 530–33. When Dr. Amadi was asked why those patient profiles were not produced to the DEA in 2016, Dr. Amadi responded: ''Because I didn't know how to add this remark at the beginning—at that time. I had to call for system support to—for them to show me how to get this included in the printout.'' *Id.* at 533. The ALJ found that this explanation lacked credibility because Dr. Amadi had been using this same software program since the Respondent Pharmacy opened in 2013. *Id.* at 521. I agree with the ALJ that Dr. Amadi's explanation lacks credibility both for the reason cited by the ALJ, and because at the hearing, Dr. Amadi was evasive in his responses to questions regarding the ''updated'' profiles. *Id.* at 531–34, 537–39.

Based on the ALJ's findings regarding Dr. Amadi's credibility and my own assessment of the record, I give Dr. Amadi's testimony limited credence, and where it conflicts with the testimony of other witnesses, or with the documentary evidence of record, I credit that other testimony and those documents over Dr. Amadi's testimony.

The Respondent Pharmacy's second witness was Kenneth Emelonye, Pharm.D. (hereinafter, Dr. Emelonye). Following *voir dire* by counsel for the Government, Dr. Emelonye was accepted as an expert witness, without objection, ''in the area of pharmacy.'' *Id.* at 647. In general, his testimony was consistent with the testimony of the Government's expert witness, Dr. Witte.

The ALJ found Dr. Emelonye to be a credible witness, and I agree. RD, at 13.

D. Dr. Amadi's Employment at Respondent Pharmacy

Respondent Pharmacy employed Dr. Amadi as a staff pharmacist and as a pharmacist-in-charge. RD, at 14. Dr.

[5] Later, Dr. Amadi modified his testimony indicating that he did not recall talking to Ms. Amadi on the day he surrendered the registration for Cedar Hill. Tr. 609.

[6] Throughout this Decision, I have cited to the administrative compilation for the state of Texas current as of June 1, 2020. Although I have cited to a contemporary compilation, the portions of the Texas Administrative Code that I cite in this Decision were in effect when the prescriptions at issue in this matter were dispensed in 2014 and 2015 and have remained unchanged. *See* Texas Secretary of State, *Historical Listing for the Texas Administrative Code, http://www.texreg.sos.state.tx.us* (last visited June 1, 2020).

[7] Significantly, these exhibits stand in stark contrast to the exhibits offered by Respondent Pharmacy. While Respondent Pharmacy presented prescriptions that contained a signature block for a pharmacist to sign, not a single one of these prescriptions is signed. Tr. 601; RX A, at 55, 58, 68, 80, 82, 93, 105; RX C, at 2, 3; RX E, at 8; RX H, at 12; RX I, at 4. In fact, GX 4, at 4 and RX C, at 2, are the same document, except that Dr. Amadi's signature is only on the Government's Exhibit.

Amadi was unsure of his exact dates of employment, Tr. 517–18, but information on file with the Texas State Board of Pharmacy showed that, as of November 17, 2015, Dr. Amadi was a staff pharmacist at Respondent Pharmacy, and he was the pharmacist-in-charge of Respondent Pharmacy, as of November 7, 2016. GX 18, at 1, 3. Dr. Amadi was also the pharmacist-in-charge at Cedar Hill, the second pharmacy owned by Ms. Amadi, Respondent Pharmacy's owner, until he surrendered the Cedar Hill DEA registration in June of 2015. GX 16, at 1.

Prior to working at Respondent Pharmacy and Cedar Hill, Dr. Amadi was the owner of Bestaid Pharmacy, DEA registration number FB2238067. Tr. 496. Dr. Amadi voluntarily surrendered the DEA registration for Bestaid Pharmacy on October 5, 2011, by signing a form stating that the surrender was ''in view of [his] alleged failure to comply with the Federal requirements pertaining to controlled substances . . . .'' GX 11. Investigator Two, who witnessed the surrender, testified that Dr. Amadi surrendered the Bestaid resignation at the end of a hearing following an Order to Show Cause the DEA had issued to Bestaid, but prior to the final decision. *See* GX 11; Tr. 460–64. Because Dr. Amadi has surrendered the Bestaid registration for cause, he was ineligible for employment in a capacity where he had access to controlled substances absent a waiver by the DEA.[8] [9] 21 CFR 1301.76(a). Ms. Amadi applied to the DEA for a waiver to employ Dr. Amadi as a pharmacist at Respondent Pharmacy with access to controlled substances by a letter dated June 25, 2015. GX 12. The DEA denied the waiver request on August 8, 2016. GX 13, at 1–5; RD, at 14.

The ALJ found that Dr. Amadi had access to controlled substances while employed at Respondent Pharmacy in spite of his ineligibility. RD, at 59–60. Respondent Pharmacy objected to this finding. Resp Exceptions, at 13. Respondent Pharmacy argued that Dr. Amadi did not have access to controlled substances while working at Respondent Pharmacy—that Dr. Amadi testified that his job at Respondent Pharmacy ''was to assist with the intake of new customer [sic], enter the prescriptions into their internal computer system, prep the prescriptions to be filled, contact the doctors [sic] offices to determine the validity of the prescriptions, do the clinical review, check the Texas patient monitoring system, and other trivial responsibilities.'' *Id.* Respondent Pharmacy stated the only person with access to controlled substances at Respondent Pharmacy was pharmacist Kweku Ohene. *Id.*

I reject this Exception and give no weight to Dr. Amadi's testimony that he did not have access to controlled substances at the Respondent Pharmacy, as it is controverted by the documentary evidence and the credible testimony of DEA investigators. First, as I have already found, the documentary evidence establishes that Dr. Amadi was filling prescriptions for controlled substances at Respondent Pharmacy. *Supra* II.C. Additionally, Dr. Amadi ordered and received controlled substances on behalf of Respondent Pharmacy. Tr. 62, 70. He was Respondent Pharmacy's sole employee with access to the DEA's Controlled Substances Ordering System (''CSOS'') for electronic ordering of Respondent Pharmacy's schedule II controlled substances, *id.;* GX 28, and he used CSOS to record the date on which schedule II drugs were received by Respondent Pharmacy, Tr. 70–71.[10] Dr. Amadi also signed invoices for controlled substances for Respondent Pharmacy. *Id.* at 140–41; GX 23, at 7–12, 15–22, 25, 27, 34–38. Investigator One credibly testified that the person who signs and dates an invoice has access to controlled substances because to retrieve the invoice, the person must open the box, allowing access to the controlled substances inside the box. Tr. 140–41. Finally, Investigator One observed Dr. Amadi working behind the counter at Respondent Pharmacy on several occasions, including after Respondent Pharmacy's waiver to allow Dr. Amadi access to controlled substances had been denied. *Id.* at 72–73, 97–98. Based on the foregoing, I agree with the ALJ and find that Dr. Amadi had access to controlled substances while employed at Respondent Pharmacy.

E. The Investigation and Inspection of Respondent Pharmacy and Cedar Hill

DEA conducted simultaneous inspections of Respondent Pharmacy and Cedar Hill on June 16, 2015. During the inspections, the DEA investigators gathered and otherwise requested various types of records from the pharmacies.

1. Respondent Pharmacy's Records

a. Initial Inventory

During the June 16 inspection, Inspector One requested the initial inventory of Respondent Pharmacy's controlled substances from Dr. Amadi. Tr. 59–60. Dr. Amadi claimed the initial inventory existed but that he could not locate it. *Id.* Investigator One made a second request for the initial inventory on June 23, 2015. *Id.* at 60. Dr. Amadi responded to Investigator One's request by stating that he ''didn't look for it,'' and Investigator One testified that she never did receive an initial inventory for Respondent Pharmacy. *Id.* at 60–61.

Respondent Pharmacy filed an Exception to the ALJ's finding that Respondent Pharmacy failed to provide an initial inventory to the DEA. Resp Exceptions, at 22–23. Respondent Pharmacy claimed that it had included the initial inventory as ''Exhibit U'' in its exhibits for the hearing in this matter. *Id.* I reject Respondent Pharmacy's Exception. Respondent Pharmacy's claim that an initial inventory was included in the record as Respondent's Exhibit U is incorrect. There is no Respondent's Exhibit U in the record, and Respondent Pharmacy did not provide a citation to the transcript showing that ''Exhibit U'' was introduced at the hearing. *See* 21 CFR 1316.66(a) (requiring a party's exceptions to include a statement of supporting reasons with evidence of record including specific citations of the pages of the transcript). I have reviewed the transcripts of the hearing and find Respondent Pharmacy did not introduce an ''Exhibit U'' or any other exhibit

[8] During the hearing, Respondent Pharmacy seemed to argue that the surrender of the Bestaid registration was not for cause. 21 CFR 1301.76(a) defines ''for cause'' to include ''a surrender in lieu of, or as a consequence of, any federal . . . administrative . . . action resulting from an investigation of the individual's handling of controlled substances.'' Because Dr. Amadi's surrender of his Bestaid registration occurred at the conclusion of a hearing in which he was responding to an OSC as to why the Bestaid registration should not be revoked, I find that the surrender of the Bestaid registration was for cause. *See JM Pharmacy Grp., Inc., d/b/a/Farmacia Nueva & Best Pharma Corp.,* 80 FR 28,667, 28,669 (2015) (''[P]ersons of ordinary intelligence cannot dispute that a surrender which occurs in response to allegations of misconduct raised by the Agency's Special Agents and Diversion Investigators is 'for cause,' . . . .'').

[9] The Government also argued that Dr. Amadi is ineligible based on his surrender of the DEA registration for Cedar Hill. Respondent Pharmacy disputes both the Government's factual and legal basis for this claim. I find it unnecessary to resolve this issue in this case, however, because 21 CFR 1301.76(a) clearly is applicable to Dr. Amadi's surrender of the Bestaid registration.

[10] Dr. Amadi lacked the necessary power of attorney to order schedule II controlled substances for Respondent Pharmacy. The Controlled Substance Act designates the DEA registrant—in this case, Ms. Amadi—as the individual authorized to order controlled substances on behalf of a pharmacy. Tr. 61; *see* 21 U.S.C. 822(b). The CSA allows the pharmacy owner to delegate the authority to order schedule II controlled substances to someone else via a power of attorney, 21 CFR 1305.05, but Respondent Pharmacy did not have any powers of attorney on file, Tr. 62.

which it purported to be an initial inventory. I have also reviewed all of Respondent's Exhibits that were introduced at the hearing, and there is no initial inventory in any of Respondent Pharmacy's introduced exhibits. Accordingly, I find that Respondent Pharmacy did not produce an initial inventory.

b. 222 Forms and Invoices for Controlled Substances

During the inspection, Investigator One collected copies of records related to Respondent Pharmacy's purchases of controlled substances, including DEA Form 222s (hereinafter, 222 Form) and invoices. Pharmacies use 222 Forms to purchase schedule II controlled substances and must document the date and number of items received on the form when they receive the purchased items from the supplier. 21 CFR 1305.13(e). The Government has alleged that four 222 Forms from Respondent Pharmacy were not in compliance with DEA requirements, because they did not document the date on which the controlled substance/s were receive and the quantity received. Respondent Pharmacy ordered multiple controlled substances on each of the four subject 222 Forms. GX 22, at 1, 2, 4, 6. On three of the four forms, Respondent Pharmacy recorded the date and quantity received for all but one of the controlled substances on the form. *Id.* at 1, 4, 6. On the fourth of the 222 Forms, Respondent Pharmacy failed to record the date or quantity received for three controlled substances. *Id.* at 2.

Although the four subject 222 Forms were missing receipt dates for at least one of the controlled substances ordered on each of forms, GX 22, at 1, 2, 4, 6, there is no evidence that Respondent Pharmacy received those controlled substances. Investigator One testified that there was no evidence ''in front of [the ALJ] that the Pharmacy actually received those controlled substances.'' Tr. 211. There is, in fact, evidence that Respondent Pharmacy did *not* receive some of the controlled substances. Invoices from Respondent Pharmacy's supplier show that some of the controlled items were never shipped. The chart below illustrates the four subject 222 Forms and shipping information from their corresponding invoices when available:

Exhibits	Date/ packages received	Shipped/not shipped	Evidence of receipt
GX 22, at 1, 8	Blank	• Hydrocodone: Unknown	No.
GX 22, at 4, 11	Blank	• Hydromorphone: Unknown	No.
GX 22, at 6, 13	Blank	• Hydrocodone 10/325: Not Shipped	No.
GX 22, at 2, 9	Blank	• Hydrocodone 10/325 (500): Not Shipped	No.
		• Hydrocodone 10/325 (1000): Not Shipped	
		• Hydrocodone 5/325: Shipped	

The Government has also alleged that Respondent Pharmacy failed to record the date it received shipments of controlled substances on 47 invoices, representing approximately 80 different shipments of controlled substances, that the Government gathered from Respondent Pharmacy. ALJX 1, at 7. DEA regulations require pharmacies to record the date they receive orders of controlled substances. 21 CFR 1304.21(d), 1304.22(c).

Respondent Pharmacy conceded that ''several of the invoices provided to the Government did not include dates'' but argued that all of the subject invoices complied with DEA regulations. Resp Exceptions, at 23. I have reviewed the invoices, and while I reject Respondent Pharmacy's assertion that all of the invoices fully complied with DEA regulations, I do find that 16 of the 47 subject invoices were mis-categorized. The 16 mis-categorized invoices were for schedule II controlled substances. GX 22, at 3; GX 23, at 16, 33, 41, 43, 45, 47–49, 51–55, 57, 82. In contrast to schedules III–V, pharmacies must record the date they receive schedule II substances on either the 222 Form or in CSOS, whichever was used to order the drugs—pharmacies are not required to also record the date of receipt for schedule II substances on the invoice.[11] 21 CFR 1305.13(e), 1305.22(g). However, I find that on the 31 invoices for schedule III–IV controlled substances Respondent Pharmacy did not record the date it received the controlled substances that were shipped by the supplier as required by DEA regulations.

2. DEA Inventory and Audit

Investigator One testified that during the inspection of Respondent Pharmacy, another Diversion Investigator conducted an inventory of Respondent Pharmacy's oxycodone 30mg and hydrocodone 10/325. Tr. 117–19. Dr. Amadi signed the investigator's closing inventory, documenting his agreement with the count. *Id.* at 119; GX 21, at 2. Following the inspection, and after obtaining Respondent Pharmacy's records, Inspector One conducted an audit of the two drugs the DEA had inventoried, finding that Respondent Pharmacy had an overage of 16,731 tablets of hydrocodone 10/325 and a 200 tablet shortage of oxycodone 30mg.[12] Tr. 116–22; GX 21, at 1. Investigator One testified that she compared invoices she obtained from one of Respondent Pharmacy's suppliers and found that Respondent Pharmacy was missing records for purchases of controlled substances. Tr. 165–67. She believed that the hydrocodone 10/325 overage she found in her audit could be attributed to the missing purchase records. *Id.* In regard to the oxycodone 30mg shortage, Investigator One testified that she had no evidence that Respondent Pharmacy actually received the missing 200 tablets. *Id.* at 210.

F. The Subject Prescriptions

During the inspections of Respondent Pharmacy and Cedar Hill, the DEA Investigators also collected records for prescriptions, which the Government alleged were filled despite containing ''one or more unresolved red flags for diversion.'' Govt Posthearing, at 30. The first set of prescriptions, Government Exhibits 2–9, were obtained during the inspection of Respondent Pharmacy.

[11] Two of the mis-categorized invoices also indicate that the supplier did not ship any of the controlled substances listed on the invoice to Respondent Pharmacy. GX 23, at 33 and 52. Respondent Pharmacy could not record the date it received the controlled substances because the controlled substances were never received.

[12] An overage indicates that a pharmacy sold more drugs than it had in inventory—an impossibility that is attributable to recordkeeping or computation errors; a shortage indicates a pharmacy could not account for all drugs that it had purchased. *See* Tr. 117, 121. Because Respondent Pharmacy did not provide an initial inventory, Inspector One testified that she began her audit from the time Respondent Pharmacy opened using the assumption that the initial inventory count was zero. *Id.* at 121–22.

The second set, Government Exhibit 10, was obtained from Cedar Hill and includes nearly 100 prescriptions all issued by a physician in Houston, Texas, Dr. R.G.

On August 18, 2016, following the inspection, the DEA subpoenaed Respondent Pharmacy for the patient profiles (or any other records that Respondent Pharmacy maintained on the patients pursuant to state law) for the 31 patients whose prescriptions were collected from Respondent Pharmacy and included in Government Exhibits 2–9. GX 27; Tr. 74–79. The DEA subpoena specifically requested ''a copy of the complete patient profile record or any other patient record (paper or electronic) that [the] pharmacy maintained [for the 31 subject patients], pursuant to the requirements of Texas Administrative Code Title 22 § 291.33(c)(2)(A) & (C) Operational Standards.'' GX 27, at 1. The subpoena further clarified that the response should include any and all ''[p]harmacist comments relevant to the individuals [sic] drug therapy, including any other information peculiar to the specific patient or drug as well as any consultation with the prescribing practitioner . . . .'' *Id.* Respondent Pharmacy responded to that subpoena through its counsel in October 2017, nearly a month after a response was due, with records containing all of the requested profiles. *See id.* at 6–52. A review of the patient profiles Respondent Pharmacy provided reveals that none of the profiles contain any pharmacist remarks regarding consultations with prescribing practitioners. *See id.* Respondent Pharmacy provided no other records in response to the August 18 subpoena.

On June 27, 2017, less than three weeks before the hearing on the OSC, Respondent Pharmacy filed a complete set of ''Amended Exhibits.'' ALJX 21. These exhibits included patient profiles (hereinafter, Respondent's profiles) that contained additional information that was not in the profiles provided to the DEA in October 2016. The Respondent's profiles contain the patient's address, phone number, date of birth, allergies, and a remarks section with comments. *See* RX A–J. None of the comments in the remarks section of the Respondent's profiles contain a date indicating when the comment was added to the profile, and there are no other dates on the Respondent's profiles that provide documentary support that the additional information in the profiles was in the records at the time of the Government subpoena. *See id.*

The ALJ wrote in the RD that, although he would discuss the Respondent's profiles when considering the Government's allegations against Respondent Pharmacy, he would give no weight to any of the information contained therein that was not contained in the patient profiles Respondent Pharmacy provided in response to the DEA subpoena in October 2016. RD, at 52. The ALJ decided not to give any weight to the information in Respondent's profiles, because (1) per the subpoena, Respondent Pharmacy was required to provide the information to the DEA by September 7, 2016; (2) Respondent Pharmacy did not produce the information until shortly before the hearing; (3) all of Respondent's profiles have a date range that runs until at least May 2017, more than eight months after Respondent Pharmacy was supposed to have produced the documents ordered by the DEA subpoena; (4) the ALJ did not find Dr. Amadi's testimony credible that he did not know how to print off the remarks section of the patient profiles in October 2016; and (5) the comments in the remarks section of the Respondent's profiles do not contain any dates that establish that the remarks were entered into the profile contemporaneously with Respondent Pharmacy filling the prescriptions involved with this matter. RD, at 52–53.

Respondent Pharmacy has objected to the ALJ's decision to give no weight to Respondent's profiles. Resp Exceptions, at 14. Respondent Pharmacy acknowledges that Respondent's profiles contain information that was not provided to the DEA in October 2016, but it argues that the DEA subpoena did not specify the exact information it was seeking in its request. *Id.* Respondent Pharmacy further explained that when printing the profiles for the DEA in October 2016, Dr. Amadi ''did not check the box to include the patient remarks to be outputted,'' and after receiving the Government's Prehearing Statement, Dr. Amadi ''contacted tech support to help him print out the client profiles with the remarks section included.'' *Id.* at 14–15.

Having considered Respondent Pharmacy's arguments, I agree with the ALJ that Respondent's profiles deserve no weight. Contrary to Respondent Pharmacy's assertions, the DEA subpoena clearly specified the exact information it was requesting from Respondent Pharmacy—all of which was information Respondent Pharmacy was legally required to maintain pursuant to the Texas Operational Standards for Community Pharmacies—and further highlighted that the subpoena was requesting all documentation of the pharmacists' consultations with prescribing physicians. GX 27, at 1; *see* 22 Tex. Admin. Code § 291.33(c)(2). This information was clearly missing from the patient profiles Respondent Pharmacy provided in response to the subpoena. *See* GX 27, at 13–40, 49–52. If Respondent Pharmacy needed to contact tech support to learn how to print the requested information, the time to do that was when responding to the subpoena, not three weeks before the hearing. I further agree with the ALJ that Dr. Amadi's testimony regarding the patient profiles is not credible. RD, at 52–53. Dr. Amadi testified that the pharmacist's remarks from Respondent's profiles were contemporaneous documentation, but none of the remarks contain dates or other evidence that establish the remarks were entered into the profiles contemporaneously with the time Respondent Pharmacy filled the prescriptions, a requirement under Texas law. 22 Tex. Admin. Code § 291.33(c)(2)(i). *See, e.g.,* RX A; RX B, at 7; RX C, at 1; RX E, at 7; RX H, at 4. Finally, as I will explain in detail below, even had Respondent's profiles been credible, the remarks on the profiles were insufficient to meet the minimum requirements set forth by Texas law.

1. Texas Pharmacists' Standard of Practice

Dr. Witte, the Government's expert witness, and Dr. Emelonye, the Respondent Pharmacy's expert witness, testified about a Texas pharmacy's/pharmacist's standard of practice and how pharmacists apply federal and state law when presented with a prescription for a controlled substance. Dr. Witte's testimony was largely uncontroverted or supported by Dr. Emelonye's testimony. As will be discussed *infra,* Dr. Emelonye's testimony did have minor disagreements with Dr. Witte's testimony in regard to whether particular circumstances presented a red flag on a controlled substance prescription.

When presented with a prescription, a Texas pharmacist must first look over the prescription to ensure it meets all of the requirements of Texas and federal law. Tr. 228. The pharmacist must check the prescription has the patient's name, address, date of birth, the physician's signature and DEA number; the drug name and strength; the quantity; and instructions for use. *Id.* at 228, 242, 647; Tex. Health & Safety Code Ann. § 481.074(k)(3), (7) (West 2019) (mandating that a ''prescription for a controlled substance'' must show ''the name, address, and date of birth or age of the patient'' as well as the ''Federal

Drug Enforcement Administration number'' of the practitioner issuing the prescription). If a prescription is missing the patient's address and date of birth, the pharmacist should contact the prescriber for the missing information. Tr. 424–26. Alternatively, if the prescription was missing only the address, the pharmacist could check the name and the patient's date of birth against a valid government identification to obtain the patient's address.[13] *Id.* at 424–27, 650. Once the pharmacist verifies the patient's information, the pharmacist should fill in the required information on the prescription and only then dispense the controlled substance. *Id.* at 335, 424–27.

The pharmacist must also review the prescription for red flags—any issue that calls into question a prescription's legitimacy. *Id.* at 228. If the prescription has a red flag, the pharmacist must investigate and resolve the red flag before dispensing the prescription. The investigation would include steps such as interviewing the patient, speaking with the prescriber, and reviewing the Texas Prescription Monitoring Program. *Id.* at 228–29, 233–34, 675. The pharmacist should refuse to fill a prescription if he or she is unable to resolve a red flag on the prescription. *Id.* at 233–34. Filling a prescription without resolving a red flag would fall outside the minimal standard of practice of pharmacy in the state of Texas. *Id.* at 235.

These standards of practice are broadly codified in Texas law, which provides that ''[a] pharmacist may not: (1) Dispense . . . a controlled substance . . . except under a valid prescription and in the course of professional practice.'' Tex. Health & Safety Code Ann. § 481.074(a). Texas law further provides that ''[a] pharmacist may not: (2) Dispense a controlled substance if the pharmacist knows or should have known that the prescription was issued without a valid patient-practitioner relationship.'' *Id.* It is also unlawful in Texas for any ''registrant or dispenser'' to deliver a controlled substance in violation of section 481.074 of the Texas Health and Safety Code. *Id.* at § 481.128. A Texas pharmacist is expected to ''exercise sound professional judgment with respect to'' determining if a prescription was issued for a legitimate medical purpose by a practitioner in the course of medical practice. 22 Tex. Admin. Code § 291.29(a), (b) (2020).

[13] Dr. Witte testified that a pharmacist should always call the prescriber if the prescription is missing the address and date of birth because many people share the same name. Tr. 425.

In addition to the Texas statutes, the Texas Board of Pharmacy has issued rules for the operational standards that Texas pharmacists are expected to follow when filling a new or refill prescription. Those operational standards dictate that:

> [f]or the purpose of promoting therapeutic appropriateness, a pharmacist shall, prior to or at the time of dispensing a prescription drug order, review a patient's medication record. Such review shall at a minimum identify clinically significant: . . . (III) reasonable dose and route of administration; (IV) drug-drug interactions; . . . [and] (X) proper utilization, including overutilization and underutilization.

22 Tex. Admin. Code § 291.33(c)(2)(A)(i).

The operational standards also mandate that ''[u]pon identifying any clinically significant conditions, [or] situations . . . the pharmacist shall take appropriate steps to avoid or resolve the problem including consultation with the prescribing practitioner.'' *Id.* at 291.33(c)(2)(A)(ii). Furthermore, ''[p]rior to dispensing, any questions regarding a prescription drug order must be resolved with the prescriber and written documentation of these discussions made and maintained.'' *Id.* at § 291.33(c)(2)(A)(iv).

If the pharmacist fills the prescription, the pharmacist is obliged to document the results of his investigation in the electronic patient notes or on the prescription and the documentation should always be contemporaneous. Tr. 234; *see* 22 Tex. Admin, Code § 291.33(c)(2)(C) (requiring pharmacists to document discussions with the prescriber concerning red flags either ''on the prescription or in the pharmacy's data processing system''). While Texas law does not dictate the amount of detail and specificity a pharmacist's note must include to adequately resolve a red flag, Tr. 738, Texas operational standards state the documentation, at a minimum, must include ''(i) date the prescriber was consulted; (ii) name of the person communicating the prescriber's instructions; (iii) any applicable information pertaining to the consultation; and (iv) initials . . . of the pharmacist . . . clearly recorded for the purpose of identifying the pharmacist who performed the consultation,'' 22 Tex. Admin. Code § 291.33(c)(2)(C). These notes are used upon a patient's return to the pharmacy to demonstrate to the pharmacist or to the next pharmacist that the red flags have been investigated and resolved. Tr. 723, 738, 743.

Drs. Witte and Emelonye testified regarding some of the red flags that a Texas pharmacist is expected to recognize and resolve before filling a prescription for a controlled substance. The Texas State Board of Pharmacy also has non-exhaustive, codified lists of circumstances and red flags that a pharmacist must weigh when evaluating a prescription's legitimacy. 22 Tex. Admin. Code § 291.29(c), (f). Dr. Witte explained that there is no exhaustive list of every red flag of diversion and no specific number of red flags trigger a pharmacist's obligation to refuse to fill a prescriptions. Rather, pharmacists are expected to exercise judgment in detecting and responding to red flags. Tr. 234, 288. Dr. Witte's testimony on this matter is supported by Texas regulations, which require pharmacists to use their professional judgment to determine if a prescription was issued for a legitimate medical purpose. *See* 22 Tex. Admin. Code § 291.29(a), (b).

Dr. Witte first explained the concept of high-alert drugs. High-alert drugs are referred to as such because they are highly abused controlled substances. Tr. 229–30. Hydrocodone, oxycodone, alprazolam, and promethazine with codeine are high-alert drugs. *Id.* at 229. A prescription consisting of some combination of high alert drugs is referred to as a ''drug cocktail'' and is a red flag. *Id.* at 229–32, 352–53; *see* 22 Tex. Admin. Code § 291.29(f)(3). A drug cocktail will generally include a narcotic, such as hydrocodone or oxycodone, along with alprazolam, carisoprodol, or promethazine with codeine. Tr. 229–31, 251, 282, 352.

Travelling a long distance or an unusual route from the patient's home to see a particular physician and then to fill the prescription is also a red flag. *Id.* at 231–32, 400; 22 Tex. Admin. Code § 291.29(c)(4) (reasons to suspect a prescription is not legitimate include ''the geographical distance between the practitioner and the patient or between the pharmacy and the patient''). Dr. Witte testified that the distance a patient travels to obtain and fill a prescription can, by itself, be sufficient reason for a pharmacist to decline to fill a prescription, while Dr. Emelonye minimized the significance of distance, testifying that distance alone would not be sufficient to raise his concern. Tr. 671–74. Dr. Emelonye agreed with Dr. Witte, however, that a pharmacist should investigate why an out-of-town patient was at a pharmacy to fill a prescription for a controlled substance. *Id.* at 400, 671–72, 718–19. To the extent Dr. Witte and Dr. Emelonye's testimony on this matter differ, I credit Dr. Witte's testimony as it is consistent with 22

Tex. Admin. Code § 291.29(c)(4), which states that distance is a red flag.[14]

Paying cash for a prescription can be a red flag. Tr. 232, 387; 22 Tex. Admin. Code § 291.29(f)(12). A cash payment for a prescription, in isolation, may be not a great concern to a pharmacist as some patients do not have insurance. Tr. 659. When a cash payment, however, is coupled with other issues, then the cash payment is a concern. *Id.*

Prescriptions from individuals obtaining the same or similar combinations of controlled substances from the same prescriber is a red flag commonly referred to as ''pattern prescribing.'' *Id.* at 228–29, 232–33, 353. Pattern prescribing can take several forms including when prescriptions by a prescriber are routinely for controlled substances commonly known to be abused drugs, 22 Tex. Admin. Code § 291.29(f)(3); prescribers that commonly write prescriptions for the highest strength and/or for large quantities of controlled substances, *id.* at (f)(5); and prescriptions from a prescriber that display a reasonably discernable pattern of substantially identical prescriptions for controlled substances for numerous persons, indicating a lack of individual drug therapy, *id.* at (f)(1). Unlike some red flags, such as drug cocktails and cash payments, pattern prescribing can manifest over an extended period of time and may not be immediately recognizable to a pharmacist. *See* Tr. 439, 449.

Other relevant red flags identified by Drs. Witte and Emelonye and/or codified in the Texas Administrative Code include, doctor shopping, when a patient receives prescriptions for controlled substances from different doctors, Tr. 678, 728; 22 Tex. Admin Code § 291.29(c)(7); pharmacy shopping, when a patient is using multiple pharmacies to fill prescriptions for controlled substances, 22 Tex. Admin. Code § 291.29(c)(7); Tr. 656; inappropriate dosing instructions, Tr. 664; and prescriptions for multiple drugs in the same class, such as multiple narcotics, *id.* at 234, 440–42.

2. Alleged Red Flags on the Subject Prescriptions

The Government has alleged that the subject prescriptions from Respondent Pharmacy and Cedar Hill all presented two or more red flags and that Respondent Pharmacy and Cedar Hill filled the prescriptions without resolving the red flags. The Government alleged that by filling prescriptions with these red flags without properly investigating, documenting, and resolving the red flags, Respondent Pharmacy and Cedar Hill fell below the minimum standards of the practice of pharmacy in Texas and were outside the usual course of professional practice of a pharmacy in Texas.

a. Prescriptions Issued by Dr. T.T.

From August 2014 to March 2015, Respondent Pharmacy filled prescriptions issued by Dr. T.T. GX 4; GX 5, at 13–15; GX 6, at 1–15; GX 7, at 16–29; GX 8, at 11–22. The Government alleged that the Dr. T.T. prescriptions had red flags including cash payments, distance, drug cocktails, and inappropriate dosing; and that, taken together, the Dr. T.T. prescriptions evince the red flag of pattern prescribing. ALJX 1, at 4–6. The Government further alleged that Respondent Pharmacy filled the prescriptions with red flags from Dr. T.T. without investigation, documentation, or resolution of the alleged red flags. *Id.*

To support these allegations, the Government submitted prescriptions written by Dr. T.T. and Respondent Pharmacy's patient profiles for five patients: H.P., V.S., R.J., M.H., and K.L. GX 4; GX 5, at 13–15; GX 6, at 1–15; GX 7, at 16–29; GX 8, at 11–22. Dr. Witte testified that the prescriptions showed red flags. First, Dr. T.T. prescribed all five patients red flag drug cocktails of high-alert controlled substances. *See* GX 4; GX 5, at 13–15; GX 6, at 1–15; GX 7, at 16–29; GX 8, at 11–22. As part of the drug cocktails, all five patients were prescribed large quantities of hydrocodone, another red flag. GX 4; GX 5, at 13–15; GX 6, at 1–15; GX 7, at 16–29; GX 8, at 11–22; *see* Tr. 419–20. All of the prescriptions were also paid for in cash. *See* GX 4; GX 5, at 13–15; GX 6, at 1–15; GX 7, at 16–29; GX 8, at 11–22.

Dr. Witte also testified that the prescriptions from Dr. T.T. displayed pattern prescribing. Tr. 265, 353. Dr. Witte observed that Dr. T.T. repeatedly prescribed cocktails containing combinations of hydrocodone, alprazolam, and promethazine with codeine, and all of Dr. T.T.'s prescriptions for hydrocodone had been for 120 tablets. *Id.* at 419–20. Dr. Witte also highlighted that Dr. T.T. prescribed promethazine with codeine for a cough over several months. *Id.* at 340–41. In her expert opinion, Dr. Witte would not expect a patient to need a cough syrup month after month. *Id.* Dr. Witte also testified that the Dr. T.T. prescriptions for promethazine with codeine were written for a suboptimal dose,[15] another red flag. *See id.* at 233, 392–95; *see also id.* at 664–65 (Dr. Emelonye testifying that the dose was suboptimal and that he would call the prescriber if presented with a promethazine with codeine prescription with those dosing instructions.). Dr. Witte also pointed out that many of Dr. T.T.'s prescriptions included the same diagnosis, providing further evidence of an illegitimate pattern. *Id.* at 264–65, 279.

Finally, Dr. Witte testified that all of the patients travelled unusual distances or routes to Dr. T.T. to obtain their prescriptions and/or to Respondent Pharmacy to fill their prescriptions. *Id.* at 263, 271–72, 280–81, 298–99, 342. The Government presented evidence of the routes and distances the patients travelled: H.P. travelled approximately 123 miles, V.S. travelled approximately 106 miles; R.J. travelled approximately 59 miles; and M.H. and K.L. each travelled approximately 65 miles. *See* GX 25. Dr. Witte opined that in an urban setting such as the Dallas/Ft. Worth Metroplex, where all of the patients lived, she would consider all of the distances and/or routes the patients travelled to raise red flags.[16] *See* Tr. 263, 271–72, 280–81, 298–99, 342–43.

The ALJ concurred with Dr. Witte's testimony and found that Respondent Pharmacy filled prescriptions from Dr. T.T. that displayed red flags of drug cocktails, high dosages of high-alert drugs, inappropriate dosing, pattern prescribing, unusual routes and/or distances, and cash payments. RD, at 29–32. I agree.

Respondent Pharmacy objected to the ALJ's findings that the prescriptions from Dr. T.T. presented the red flags of pattern prescribing, unusual or long distances, and cash payments. Resp Exceptions, at 17–22. In its Exceptions,

[14] The experts' disagreement on this matter was also inconsequential to this matter, as I found that all of the subject prescriptions had multiple red flags. *Infra* II.F.2.

[15] Both Dr. Witte and Dr. Emelonye testified that the standard dosing instruction for promethazine with codeine cough syrup is one to two teaspoons every four to six hours. Tr. 261, 392, 663. The prescriptions the Government presented from Dr. T.T. were for one teaspoon every twelve hours. Dr. Emelonye testified that, although a prescriber may have a legitimate medical reason to prescribe a suboptimal dose, he would always call the prescriber in such circumstances. *Id.* at 665–68.

[16] The ALJ made the following finding in the Recommended Decision, which I adopt: ''Dr. Witte was accepted as an expert in the field of pharmacy in the state of Texas, not geography. Tr. 227. Thus, I do not credit her testimony concerning distances, routes, and general availability of pharmacies as that of an expert. I do credit it, however, as a reasonable observation based upon common experience. Certainly one is more likely to pass by a location to fill prescriptions in an urban area than a rural one. Common experience also suggests that, in general, it is more time consuming to travel even a short distance in an urban area than in a rural one.'' RD, at 57, n.27.

Respondent Pharmacy stated that it ''did not intentionally or unintentionally identify or detect pattern prescribing when filling any of its prescriptions from Dr. T.T.'' *Id.* at 18. Respondent Pharmacy argued that ''filling a small number of prescriptions from Dr. T.T. does not equate to [sic] red flag indicating pattern prescribing,'' because ''pattern prescribing occurs when a physician prescribes the same drug and dosage to every patient the physician sees,'' and the prescriptions filled by Respondent Pharmacy were for varying drugs such as hydrocodone, alprazolam, and promethazine with codeine. *Id.* at 17–18.

Respondent Pharmacy correctly argues that varying substances and doses could weigh against a finding of pattern prescribing, but I credit Dr. Witte's expert testimony that the Dr. T.T. prescriptions did display pattern prescribing. As Dr. Witte testified, Respondent Pharmacy's experience filling prescriptions from Dr. T.T., in which he routinely prescribed an identical, large amount of hydrocodone and suboptimal dosing of promethazine with codeine, was sufficient for Respondent Pharmacy to have recognized Dr. T.T.'s pattern prescribing. I, therefore, reject Respondent Pharmacy's Exception to the ALJ's finding that the Dr. T.T. prescriptions displayed pattern prescribing.

Respondent Pharmacy also argued that the distances the Dr. T.T. patients travelled was not a red flag. Resp Exceptions, at 18. Respondent Pharmacy argued that its patients travel from all over the Dallas/Forth Worth Metroplex, an area Respondent Pharmacy states covers 9,286 square miles, to visit their doctors and run errands. *Id.* at 19. I reject this Exception.

The Government submitted evidence of the long distances that Dr. T.T.'s patients travelled with routes that had them pass from one side of Dallas to the other (some also passed through Ft. Worth and Arlington, Texas). *See* GX 25. In its Exceptions, Respondent Pharmacy specifically highlighted patient H.P.—arguing that the 123-mile trip she took from her home west of Ft. Worth to Dr. T.T.'s office in North Dallas to Respondent Pharmacy in South Dallas was not unusual. Resp Exceptions, at 19–20. Respondent Pharmacy's argument strains credulity. Clearly, a 123-mile trip is a long distance to travel to obtain a prescription and fill it in an urban setting.[17] Although there could have been a valid reason for the distances and routes the Dr. T.T. patients travelled, the minimum standards of practice in Texas obligate a pharmacist to at least raise this concern with the provider to determine the prescription's legitimacy, and then document the explanation. 22 Tex. Admin. Code § 291.33(c)(2); *see id.* at § 291.29 (c)(4) (requiring a pharmacist to consider geographic distance between the practitioner and the patient or between the pharmacy and the patient when evaluating a prescription's legitimacy).

Respondent Pharmacy finally argued that the cash payments for the Dr. T.T. prescriptions did not present a red flag because ''in the absence of other signs of diversion, prices in the range of $25 to $220 may be insufficient to prove that a pharmacist violated his or her corresponding responsibility.'' Resp Exceptions, at 21–22 (citing *Hills Pharmacy, L.L.C.,* 81 FR 49,816, 49,839 n.39 (2016)). The Dr. T.T. prescriptions, however, presented multiple other red flags of diversion in addition to cash payments. The Texas Administrative Code also states that cash payments are a red flag without reference to price. 22 Tex. Admin. Code § 291.29(f)(12). Accordingly, I reject Respondent Pharmacy's Exception.

After finding the Dr. T.T. prescriptions displayed red flags, the ALJ found that Respondent Pharmacy had no documentation on the hard-copies of the prescriptions or the patient profiles that the red flags were investigated or resolved and that any documentation that was in Respondent's profiles was inadequate. RD, at 66, 68, 71–73, 78. For the reasons that follow, I agree with the ALJ's finding.

Respondent Pharmacy argued that it had resolved any red flags that existed on the Dr. T.T. prescriptions before filling the prescriptions. Resp Exceptions, at 15. Dr. Amadi testified regarding the protocol pharmacists at Respondent Pharmacy followed when presented with a prescription for a controlled substance. Tr. 565–66. He stated that a pharmacist at Respondent Pharmacy would look for previous records that the patient had received the prescription before, and if the patient had, he would look at the prescriber, the dosing, and the duration; if the pharmacist still had questions, he would then check the prescription monitoring program; and, if there was reason to, the pharmacist would call the prescriber. *Id.* There is no evidence, however, that Respondent Pharmacy followed this protocol for the Dr. T.T. prescriptions. None of the hard-copy prescriptions or the patient profiles have documentation of any investigation pharmacists at Respondent Pharmacy allegedly conducted on the Dr. T.T. prescriptions. *See* GX 4; GX 5, at 13–15; GX 6, at 1–15; GX 7, at 16–29; GX 8, at 11–22. Respondent's profiles, the patient profiles Respondent Pharmacy furnished three weeks before the hearing, have pharmacists' remarks for some of the Dr. T.T. prescriptions, but none of them meet the minimal requirements of 22 Tex. Admin. Code 231.33(c)(2)(C). *See* RX C, at 1; RX D, at 13; RX H, at 10. Dr. Witte also credibly testified that the pharmacist remarks from Respondent's profiles were insufficient to satisfactorily resolve the red flags on the prescriptions. Tr. 346–47. Furthermore, as discussed *supra* at II.F, I give Respondent's profiles no weight.

In summary, I find that the Dr. T.T. prescriptions displayed red flags including pattern prescribing, distance, cash payments, drug cocktails, and high dosages of high-alert controlled substances and that the pharmacists at Respondent Pharmacy knew or should have known the prescriptions raised red flags. I further find that, even if the red flags were resolvable, there was no credible evidence that Respondent Pharmacy addressed or resolved them before filling the prescriptions. I do not place any weight on Dr. Amadi's testimony that Respondent Pharmacy resolved the red flags, because Respondent Pharmacy did not maintain contemporaneous documentary evidence in accordance with Texas standards of practice to support the claim that it resolved the red flags before filling the prescriptions, and because Dr. Amadi's testimony was not credible. *See supra* II.C.

b. Prescriptions From AC Medical Clinic

The Government alleged that Respondent Pharmacy filled prescriptions written by prescribers at AC Medical Clinic in Arlington, Texas that raised red flags without proper investigation, resolution, and documentation of the red flags. ALJX 1, at 4–6. The Government further alleged that filling the prescriptions without resolving and documenting the red flags fell below the minimum standard of practice for a Texas pharmacy/pharmacist and was outside the usual course of professional practice for a pharmacy/pharmacist in Texas. *Id.*

To support these allegations, the Government presented into evidence

[17] In light traffic, it would take 2 hours and 16 minutes to complete this round trip. GX 25, at 1; *see E. Main St. Pharmacy,* 75 FR 66149, 66164 (2010) (finding that driving two or more hours to fill a prescription would be a red flag to any pharmacist).

dozens of prescriptions written by prescribers at AC Medical and filled at Respondent Pharmacy between August 16, 2014 and May 8, 2015 (hereinafter, the AC Medical prescriptions). GX 2, 5–9. The Government also introduced Respondent Pharmacy's electronic patient profiles for the patients who received the AC Medical prescriptions. *Id.* Finally, the Government presented testimony from Dr. Witte that all of the AC Medical prescriptions presented red flags, that there was no evidence that Respondent Pharmacy resolved the red flags prior to filling the prescriptions, and that filling the prescriptions fell below the minimum standard of practice and was outside the usual course of professional practice of pharmacy in Texas. *See, e.g.,* Tr. 270–73, 278, 293–94, 332–35.

The AC Medical staffers who prescribed the AC Medical prescriptions were Dr. N.E; Dr. C.V.; L.R., ACNS–BC; S.G., FNP; and C.Z., PA. *Id.* Almost all of the paper AC Medical prescriptions were written on prescription pads from AC Medical making it easy to identify that the prescription came from a prescriber at the clinic.[18] Many of the AC Medical prescriptions prescribed by Dr. C.V. were electronic prescriptions, which all listed an address different from the address listed on the paper AC Medical prescriptions, but Dr. C.V.'s electronic prescriptions still clearly identified that they came from AC Medical. *See, e.g.,* GX 2, at 13, 24, 34.

i. December 12 and 13, 2014 AC Medical Prescriptions

On December 12, 2014, Respondent Pharmacy dispensed identical prescriptions of alprazolam to patients M.B. and L.B. at approximately the same time.[19] GX 8, at 3, 7. L.B. and M.B. reside at the same address. *Id.* The next day, Respondent Pharmacy filled identical prescriptions for hydrocodone for M.B. and L.B. *Id.* at 1, 9. These prescriptions were also filled one right after the other according to the prescription numbers. *Id.* All of the prescriptions were prescribed by Dr. NE *Id.* M.B. and L.B. paid for the alprazolam and hydrocodone prescriptions with cash. *Id.* at 1–9.

As already discussed, hydrocodone and alprazolam are a drug cocktail, which constitutes a red flag. *Supra* II.F.1. Paying cash for controlled substances is also a red flag. *Id.* Additionally, Dr. Witte testified that when two patients living at the same address obtain prescriptions from the same provider for the same highly abused drug cocktail, in this case hydrocodone and alprazolam, it is a red flag indicating diversion. Tr. 293; *see also* 22 Tex. Admin. Code § 291.29(f)(11) (It is a red flag when ''multiple persons with the same address present substantially similar controlled substance prescriptions from the same practitioner.'').

Despite the red flags on the prescriptions, there was no documentation on M.B.'s and L.B.'s prescriptions or patient profiles that Respondent Pharmacy had resolved the red flags of pattern prescribing, drug cocktails, or cash payments. GX 8, at 1, 3, 6, 7. The Respondent's profiles did contain remarks on both M.B. and L.B.'s profiles, RX A, at 62, 66, but as discussed *supra* at II.F, I give the Respondent's profiles no weight. I also credit Dr. Witte's testimony that neither remark adequately resolved the red flags, *see* Tr. 734–35, and agree with the ALJ's finding that neither remark had the minimum information a pharmacist must document regarding a resolved red flag under the Texas Operational Standards,[20] RD, at 63–64; 22 Tex. Admin. Code § 291.33(c)(2). Respondent Pharmacy claimed the remarks in the Respondent's profiles met the Texas Operational Standards. Resp Exceptions, at 15. The remarks on the December 12, 2014 AC Medical prescriptions, however, did not meet the standards as they were missing the date of the consultation, the name of the person communicating the prescriber's instructions, and the initials of the pharmacist performing the consultation—all required information under the Texas Operational Standards when documenting the resolution of a red flag. *See* 22 Tex. Admin. Code § 291.33(c)(2)(C).

ii. January 14 and 15, 2015 AC Medical Prescriptions

On January 14 and 15, 2015, Respondent Pharmacy dispensed prescriptions for alprazolam and hydrocodone to patients L.H., R.C., and K.W. (male). GX 7, at 1, 5, 9. Respondent Pharmacy filled prescriptions for alprazolam for L.H. and R.C. on January 14. *Id.* at 1, 5. On January 15, Respondent Pharmacy filled an alprazolam prescription for K.W. (male) and hydrocodone prescriptions for all three patients. *Id.* at 1, 5, 9. All of the alprazolam prescriptions were identical and prescribed by Dr. NE *Id.* All of the hydrocodone prescriptions were identical and prescribed by Dr. C.V. *Id.* The three patients paid cash for the prescriptions. GX 7, 1–15.

The ALJ found, and I concur, that the prescriptions displayed red flags of drug cocktails, cash payments, and pattern prescribing. RD, at 33. I further find that K.W. (male)'s alprazolam prescription is invalid because it does not list the patient's address. GX 7, at 15; Tr. 423–24, 647–49. Dr. Witte testified that to resolve a missing address on a prescription, a pharmacist should confirm the address and fill it in on the prescription itself. Tr. 335. The line on K.W. (male)'s prescription for the patient address remains blank. GX 7, at 15.

I further find, as the ALJ did, that nothing in the record demonstrates that Respondent Pharmacy resolved the red flags on the prescriptions. *See* RD, at 69–71. Respondent Pharmacy argued it had resolved the red flags on patient R.C.'s prescription because Dr. Amadi testified that he had identified the hydrocodone and alprazolam combination as a red flag and had contacted the prescribing doctor's office to ensure the validity of the prescription. Resp Exceptions, at 15 (citing Tr. 572). I do not credit Dr. Amadi's testimony. There is no documentation on any of the three patients' prescriptions or patient profiles that any of the red flags on the prescriptions had been resolved. *See* GX 7. The Respondent's profiles do contain remarks for these patients, but even assuming I were to give those profiles any weight, the remarks do not comply with the operational rules for Texas pharmacists and are inadequate to address the red flags.[21] *See* 22 Tex. Admin. Code § 291.33(c)(2)(C).

[18] For unexplained reasons, Dr. C.V. wrote three of the subject prescriptions and Dr. NE wrote one of the subject prescriptions from a prescription pad individual to that doctor. *See* GX 2, at 3, 19, 33; GX 8, at 5.

[19] On December 12, 2014, M.B. and L.B filled five prescriptions at Respondent Pharmacy. The prescription numbers for those five prescriptions are in sequential order from 37218 through 37222. GX 8, at 3, 7.

[20] The remark on L.B.'s Respondent profile reads, ''md. oked rx.'' RX A, at 66. The remark on M.B's Respondent profile reads, ''rx info, did not have a diagnosis code. md confirmed pt has lower back pain.'' *Id.* at 62.

[21] The remark on K.W. (male)'s Respondent profile does not refer to any controlled substances, only two antidepressants. Tr. 729–30. The remark on R.C.'s profile states that a doctor was consulted and approved the combination of hydrocodone, alprazolam, and methocarbomal, but the comment does not specify which of the three doctors listed on the profile was consulted, identify the date of the consultation, or explain why the patient was receiving prescriptions from controlled substances from multiple doctors and paying in cash. RX A, at 21. The remark on L.H.'s Respondent profile states that the doctor said the patient had an accident and approved the medication. The remark, however, does not identify which of the two doctors on the profile the pharmacist spoke with, does not address why the patient was receiving controlled substances from two doctors, is undated, and according to Dr. Witte, did not resolve the red flags. RX A, at 43, Tr. 732.

iii. March 2–6, 2015 AC Medical Prescriptions

On March 2, 2015, Respondent Pharmacy dispensed alprazolam to patients V.B., F.S., and K.M.[22] GX 5, at 1, 4, 10. The following day, March 3, 2015, Respondent Pharmacy filled hydrocodone prescriptions for the same three patients.[23] *Id.* On March 4, 2015, Respondent Pharmacy filled alprazolam prescriptions for patients A.W. and C.M. GX 2, at 37; GX 9, at 12. The next day, March 5, 2015, Respondent Pharmacy filled hydrocodone prescriptions for A.W. and C.M. and alprazolam and hydrocodone prescriptions for patients J.W. and D.T. GX 2, at 38; GX 9, at 1, 5, 12. On March 6, 2015, Respondent Pharmacy filled another prescription for hydrocodone for D.T. GX 9, at 1. The prescriptions were all written by prescribers at AC Medical. The patients paid for the prescriptions with cash. GX 2, at 37–38; GX 5, at 1–12; GX 9.

The instructions on the alprazolam prescriptions stated the alprazolam was to be taken twice a day. GX 2, at 37–38; GX 5, at 1–12; GX 9. Three times a day, however, is the standard dose for alprazolam. Tr. 389–91, 661–62. The prescriptions for hydrocodone were all for 90 tablets and contained dosing instructions of 1 tablet to be taken 3 times a day as needed.[24] GX 2, at 38; GX 5, at 3, 6, 11; GX 9, at 3, 4, 10, 14. All of the hydrocodone prescriptions were written by Dr. C.V., a different doctor than the practitioners who wrote the prescriptions for alprazolam. GX 2, at 38; GX 5, at 3, 6, 11; GX 9, at 3, 4, 10, 14; Tr. 277–78.

Based on the documentary evidence and the testimony of Dr. Witte and Dr. Emelonye,[25] the ALJ found dispensing alprazolam and hydrocodone one day apart or the same day to the same patients, under these circumstances, raises the following red flags: Pattern prescribing, different prescribers of controlled substances; drug cocktails; and cash payments. RD, at 30, 34–35. I concur with the ALJ's findings. The expert testimony of Dr. Witte established that the same patient filling separate prescriptions for alprazolam and hydrocodone is a drug cocktail whether filled on the same day or on consecutive days. Tr. 344, 725. The pharmacist who filled the prescriptions one day apart for V.B., F.S., K.M, and C.M. should have known the patients were receiving a drug cocktail by looking at the patients' profiles. Tr. 432–34. The identical, suboptimal dosing instructions for patients filling prescriptions for controlled substances from the same medical clinic at the same time also evidences pattern prescribing as does that fact that all of the patients received the same hydrocodone prescription from Dr. C.V. Tr. 270, 278; *see* 22 Tex Admin Code § 291.29(f).

Respondent Pharmacy claimed the prescriptions did not display red flags of pattern prescribing and cash payments. Resp Exceptions, at 17–18, 21–22. Respondent Pharmacy did not provide any reasoning or argument why the prescriptions do not display pattern prescribing, *see id.* at 17–18; while the Government presented credible expert testimony that a Texas pharmacist would have recognized the pattern prescribing on the subject prescriptions. Tr. 270, 278. For the cash payments, Respondent Pharmacy argued that ''in the absence of other signs of diversion, prices in the range of $25 to $220 may be insufficient to prove that a pharmacist violated his or her corresponding responsibility.'' *Id.* at 21–22 (citing *Hills Pharmacy, L.L.C.,* 81 FR 49,816, 49,839 n.39 (2016)). The subject prescriptions, however, presented multiple other red flags of diversion in addition to cash payments. The Texas Administrative Code also states that cash payments are a red flag without reference to price. *See* 22 Tex. Admin. Code § 291.29(f)(12). Accordingly, I reject the Respondent Pharmacy's Exceptions to the ALJ's findings that the prescriptions presented the red flags of pattern prescribing and cash payments.

Despite the numerous red flags on the prescriptions, there is no documentation on either the hard-copy prescriptions or in Respondent Pharmacy's electronic patient profiles that the red flags were resolved. *See* GX 2, at 36–38; GX 5, 9. Additionally, and significantly, there are no notes explaining why patient D.T. obtained 180 tablets of hydrocodone in two prescriptions on consecutive days. The Respondent's profiles, to which I do not give weight, all have a remark for these patients, RX A, at 47, 50, 74; RX D, at 10, but the remarks fail to address all of the red flags raised by the suspect prescriptions and fail to meet the requirements set forth by the Texas Operational Standards. 22 Tex. Admin. Code § 291.33(c)(2)(C). Dr. Witte also testified that all of the Respondent's profiles fell below the minimum acceptable standard of practice for a pharmacy in Texas and specifically testified that the remarks for patients K.M. and C.M. failed to adequately resolve the prescriptions' red flags. Tr. 733, 746.

As with all of the subject prescriptions that had remarks in the Respondent's profiles, Respondent Pharmacy filed an Exception to the ALJ's finding that the remarks did not meet the Texas Operational Standards. Resp Exceptions, at 15. The remarks on the March 2–6, 2015 AC Medical prescriptions, however, did not meet the standards, as they were all missing the date of the consultation, the name of the person communicating the prescriber's instructions, and the initials of the pharmacist performing the consultation—all required information under the Texas Operational Standards when documenting the resolution of a red flag. 22 Tex. Admin. Code § 291.33(c)(2)(C).

In its Exceptions, Respondent Pharmacy also specifically argued that Dr. Amadi resolved the red flags on the prescriptions filled on March 4 and 5, 2015, for a patient A.W. before filling them. Resp Exceptions, at 15. Dr. Amadi testified during the hearing that he recognized that A.W.'s prescriptions for alprazolam and hydrocodone filled on consecutive days was a red flag drug cocktail and that he resolved the red flag by contacting the prescribing doctor's office to ensure the validity of the prescription. Tr. 563–65. Having considered Respondent Pharmacy's argument, I find there is substantial evidence to support the Government's allegation that Respondent Pharmacy filled prescriptions for patient A.W. without resolving the red flags on the prescriptions. Despite Dr. Amadi's claim that he resolved the red flags on the prescriptions, there is no documentation of his investigation on either the prescriptions or A.W.'s patient profile. *See* GX 2, at 36–38. The Respondent's profiles do have a remark for patient A.W., but it does not resolve the red flags on the prescriptions. RX A, at 1.[26]

[22] The three patients filled a total of 9 prescriptions at Respondent Pharmacy on March 2, 2015. All 9 prescriptions fell between prescription fill numbers 39126 and 39138. GX 5, at 2, 5, 12. When asked for her assessment of the prescriptions, Dr. Witte testified ''you wonder, did all the patients happen to be in the pharmacy at the same time, dropping of the same prescriptions from the same practice, or were they delivered by one person.'' Tr. 270.

[23] The prescription fill numbers for the three prescriptions were 192, 193, and 195. Tr. 176.

[24] Dr. Witte testified that hydrocodone is typically dosed one tablet every four to six hours. Tr. 252–53.

[25] Dr. Emelonye testified that he would ''ask questions to find out what was going on'' if a patient presented prescriptions for two different controlled substances written by two different doctors a day apart. Tr. 678.

[26] The remark states ''Dr. consulted and she confirmed that pt needs the meds for his conditions.'' This remark does not identify which of the two doctors listed on the profile the pharmacist spoke with, does not address why the patient was receiving controlled substances from two doctors, does not address why the patient was paying with cash, and is undated. Further, Dr. Witte

Continued

I, therefore, do not place any weight on Dr. Amadi's testimony that he resolved the red flag on A.W's prescription because Respondent Pharmacy produced no contemporaneous documentary evidence to support its claim that Dr. Amadi resolved the red flags before filling the prescriptions and because Dr. Amadi's testimony was not credible.

iv. Other AC Medical Prescriptions

The Government presented patient profiles and prescriptions demonstrating that Respondent Pharmacy filled prescriptions from AC Medical for patients receiving both hydrocodone and alprazolam to seven additional patients. GX 2, at 1–14, 17–27, 31–35, 39–42. As already discussed, a combination of hydrocodone and alprazolam is a drug cocktail and a red flag. The prescriptions were also all paid for with cash—another red flag. *Id.* There is no documentation on the hard-copy prescriptions or the patient profiles that Respondent Pharmacy resolved the red flags before dispensing the prescriptions. *Id.* The Respondent's profiles did contain pharmacist's remarks for most of these patients, but none of the remarks contained the minimum information required by the Texas Operational Standards. RX A, at 27, 34, 38, 53, 67; *see* Tex. Admin. Code § 291.33(c)(2)(C). Dr. Witte also testified that none of the remarks adequately resolved the red flags on the prescriptions. Tr. 346–47, 726–737, 746. I therefore find that Respondent Pharmacy filled prescriptions from AC Medical that had red flags of drug cocktails and cash payments without resolving the red flags or documenting the resolution of the red flags.

In summary, I find the AC Medical prescriptions displayed red flags including pattern prescribing, cash payments, patients receiving controlled substance prescriptions from different doctors, and drug cocktails and that the pharmacists at Respondent Pharmacy knew or should have known the prescriptions raised red flags. Notably, all of the patients who filled the subject prescriptions from AC Medical at Respondent Pharmacy received the drug cocktail of alprazolam and hydrocodone. I also find that one of the AC Medical prescriptions Respondent Pharmacy filled was facially invalid because it did not list the patient's address.[27] I further find that, even if the red flags on the prescriptions were resolvable, there was no credible evidence that Respondent Pharmacy addressed or resolved them before filling the prescriptions. I do not place any weight on Dr. Amadi's testimony that Respondent Pharmacy resolved the red flags because Respondent Pharmacy did not maintain contemporaneous documentary evidence in accordance with Texas standards of practice to support the claim that it resolved the red flags before filling the prescriptions and because Dr. Amadi's testimony was not credible. *See supra* II.C.

c. Prescriptions From KSW Medical Clinic

In March 2015, two of the prescribers from the AC Medical Clinic, Dr. NE and S.G., FNP, began writing prescriptions from a different clinic, KSW Medical Clinic in Desoto, Texas. The Government alleges that Respondent Pharmacy continued to fill prescriptions from these providers after they moved from AC Medical to KSW Medical without investigation, resolution, or documentation of red flags on the prescriptions in violation of the standard of practice for a Texas pharmacy/pharmacist and outside the usual course of professional practice for a Texas pharmacy/pharmacist. ALX 1, at 4–6. To support these allegations, the Government introduced prescriptions written by prescribers at KSW Medical Clinic and filled by Respondent Pharmacy between March 31, 2015 and May 8, 2015. GX 2, at 15–16, 29–30; GX 3. All of the KSW prescriptions were written on prescription pads from the KSW Medical Clinic making it easy to identify that the prescription came from a prescriber at the clinic. *Id.*

i. May 8, 2015 KSW Medical Prescriptions

On May 8, 2015, Respondent Pharmacy filled nine controlled substance prescriptions from KSW Medical for patients D.B., K.W., O.F., M.J., and C.F. GX 3. Dr. Witte testified that the prescriptions presented red flags that Respondent Pharmacy failed to resolve and that filling the prescriptions fell below the minimum standard of practice and was outside the usual course of professional practice of pharmacy in Texas. Tr. 250–57.

The ALJ found that the prescriptions for patients D.B., K.W., O.F., and M.J. raised the following red flags: Pattern prescribing, specifically, the prescriptions had the same directions for use, the prescriptions were issued by the same medical practice (KSW Medical), and the prescriptions were all presented to Respondent Pharmacy at approximately the same time;[28] drug cocktails (hydrocodone and alprazolam); and cash payments. RD, at 28. The ALJ also found that the alprazolam prescriptions for all four patients were facially invalid. *Id.* To be facially valid, a prescription must contain the patient's address and the provider's DEA number. Tr. 242, 335, 423–25, 647–49; Tex. Health & Safety Code § 481.074(k)(3), (7). The alprazolam prescriptions for K.W., O.F., and M.J. did not contain an address or the provider's DEA number, Tr. 242, 245–48; GX 3, at 6, 10, 14, and the alprazolam prescription for D.B. was missing the patient's address, Tr. 370; GX 3, at 2. On May 8, 2015, Respondent Pharmacy also filled a prescription for hydrocodone for patient C.F. GX 3, at 20. The ALJ found this prescription raised the red flags of pattern prescribing, specifically the prescription was the same quantity and dosing as the other hydrocodone prescriptions from KSW Medical that were brought to Respondent Pharmacy that day; a prescription for a high-alert controlled substance; and cash payment. RD, at 28. Having reviewed the record, I concur with the ALJ's findings.

Respondent Pharmacy filed an Exception to the ALJ's finding that the May 8, 2015 KSW Medical prescriptions displayed the red flags of pattern prescribing. Resp Exceptions, at 17–18. I reject Respondent Pharmacy's Exception and find that a reasonable pharmacist practicing within the standard of practice for a Texas pharmacist would have recognized the pattern prescribing displayed by the prescriptions. Dr. Witte credibly testified that a pharmacist working a typical 8 to 10 hour shift would be unlikely to encounter nine prescriptions on the same day in close proximity to one another for the same controlled substances, with similar dosing and instructions, all from the same medical practice. Tr. 251. While the pattern might not have been apparent when the first or second prescription was presented, Dr. Amadi should have realized by the time he received the third or fourth prescription that drug cocktails repeatedly coming from KSW Medical for hydrocodone and

provided credible expert testimony that the remark was inadequate to resolve the red flags on the prescriptions. Tr. 726–28.

[27] A review of the subject prescriptions from AC Medical in the Government's exhibits shows that many of the other prescriptions were missing addresses and/or the prescriber's DEA number, but the Government only charged one prescription from AC Medical as facially invalid. *See* ALJX 1, at 4–6. I am, therefore, only including a finding on the single prescription.

[28] Dr. Witte testified that the fill stickers for the prescriptions indicate the patients either came into the pharmacy at the same time or that one person was dropping of the prescriptions for all of the patients. Tr. 250–51.

alprazolam on the same date raised the concern of illegitimacy and diversion.

Respondent Pharmacy also argued that the prescriptions displayed the red flag of cash payments for the same reasons it objected to this finding for the Dr. T.T. and AC Medical prescriptions. Resp Exceptions, at 21–22. As with those prescriptions and for the same reasons, I reject Respondent Pharmacy's argument.

During the hearing Dr. Amadi agreed that the May 8, 2015 prescriptions from KSW Medical contained some red flags [29] but argued that he had investigated and resolved the red flags before the prescriptions were dispensed by calling the prescribers and checking the patients' identifications for the missing addresses. Tr. 584–85. The ALJ did not credit Dr. Amadi's testimony and found that (1) Respondent Pharmacy had not resolved the red flags before filling the prescriptions because there was no documentation on the prescriptions or the patient profiles that it had done so, RD, at 26; (2) the documentation in the Respondent's profiles did not adequately resolve the red flags on the prescriptions or meet the minimum standards for documenting the resolution of red flags, *id.* at 83–86; and (3) Respondent Pharmacy had not added the missing addresses as required to resolve the problems with the invalid prescriptions, *id.* at 28. Respondent Pharmacy disagreed with these findings. Resp Exception, at 15–17. I agree with the ALJ.

A pharmacist practicing in Texas must record notes on the hard-copy of the prescription or in the pharmacy's electronic patient profiles explaining whether a red flag was resolved and how it was resolved. 22 Tex. Admin. Code § 291.33(c)(2)(C). None of the hard-copies of the prescriptions or the patient profiles contained any notes resolving the red flags of drug cocktails, cash payments, or pattern prescribing. GX 3; RD, at 26. The hard-copy of the prescriptions for D.B., K.W., O.F., and M.J. also do not contain any notes or comments indicating how the pharmacist resolved the issue of the missing address before dispensing the high-alert controlled substance. GX 3; RD, at 26.

The Respondent's profiles for the patients contain remarks, but the remarks lack the information required by the Texas Operational Standards for resolving red flags. RX A, at 86, 88, 106, 112; 22 Tex. Admin. Code § 291.29(c)(2)(C). Every comment falls short of all four requirements outlined in the Texas regulation. Additionally, the patients' profiles show that all of the patients were receiving multiple drugs, both controlled and non-controlled substances, but the pharmacist's comments never say which drug the comment was addressing. Therefore, even if I were to give weight to the Respondent's profiles, and for the reasons I discussed *supra* I do not, the remarks fail to meet the standard of practice for a Texas pharmacy.

ii. Other KSW Medical Prescriptions With Red Flags

The Government presented prescriptions demonstrating that Respondent Pharmacy filled prescriptions from KSW Medical for patients receiving both hydrocodone and alprazolam on two other occasions. GX 2, at 15–16; GX 3, at 18–19. As already discussed, a combination of hydrocodone and alprazolam is a drug cocktail and a red flag. The prescriptions were also all paid for with cash, another red flag. GX 2, at 15–16; GX 3, at 18–19. There is no documentation on the hard-copy prescriptions or the patient profiles that Respondent Pharmacy resolved the red flags before dispensing the prescriptions. GX 2, at 9, 15–16; GX 3, at 17–19. I therefore find that Respondent Pharmacy filled prescriptions from KSW Medical that had red flags of drug cocktails and cash payments without resolving the red flags or documenting the resolution of the red flags.

In summary, I find the KSW Medical prescriptions displayed red flags including pattern prescribing, cash payments, and drug cocktails and that the pharmacists at Respondent Pharmacy knew or should have known the prescriptions raised red flags. I also find that four of the KSW Medical prescriptions Respondent Pharmacy filled were facially invalid because they did not list the patient's address or the prescriber's DEA registration number. I further find that, even if the red flags on the prescriptions were resolvable, there was no credible evidence that Respondent Pharmacy addressed or resolved them before filling the prescriptions. I do not place any weight on Dr. Amadi's testimony that Respondent Pharmacy resolved the red flags, because Respondent Pharmacy did not maintain contemporaneous documentary evidence in accordance with Texas standards of practice to support the claim that it resolved the red flags before filling the prescriptions and because Dr. Amadi's testimony was not credible. *See supra* II.C.

d. The Cedar Hill Prescriptions

The Government next alleged that between October 2014 and June 2015, Cedar Hill dispensed nearly 100 prescriptions that displayed red flags that were unresolvable.[30] The Cedar Hill prescriptions were all prescribed by the same doctor, Dr. R.G., in Houston for 21 patients who lived in the Dallas area. *See* GX 10. The Cedar Hill prescriptions contained 47 prescriptions for oxycodone, 49 for hydrocodone, and 26 for hydrocodone-oxycodone cocktails. *Id.* According to the fill stickers, the prescriptions were filled by pharmacist Kweku Ohene. Tr. 81; *see* GX 10. In addition to working at Cedar Hill, Mr. Ohene was also the pharmacist-in-charge of Respondent Pharmacy. GX 16, at 1.

Dr. Witte testified that the Cedar Hill prescriptions contained several red flags. First, hydrocodone and oxycodone are both high-alert controlled substances. Prescribed together, they constitute a red flag drug cocktail. *Supra* II.F.1. Dr. Witte testified that a prescription for multiple drugs in the same class, such as oxycodone and hydrocodone, which both treat pain, raises the concern of overdose. Tr. 440–41. She noted that two narcotics could be prescribed together under some circumstances; for example, prescribing one narcotic for break-through pain and the other for chronic pain, but that the directions on Cedar Hill prescriptions were not written that way. *Id.* at 289.

Second, Dr. Witte testified that the distance travelled to obtain the prescriptions in Houston and fill them at Cedar Hill is a red flag. Tr. 288. All of the patients lived in the Dallas area, meaning they travelled more than 400 miles round trip to obtain prescriptions for highly-abused controlled substances. *Id.* at 287. The diagnoses provided on the Cedar Hill prescriptions further call the distance travelled into question. Dr. Witte observed that many diagnoses on these prescriptions were chronic back pain, lumbar disc pain, or spinal stenosis, and the prescriptions stated, ''Pain functional limitation.'' *Id.* at 290; GX 10, at 35, 50, 68, 81, 99, 191, 157, 163, 167. Dr. Witte credibly testified

[29] Dr. Amaldi testified that the combination of ''the Xanax and the alprazolam'' in the prescriptions was cause for concern and would need to be addressed. Tr. 585. As alprazolam is the generic name for Xanax, I presume Dr. Almadi misspoke and intended to say it was the combination of the *hydrocodone* and the alprazolam that was the cause for concern. Dr. Amaldi also stated that a missing address is a red flag. *Id.*

[30] Respondent Pharmacy objected to the introduction of the Cedar Hill prescriptions on the basis of relevancy. I address Respondent Pharmacy's argument *infra* at III.B.2.

that she would not expect a patient suffering from mobility-impairing back pain to be capable of sitting in a car for the multi-hour trip between Dallas and Houston. Tr. 290.

Dr. Witte additionally testified that the prescriptions presented the red flag of pattern prescribing. All of the prescriptions were written by the same physician, Dr. R.G., and all were for hydrocodone, oxycodone, or a combination of the two. Tr. 287–89; *see* GX 10. Most of the prescriptions were also paid for in cash, another red flag. Tr. 287–88; GX 10, at 1–35, 38–41, 54–110, 131–192.[31] Only 19 of the prescriptions were billed to insurance. GX 10, at 36–37, 42–53, 111–30.

Dr. Witte opined that the combination of red flags on the Cedar Hill prescriptions—the extraordinary distances traveled by the patients to obtain their prescriptions, the pattern prescribing, the cash payments—were so egregious that they were unresolvable. Tr. 288–89. She explained that when a prescription has unresolvable red flags, there is ''nothing that could be done that would convince you as a pharmacist to fill these prescriptions.'' *Id.* at 436. Dr. Witte testified that with the Cedar Hill prescriptions, a pharmacist could perhaps have resolved the red flags on the first prescription he saw based on an explanation from the prescriber, but that after a few prescriptions, the pattern was apparent and the pharmacist should have refused to fill the prescriptions regardless of any explanation from the prescriber. *Id.* at 436–40. The ALJ concurred with Dr. Witte and found that the Cedar Hill prescriptions raised red flags and that the red flags were unresolvable. RD, at 87–89.

Respondent Pharmacy argued that the cash payments for the Cedar Hill prescriptions did not present a red flag. Resp Exceptions, at 21–22. Respondent Pharmacy argued that ''in the absence of other signs of diversion, prices in the range of $25 to $220 may be insufficient to prove that a pharmacist violated his or her corresponding responsibility.'' *Id.* (citing *Hills Pharmacy, L.L.C.,* 81 FR 49,816, 49,839 n.39 (2016). The Cedar Hill prescriptions, however, presented multiple other red flags of diversion in addition to cash payments. The Texas Administrative Code also states that cash payments are a red flag without reference to price. *See* 22 Tex. Admin. Code § 291.29(f)(12). Accordingly, I reject Respondent Pharmacy's Exception.

Based on the evidence on the record, I find that the Cedar Hill prescriptions raised red flags and that the pharmacists at Cedar Hill knew or should have known that the prescriptions raised the red flags. I further find that the pharmacists at Cedar Hill filled the prescriptions without resolving the red flags, as the red flags were unresolvable.[32]

III. Discussion

The Government alleged that Respondent Pharmacy's registration should be revoked because Respondent Pharmacy committed acts that would render its registration inconsistent with the public interest as provided in 21 U.S.C. 823(f). The gravamen of the Government's allegations and evidence in this case focuses on whether Respondent Pharmacy violated federal and state laws relating to controlled substances when it filled prescriptions, employed Dr. Amadi in a position with access to controlled substances, and failed to properly maintain certain records.

Section 304(a) of the Controlled Substances Act (hereinafter, CSA) provides that ''[a] registration . . . to . . . dispense a controlled substance . . . may be suspended or revoked by the Attorney General upon a finding that the registrant . . . has committed such acts as would render [its] registration under section 823 of this title inconsistent with the public interest as determined under such section.'' 21 U.S.C. 824(a). In the case of a practitioner, which includes a pharmacy, the CSA requires the Agency consider the following factors in determining whether Respondent Pharmacy's registration would be inconsistent with the public interest:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The [registrant's] experience in dispensing, or conducting research with respect to controlled substances.

(3) The [registrant's] conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety.

21 U.S.C. 823(f).

The DEA considers these public interest factors in the disjunctive. *Robert A. Leslie, M.D.,* 68 FR 15,227, 15,230 (2003). Each factor is weighed on a case-by-case basis. *Morall* v. *Drug Enf't Admin.,* 412 F.3d 165, 173–74 (D.C. Cir. 2005). Any one factor, or combination of factors, may be decisive. *David H. Gillis, M.D.,* 58 FR 37,507, 37,508 (1993). Thus, there is no need to enter findings on each of the factors. *Hoxie* v. *Drug Enf't Admin.,* 419 F.3d 477, 482 (6th Cir. 2005). Furthermore, there is no requirement to consider a factor in any given level of detail. *Trawick* v. *Drug Enf't Admin.,* 861 F.2d 72, 76–77 (4th Cir. 1988). The balancing of the public interest factors ''is not a contest in which score is kept; the Agency is not required to mechanically count up the factors and determine how many favor the Government and how many favor the registrant. Rather, it is an inquiry which focuses on protecting the public interest . . . .'' *Jayam Krishna-Iyer, M.D.,* 74 FR 459, 462 (2009). When deciding whether registration is in the public interest, the DEA must consider the totality of the circumstances. *See generally Joseph Gaudio, M.D.,* 74 FR 10,083, 10,094–95 (2009) (basing sanction on all evidence on record).

The Government has the burden of proving that the requirements for revocation of a DEA registration in 21 U.S.C. 824(a) are satisfied. 21 CFR 1301.44(e). When the Government has met its *prima facie* case, the burden then shifts to the Respondent to show that revoking registration would not be appropriate, given the totality of the facts and circumstances on the record. *Med. Shoppe-Jonesborough,* 73 FR 364, 387 (2008).

While I have considered all of the public interest factors, the Government's case invoking the public interest factors of 21 U.S.C. 823(f) seeks the revocation of Respondent Pharmacy's registration based primarily on conduct most aptly considered under Public Interest Factors Two and Four. I find that the Government's evidence with respect to Factors Two and Four satisfies its *prima facie* burden of showing that Respondent Pharmacy's continued registration would be ''inconsistent with the public interest.'' 21 U.S.C. 823(f). I further find that Respondent Pharmacy

[31] Respondent Pharmacy charged $480 for 120 tablets of oxycodone 500 30mg and $100 for 60 tablets of hydrocodone 10/325 mg meaning most patients who obtained hydrocodone-oxycodone cocktails from Dr. R.G. paid $580 for high-alert controlled substances that are typically covered by insurance. *See, e.g.,* GX 10, at 2, 4, 6, 8, 10, 12, 14, 16, 18, 20, 22, 24.

[32] The Cedar Hill prescriptions do not contain any notes or comments documenting the resolution of the red flags on the hard copies of the prescriptions, *see* GX 10; but the Government did not obtain the electronic patient profiles for the Cedar Hill prescriptions, which could have contained the documentation. I find, however, that it is irrelevant whether the Cedar Hill pharmacists investigated the red flags on the Cedar Hill prescriptions as Dr. Witte credibly testified that they were unresolvable. Further, Respondent Pharmacy did not argue in its Posthearing Brief or in the Exceptions that it filed to the Recommended Decision that Cedar Hill pharmacists had investigated or resolved the red flags on the Cedar Hill prescriptions.

failed to provide sufficient evidence to rebut the Government's *prima facie* case. Specifically, I find that the record contains substantial evidence that pharmacists at Respondent Pharmacy and Cedar Hill violated their corresponding responsibility when they dispensed over two hundred prescriptions. I also find there is substantial evidence on the record that Respondent Pharmacy employed Dr. Amadi in a capacity where he had access to controlled substances, a position for which he was ineligible under federal law, and violated multiple federal and state recordkeeping requirements.

A. Factors One and Three

Respondent Pharmacy filed exceptions to the findings in the Recommended Decision that Factors One and Three do not weigh for or against revocation of Respondent Pharmacy's registration. Respondent Pharmacy argues that Factors One and Three should weigh in favor of Respondent Pharmacy retaining its registration, because Respondent Pharmacy holds a valid state license to operate as a pharmacy and none of its employees have a conviction record related to controlled substances. Resp Exceptions, at 7–8.

It is undisputed that Respondent Pharmacy holds a valid state pharmacy license in Texas. However, possession of a state license does not entitle a holder of that license to a DEA registration. *Mark De La Lama, P.A.,* 76 FR 20,011, 20,018 (2011). It is well established that a ''state license is a necessary, but not a sufficient condition for registration.'' *Robert A. Leslie, M.D.,* 68 FR at 15,230. The ultimate responsibility to determine whether a DEA registration is consistent with the public interest resides exclusively with the DEA, not to entities within state government. *Edmund Chein, M.D.,* 72 FR 6580, 6590 (2007), *aff'd Chein* v. *Drug Enf't Admin.,* 533 F.3d 828 (DC Cir. 2008).

In determining the public interest under Factor One, the ''recommendation of the appropriate State licensing board or professional disciplinary authority . . . shall be considered.'' 21 U.S.C. 823(f)(1). ''Two forms of recommendations appear in Agency decisions: (1) A recommendation to DEA directly from a state licensing board or professional disciplinary authority (hereinafter, appropriate state entity), which explicitly addresses the granting or retention of a DEA COR; and (2) the appropriate state entity's action regarding the licensure under its jurisdiction on the same matter that is the basis for the DEA OSC.'' *John O. Dimowo,* 85 FR 15,800, 15,809 (2020); *see, also, Vincent J. Scolaro, D.O.,* 67 FR 42,060, 42,065 (2002) (''While the State Board did not affirmatively state that the Respondent could apply for a DEA registration, [the ALJ] found that the State Board by implication acquiesced to the Respondent's application because the State Board has given state authority to the Respondent to prescribe controlled substances.'').

The record in this case contains no evidence of a recommendation regarding Respondent Pharmacy's privilege to operate as a pharmacy by the relevant state licensing board or professional disciplinary authority or any action by the state licensing board that demonstrates that it has considered the same facts in relation to Respondent Pharmacy's continued licensure. Prior Agency decisions have found that where the record contains no evidence of a recommendation by a state licensing board, that absence does not weigh for or against revocation. *See, e.g., Ajay S. Ahuja, M.D.,* 84 FR 5479, 5490 (2019) (finding that ''where the record contains no evidence of a recommendation by a state licensing board that absence does not weigh for or against revocation.''); *Holiday CVS LLC dba CVS Pharmacy Nos 219 and 5195,* 77 FR 62,316, 62,340 (2012); *Roni Dreszer, M.D.,* 76 FR 19,434, 19,444 (2011). Accordingly, I agree with the ALJ's finding that Factor One does not weigh for or against revocation in this matter.

As to Factor Three, there is no evidence that Respondent Pharmacy's owner or any of its employees have been convicted of an offense under either federal or state law ''relating to the manufacture, distribution, or dispensing of controlled substances.'' 21 U.S.C. 823(f)(3). However, there are a number of reasons why even a person who has engaged in criminal misconduct may never have been convicted of an offense or even prosecuted for one. *Dewey C. MacKay, M.D.,* 75 FR 49,956, 49,973 (2010), *pet. for rev. denied, MacKay* v. *Drug Enf't Admin.,* 664 F.3d 808, 822 (10th Cir. 2011). Therefore, the DEA has held that ''the absence of such a conviction is of considerably less consequence in the public interest inquiry'' and is not dispositive. *Id.* Accordingly, I agree with the ALJ and find that Factor Three weighs neither for nor against revocation in this case.

B. Factors Two and Four

As already discussed, pursuant to section 304 of the CSA, in conjunction with section 303 of the CSA, I am to consider evidence of Respondent Pharmacy's compliance (or non-compliance) with laws related to controlled substances and experience dispensing controlled substances in determining whether Respondent Pharmacy's continued registration is ''consistent with the public interest.'' 21 U.S.C. 824(a)(4). ''[A] registrant's 'ignorance of the law is no excuse' for actions that are inconsistent with responsibilities attendant upon a registration.'' *Daniel A. Glick, D.D.S.,* 80 FR 74,800, 74,809 (2015) (quoting *Sigrid Sanchez, M.D.,* 78 FR 39,331, 39,336 (2013)). Instead, ''[a]ll registrants are charged with knowledge of the CSA, its implementing regulations, as well as applicable state laws and rules.'' *Id.* at 74,809 (internal citations omitted). Further, the Agency has consistently concluded that a pharmacy's registration is subject to revocation due to the unlawful activity of the pharmacy's owners, majority shareholders, officers, managing pharmacist, or other key employee. *EZRX, LLC,* 69 FR 63,178, 63,181 (2004); *Plaza Pharmacy,* 53 FR 36,910, 36,911 (1988).

In this matter, the Government alleged and presented evidence that pharmacists at Respondent Pharmacy and Cedar Hill filled over 200 prescriptions ''in contravention of their 'corresponding responsibility' under 21 CFR 1306.04(a)'' and ''outside the usual course of pharmacy practice in violation of 21 CFR 1306.06.'' ALJX 1, at 2. The Government further alleged that in the course of filling the prescriptions, Respondent Pharmacy violated Texas Health and Safety Code §§ 481.074(a), (k) and 481.128 and Title 22 of the Texas Administrative Code § 291.33(c)(2). *Id.* at 3–4. The Government also alleged and presented evidence that Respondent Pharmacy violated 21 CFR 1301.76(a) by employing Dr. Amadi in a position where he had access to controlled substances. *Id.* at 2. Finally, the Government alleged that Respondent Pharmacy committed several recordkeeping violations: Respondent Pharmacy failed to maintain an initial inventory as required by 21 U.S.C. 827(a)(1) and 21 CFR 1304.11; Respondent Pharmacy failed to notate whether individual controlled substances that it ordered were actually received, and if so, on what date they were received on DEA–222 forms, as required by 21 U.S.C. 828(a) and 21 CFR 1305.05, and on its invoices, as required by 21 U.S.C. 827(a)(3) and 21 CFR 1304.21(d); Respondent Pharmacy authorized Dr. Amadi to issue orders for controlled substances on Respondent Pharmacy's behalf without executing a

power of attorney, as required by 21 CFR 1305.05(a); and an audit of Respondent Pharmacy's oxycodone and hydrocodone revealed a shortage of oxycodone and an overage of hydrocodone.[33] *Id.* at 7. These allegations and the evidence of record are addressed below.

1. Unlawful Employment

The Government alleged that Respondent Pharmacy employed Dr. Amadi as a pharmacist in violation of 21 CFR 1301.76(a). ALJX 1, at 2. Section 1301.76(a) provides, in part, that a ''registrant shall not employ, as an agent or employee who has access to controlled substances, any person who has . . . surrendered a DEA registration for cause.'' [34] The Agency has explained that the purpose of this regulation is to prevent a DEA registrant from hiring an individual who would probably be denied a DEA registration due to his or her past experience with controlled substances. Registration of Manufacturers, Distributers, and Dispensers of Controlled Substances, 56 FR 36,727 (August 1, 1991). ''To hire such a person, the registrant must obtain a waiver under circumstances which clearly show that the registrant has been fully informed about the proposed employee's past experience with controlled substances and that the registrant intends to take adequate measures to ensure that no increased risk of diversion is occasioned by the proposed employment.'' *Id.* The employment prohibition in § 1301.76(a) applies both to an individual who that surrendered his or her own registration as a practitioner and to an individual who surrendered a registration on behalf of a pharmacy owned or principally operated by the individual. *See id.*

The ALJ recommended that I sustain the Government's allegation that Respondent Pharmacy violated § 1301.76(a) by employing Dr. Amadi as a pharmacist because Dr. Amadi had previously surrendered for cause the DEA registration of a pharmacy that he owned, Bestaid Pharmacy. RD, at 60. Respondent Pharmacy argued the ALJ's recommendation was incorrect because the Government did ''not meet its burden that Dr. Amadi controlled or had access to controlled substances during his employment'' at Respondent Pharmacy. Resp Exceptions, at 13. I agree with the ALJ.

Respondent Pharmacy employed Dr. Amadi as a staff pharmacist and pharmacist-in-charge. *Supra* II.D. Prior to his employment at Respondent Pharmacy, Dr. Amadi had surrendered the DEA registration for Bestaid Pharmacy for cause. *Id.* He was therefore ineligible for employment in a position with access to controlled substances pursuant to § 1301.76 absent a waiver from the DEA. As I already found, there is substantial evidence in the record that Dr. Amadi had access to controlled substances at Respondent Pharmacy—he was listed with the state as the pharmacist-in-charge, his initials appear on the prescription fill stickers for controlled substances throughout the Government's Exhibits, his signature appears on some of the filled prescriptions for controlled substances, and he ordered Respondent Pharmacy's controlled substances. *Id.* Accordingly, I find that Respondent Pharmacy violated 21 CFR 1301.76(a) by employing Dr. Amadi in a capacity where he had access to controlled substances absent a waiver from DEA.

2. Unlawful Dispensing Allegations

According to the CSA's implementing regulations, a lawful controlled substance order or prescription is one that is ''issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.'' 21 CFR 1306.04(a). While the ''responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, . . . a corresponding responsibility rests with the pharmacist who fills the prescription.'' *Id.* The regulations establish the parameters of the pharmacy's corresponding responsibility.

> An order purporting to be a prescription issued not in the usual course of professional treatment . . . is not a prescription within the meaning and intent of . . . 21 U.S.C. 829 . . . and the person knowingly filling such a purported prescription, as well as the person issuing it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances.

Id. ''The language in 21 CFR 1306.04 and caselaw could not be more explicit. A pharmacist has his own responsibility to ensure that controlled substances are not dispensed for non-medical reasons.'' *Ralph J. Bertolino, d/b/a Ralph J. Bertolino Pharmacy,* 55 FR 4729, 4730 (1990) (citing United *States* v. *Hayes,* 595 F.2d 258 (5th Cir. 1979), *cert. denied,* 444 U.S. 866 (1979); *United States* v. *Henry,* 727 F.2d 1373 (5th Cir. 1984) (reversed on other grounds)). As the Supreme Court explained in the context of the CSA's requirement that schedule II controlled substances may be dispensed only by written prescription, ''the prescription requirement . . . ensures patients use controlled substances under the supervision of a doctor so as to prevent addiction and recreational abuse . . . [and] also bars doctors from peddling to patients who crave the drugs for those prohibited uses.'' *Gonzales* v. *Oregon,* 546 U.S. 243, 274 (2006).

To prove a pharmacist violated his corresponding responsibility, the Government must show that the pharmacist acted with the requisite degree of scienter. *See* 21 CFR 1306.04(a) (''[T]he person *knowingly* filling [a prescription issued not in the usual course of professional treatment] . . . shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances.'') (emphasis added). DEA has also consistently interpreted the corresponding responsibility regulation such that ''[w]hen prescriptions are clearly not issued for legitimate medical purposes, a pharmacist may not intentionally close his eyes and thereby avoid [actual] knowledge of the real purpose of the prescription.'' *Bertolino,* 55 FR at 4730 (citations omitted); *see, also JM Pharmacy Group, Inc. d/b/a Pharmacia Nueva and Best Pharmacy Corp.,* 80 FR 28,667, 28,670–72 (2015) (applying the standard of willful blindness in assessing whether a pharmacist acted with the requisite scienter). Pursuant to their corresponding responsibility, pharmacists must exercise ''common sense and professional judgment'' when filling a prescription issued by a physician. *Bertolino,* 55 FR at 4730. When a pharmacist's suspicions are aroused by a red flag, the pharmacist must question the prescription and, if unable to resolve the red flag, refuse to fill the prescription. *Id.; Medicine Shoppe-Jonesborough,* 300 F. App'x 409, 412 (6th Cir. 2008) (''When pharmacists' suspicions are aroused as reasonable professionals, they must at least verify the prescription's propriety, and if not satisfied by the answer they must refuse to dispense.'').

In this matter, the Government did not allege that Respondent dispensed the subject prescriptions having actual knowledge that the prescriptions lacked a legitimate medical purpose. Instead, the Government alleged that Respondent violated the corresponding responsibility regulation as evidenced by it ''repeatedly distribut[ing]

[33] As will be discussed, *infra,* the regulations the Government cited in the OSC for the alleged recordkeeping violations do not always align with the stated allegations.

[34] The regulation further defines ''for cause'' to include ''surrender in lieu of, or as a consequence of, any federal . . . administrative . . . action resulting from an investigation of the individual's handling of controlled substances.'' 21 CFR 1301.76(a).

controlled substances pursuant to prescriptions that contained one or more unresolved red flags for diversion.'' Govt Posthearing, at 30.

As I already found, the subject prescriptions from Respondent Pharmacy and Cedar Hill presented multiple red flags including pattern prescribing, distance, cash payments, drug cocktails, high doses/quantities of high-alert controlled substances, different doctors prescribing controlled substances to the same patient, patients with the same last name and address presenting the same prescription within a short period of time, therapeutic duplication (two drugs in the same class prescribed together), and prescriptions lacking the patient's address or the prescriber's DEA number. Agency decisions have consistently found that prescriptions with the same red flags at issue here were so suspicious as to support a finding that the pharmacists who filled them violated the Agency's corresponding responsibility rule due to actual knowledge of, or willful blindness to, the prescriptions' illegitimacy. 21 CFR 1306.04(a); *see, e.g., Pharmacy Doctors Enterprises d/b/a Zion Clinic Pharmacy,* 83 FR 10,876, 10,898, pet. for rev. denied, 789 F. App'x 724 (11th Cir. 2019) (long distances; pattern prescribing; customers with the same street address presenting the same prescriptions on the same day; drug cocktails; cash payments; early refills); *Hills Pharmacy,* 81 FR 49,816, 49,836–39 (2016) (multiple customers filling prescriptions written by the same prescriber for the same drugs in the same quantities; customers with the same last name and street address presenting similar prescriptions on the same day; long distances; drug cocktails); *The Medicine Shoppe,* 79 FR 59,504, 59,507, 59,512–13 (2014) (unusually large quantity of a controlled substance; pattern prescribing; irregular dosing instructions; drug cocktails); *Holiday CVS,* 77 FR 62,316, 62,317–22 (2012) (long distances; multiple customers filling prescriptions written by the same prescriber for the same drugs in the same quantities; customers with the same last name and street address presenting virtually the same prescriptions within a short time span; payment by cash); *East Main Street Pharmacy,* 75 FR 66,149, 66,163–65 (2010) (long distances; lack of individualized therapy or dosing; drug cocktails; early fills/refills; other pharmacies' refusals to fill the prescriptions). Texas state law also leaves no question that Respondent Pharmacy and Cedar Hill knew, or should have known, that the prescriptions presented red flags as all of the red flags are explicitly identified in state law as circumstances a Texas pharmacist must identify before filling a prescription.[35] Dr. Witte credibly testified that a Texas pharmacist acting in the usual course of professional practice should have recognized these red flags and that a Texas pharmacist acting in the usual course of professional practice will not fill prescriptions for controlled substances without investigating, documenting the investigation, and resolving any red flags. *Supra* II.F.1. Dr. Amadi also admitted during his testimony that he had *actual* knowledge of some of the red flags on the prescriptions. For example, Dr. Amadi testified that he knew that a drug cocktail of hydrocodone and alprazolam has the potential for abuse and claimed that he often called doctors when patients presented with prescriptions for drug cocktails, demonstrating his awareness that drug cocktails are a red flag that require resolution, yet he repeatedly filled prescriptions for drug cocktails without adequate investigation and resolution of the red flag. Tr. 571–72, 575. From the fact that there is no evidence that Respondent Pharmacy or Cedar Hill adequately investigated and resolved the multiple, egregious red flags on the subject prescriptions before filling them, I find that Respondent Pharmacy and Cedar Hill either knew the prescriptions were issued without a legitimate medical purpose or dispensed the prescriptions knowing there was a high probability that the prescriptions were issued without a legitimate medical purpose.

Accordingly, I agree with the ALJ's finding in the RD that the Government has proven by substantial evidence that Respondent Pharmacy and Cedar Hill filled prescriptions for controlled substances that the pharmacists knew were not prescribed for legitimate medical purposes, or were willfully blind to such, in violation of their corresponding responsibility under 21 CFR 1306.04(a). I also agree with the ALJ's finding that by filling the subject prescriptions without resolving the red flags and documenting the resolution, Respondent Pharmacy violated Tex. Health & Safety Code §§ 481.074(a) and 481.128 and 22 Tex. Admin. Code § 291.33(c) and acted outside the usual course of professional practice in violation of 21 CFR 1306.06.[36]

I considered and reject Respondent Pharmacy's claim that it investigated and resolved the red flags on the subject prescriptions before they were filled and therefore complied with its corresponding responsibility. Resp Exceptions, at 10, 15; Resp Posthearing, at 5, 8–10, 12–13. In its Exceptions, Respondent Pharmacy summarized Dr. Amadi's testimony regarding Respondent Pharmacy's protocol for filling controlled substance prescriptions, which he stated included ''looking to see if a prior record exist [sic] for the customer, had the filled the same prescription before [sic], which doctor prescribed the prescription, the dosage amount, duration, check the Texas prescription monitoring program, and call the doctor.'' Resp Exceptions, at 17 (citing Tr. 566). I reject Respondent Pharmacy's Exception for the following reasons. First, as I already discussed, I do not credit Dr. Amadi's testimony regarding his investigation and resolution of red flags on Respondent Pharmacy's prescriptions. His testimony

[35] 22 Tex. Admin. Code § 291.29(c) (distance, doctor shopping), (f) (pattern prescribing, drug cocktails, high doses/quantities or high-alert controlled substances, multiple persons with the same address present substantially similar controlled substance prescriptions from the same practitioner, cash payments); *id.* at § 291.33 (c)(2)(A) (therapeutic duplication); Tex. Health & Safety Code § 481.074(k)(3), (7) (prescription for controlled substance must contain patient address and prescriber DEA number).

[36] As discussed *supra,* Tex. Health & Safety Code § 481.074(a) provides in relevant part that ''[a] pharmacist may not: (1) Dispense or deliver a controlled substance . . . except under a valid prescription and in the course of professional practice; (2) dispense a controlled substance if the pharmacist knows or should have known that the prescription was issued without a valid patient-practitioner relationship; (3) fill a prescription that is not filled or issued as prescribed by [the Texas Controlled Substances Act].'' Section 481.128 states in relevant part ''[a] registrant or dispenser commits an offense if the registrant or dispenser knowingly: (1) Distributes, delivers, administers, or dispenses a controlled substance in violation of [§ 481.074].'' 22 Tex. Admin. Code § 291.33(c)(2) provides in relevant part that

(A)(i) . . . [a] pharmacist shall, prior to or at the time of dispensing a prescription drug order, review the patient's medication record. Such review shall at a minimum identify clinically significant . . . (III) reasonable dose and route of administration; . . . (V) duplication of therapy; (IV) drug-drug interactions; . . . (X) proper utilization, including overutilization or underutilization. . . . (ii) Upon identifying any clinically significant situations conditions, situations, or items listed in clause (i) of this subparagraph, the pharmacist shall take appropriate steps to avoid or resolve the problem including consultation with the prescribing practitioner . . . . (iv) Prior to dispensing, any questions regarding a prescription drug order must be resolved with the prescriber and written documentation of these discussions made and maintained. . . . (C) . . . [A]nd [such documentation] shall include the following information: (i) Date the prescriber was consulted; (ii) name of the person communicating the prescriber's instructions; (iii) any applicable information pertaining to the consultation; and (iv) initials or identification code of the pharmacist performing the consultation clearly recorded for the purpose of identifying the pharmacist who performed the consultation.

was riddled with inconsistencies, and the ALJ observed, and I agree, that ''I am left with the sense that Dr. Amadi was making up testimony to fit the questions that were posed to him.'' RD, at 12–13. Second, Respondent Pharmacy did not present contemporaneous documentation of its resolution of the red flags—documentation that is required in the state of Texas. None of the prescriptions or patient profiles from Respondent Pharmacy contain pharmacist remarks regarding the red flags on the prescriptions, and the remarks in the Respondent's profiles (which I give no weight for reasons already discussed) are undated, fail to address all of the red flags on the prescriptions, and universally lack information required by Texas law. Finally, the red flags on the Cedar Hill prescriptions were unresolvable. Dr. Witte credibly testified that the red flags on the Cedar Hill prescriptions were so egregious that no explanation from the prescriber could have justified filling the prescriptions. Tr. 288–89, 436; *see United States* v. *Hayes,* 595 F.2d at 260 (''Verification by the issuing practitioner on request of the pharmacist is evidence that the pharmacist lacks knowledge that the prescription was issued outside the scope of professional practice. But it is not an insurance policy against a fact finder's concluding that the pharmacist had the requisite knowledge despite a purported but false verification. . . . What is required by [a pharmacist] is the responsibility not to fill an order that purports to be a prescription but is not a prescription within the meaning of the statute because he knows that the issuing practitioner issued it outside the scope of medical practice.'').

I also considered Respondent Pharmacy's objection to the introduction of the Cedar Hill prescriptions on the bases of relevancy both during the hearing and in the Exceptions it filed to the Recommended Decision. Tr. 81–82; Resp Exceptions, at 22. Respondent Pharmacy argued that the propriety of filling the Cedar Hill prescriptions is a moot point as Cedar Hill ceased operating as a pharmacy and surrendered its DEA registration before the OSC issued and any violations of controlled substance laws by Cedar Hill are not relevant to Respondent Pharmacy.

The DEA treats two separately organized business entities as one integrated enterprise based on overlap of ownership, management, and operations of the two entities. *Jones Total Health Care Pharmacy,* 81 FR at 79,222 (citing *MB Wholesale, Inc.,* 72 FR 71,956, 71,958 (2007)). ''[W]here misconduct has previously been proved with respect to the owners, officers, or key employees of a pharmacy, the Agency can deny an application or revoke a registration of a second or subsequent pharmacy where the Government shows that such individuals have influence over the management or control of the second pharmacy.'' *Superior Pharmacy I and Superior Pharmacy II,* 81 FR 31,310, 31,341, n.71 (2016). Further, the Agency may revoke a registration, even if there is no misconduct that can be attributed to the registration, if the Agency finds that the registrant committed egregious misconduct under a second registration. *Roberto Zayas, M.D.,* 82 FR 21,410, 21,430 (2017) (revoking physician's DEA registration in Florida due to conduct attributed to a Texas registration which had expired).

In this case, the evidence established that Respondent Pharmacy and Cedar Hill, though nominally two separate entities, were commonly owned, managed, and operated. COIF–SOE and Ms. Amadi own both pharmacies, *supra* II.A., and Ms. Amadi and Stephen Amadi are listed with the Texas State Board of Pharmacy as the only officers of the two pharmacies, GX 16, at 2; GX 18, at 2. In terms of management and operations, the pharmacies shared the same key employees. The pharmacist that filled the subject Cedar Hill prescriptions, Mr. Ohene, was the pharmacist-in-charge at Respondent Pharmacy at the time he filled the Cedar Hill prescriptions, and Mr. Ohene was still employed as a pharmacist at Respondent Pharmacy as of the hearing for this matter. GX 16, at 1; GX 18, at 3; GX 10 (prescriptions with Mr. Ohene's signature and fill stickers with his initials); Resp Posthearing, at 4 (claiming Mr. Ohene was the only person with access to controlled substances at Respondent Pharmacy). Dr. Amadi was the pharmacist-in-charge at Cedar Hill when the subject Cedar Hill prescriptions were filled and was the pharmacist-in-charge at Respondent Pharmacy at the time of the hearing. GX 16, at 1; GX 18, at 2. Additionally, when Cedar Hill surrendered its registration in June 2015, all of its controlled substances were transferred to Respondent Pharmacy further demonstrating the commonality between the ownership and operation of the two pharmacies.

Due to the commonality of ownership, management, and key employees between Respondent Pharmacy and Cedar Hill, any misconduct related to controlled substances at Cedar Hill is relevant to the determination of whether Respondent Pharmacy can be entrusted with registration. It is therefore appropriate that I consider whether the pharmacists at Cedar Hill satisfied their corresponding responsibility when filling the Cedar Hill prescriptions. However, even if I were to exclude the Cedar Hill prescriptions from consideration in this matter, it would in no way affect my decision in this case.

3. Recordkeeping Allegations

In addition to its mandate that controlled substances be dispensed properly, the CSA also recognizes that controlled substances are fungible and that a truly closed system requires that certain records and inventories be kept by all registrants who either generate or take custody of controlled substances in any phase of the distribution chain until they reach the ultimate user. *Satinder Dang, M.D.,* 76 FR 51,424, 51,429 (2011) (''Recordkeeping is one of the central features of the CSA's closed system of distribution.'') (internal citations omitted); *Paul H. Volkman,* 73 FR 30,630, 30,644 (2008), *pet. for rev. denied* 567 F.3d 215, 224 (6th Cir. 2009) (''Recordkeeping is one of the CSA's central features; a registrant's accurate and diligent adherence to this obligation is absolutely essential to protect against the diversion of controlled substances.''). The OSC alleged that Respondent Pharmacy violated multiple federal laws related to the maintenance of records.

a. Initial Inventory

The Government alleged Respondent Pharmacy violated 21 U.S.C. 827(a)(1) and 21 CFR 1304.11(b) by failing to provide an initial inventory of its controlled substances. ALJX 1, at 7. 21 U.S.C. 827(a)(1) requires all registrants to conduct an initial inventory of all controlled substances on hand on the first day it engages in the manufacture, distribution, or dispensing of controlled substances. *See also* 21 CFR 1304.11(b) (''Every person required to keep records shall take an inventory of all stocks of controlled substances on hand on the date he/she first engages in the . . . distribution of controlled substances.''). Further, the inventory ''must be kept by the registrant and be available, for at least 2 years from the date of such inventory . . . for inspection and copying by authorized employees of the Administration.'' 21 CFR 1304.04(a).[37] Investigator One credibly testified that Respondent Pharmacy failed to provide

[37] The Government did not allege that Respondent Pharmacy violated 21 CFR 1304.04 as part of its recordkeeping allegations and therefore I am making no findings related to this section, but am instead including this reference in order to support my findings related to the alleged violation of 21 CFR 1304.11.

an initial inventory to the Government despite repeated requests from Investigator One both during and following the inspection of Respondent Pharmacy. *Supra* II.E.1.a. I also already found that Respondent Pharmacy did not produce an initial inventory during the hearing on this matter to counter the Government's allegation.[38] *Id.* I find, therefore, that there is substantial record evidence that Respondent Pharmacy failed to maintain an initial inventory and, therefore, violated 21 U.S.C. 827(a)(1) and 21 CFR 1304.11(b).

b. 222 Order Forms

Next, the Government alleges that Respondent Pharmacy, as a purchaser of controlled substances, failed to document the date and number of items received on four 222 Forms, in violation of 21 U.S.C. 828(a) and 21 CFR 1305.05(a).[39] To support this allegation, the Government presented four 222 Forms on which Respondent Pharmacy failed to record the date received or the quantity of items received for at least one of the controlled substances ordered on each of the subject 222 Forms. *Supra* II.E.1.b.

Under the CSA, purchases of schedule II controlled substances must be made using an Agency order form. 21 U.S.C. 828(a). DEA regulations require those order forms, known as 222 Forms, to be signed and dated by an authorized person. 21 CFR 1305.12(d). The regulations further provide that a purchaser of controlled substances must indicate on the 222 Form itself the date on which each substance was received and the quantity received. 21 CFR 1305.13(e). The purchaser, however, is under no regulatory obligation to document its failure to receive a controlled substance on a 222 Form if the controlled substance does not arrive from the seller. *Hills Pharmacy, L.L.C.,* 81 FR at 49,843 (''DEA regulations do not require a purchaser to notate on the order form that no portion of a particular item was received and a date.''). 21 CFR 1305.13(e) only requires recording the date and quantity of controlled substance actually received. There is no requirement to indicate the date of non-receipt.

Here, there is no evidence that Respondent Pharmacy ever received the controlled substances for which the date and quantity received were missing from the four 222 Forms presented by the Government. *Supra* II.E.1.b. The mere existence of an improperly completed 222 Form is insufficient to show that a registrant actually received the controlled substances listed on the form. *Superior Pharmacy,* 81 FR at 31,338. Thus, I find the Government has failed to prove this allegation.

c. Invoices

The Government also alleged that Respondent Pharmacy violated 21 U.S.C. 827(a)(3) and 21 CFR 1304.21(d), when it failed to document the date it received shipments of controlled substances on the shipment invoices. ALJX 1, at 7. 21 U.S.C. 827(a)(3) requires registrants that dispense controlled substances, such as pharmacies, to maintain, on a current basis, an accurate record of each controlled substance it receives. DEA regulations implementing this requirement state that pharmacies must maintain a record of each order of controlled substances that includes the date of receipt, the quantity acquired, and the name, address, and registration number of the person from whom the substances were acquired. 21 CFR 1304.22(a)(2)(iv) and (c). DEA regulations further state that when recording the dates of receipt, the date on which the controlled substances are actually received will be used as the date of receipt. *Id.* at § 1304.21(d). I already found that Respondent Pharmacy did not record the date it received controlled substances on 31 invoices for schedule III–V controlled substances. Respondent Pharmacy thus failed to comply with its obligation to maintain an accurate record of each controlled substance it received.

d. Audit Discrepancies

The Agency has also considered a pharmacy registrant's inability to account for controlled substances under Factor Four. *Ideal Pharmacy Care, Inc.,* 76 FR 51,415, 51,416 (2011). Under the CSA, every registrant ''distributing, or dispensing a controlled substance or substances shall maintain, on a current basis, a complete and accurate record of each such substance . . . received, sold, delivered, or otherwise disposed of by [it].'' 21 U.S.C. 827(a)(3). In evaluating shortages under Factor Four, the Agency has held that, ''[w]hether the shortages are attributable to outright diversion by either pharmacy or store employees, theft, or the failure to maintain accurate records, does not matter.'' *Ideal Pharmacy Care,* 76 FR at 51,416. As the Agency has explained, the ''inability to account for [a] significant number of dosage units creates a grave risk of diversion.'' *Fred Samimi,* 79 FR 18,698, 18,712 (2014). The Agency has also made it clear that it is not only concerned with shortages, but that overages are equally indicative that a pharmacy registrant has ''failed to maintain complete and accurate records as required by the CSA.'' *Superior Pharmacy,* 81 FR at 31,341; *see also Hills Pharmacy,* 81 FR at 49,843–45 (considering allegations of overages and shortages).

Investigator One's audit of Respondent Pharmacy revealed an overage of 16,731 doses of hydrocodone 10/325 mg and a shortage of 200 doses of oxycodone 30 mg. GX 21, at 1. There is no evidence, however, that Respondent Pharmacy actually received the 200 tablets of oxycodone that were missing. Tr. 210. I find, therefore, that there is substantial evidence to support the allegation that Respondent Pharmacy failed to keep a current and accurate record of hydrocodone 10/325mg but that the Government did not prove by a preponderance of the evidence that Respondent Pharmacy failed to keep a current and accurate record of oxycodone 30mg.

e. Authority To Order Controlled Substances

Lastly, the Government alleged that Respondent Pharmacy, as a purchaser of controlled substances, authorized one or more individuals to issue orders for controlled substances on Respondent Pharmacy's behalf without executing a power of attorney for such individuals, in violation of 21 CFR 1305.05(a). ALJX 1, at 7. Section 1305.05(a) provides that a registrant may authorize an individual to order ''[s]chedule I and II controlled substances on the registrant's behalf by executing a power of attorney for each such individual.'' 21 CFR 1305.05(a).

I found, *supra,* that Dr. Amadi ordered schedule II controlled substances for Respondent Pharmacy. He was Respondent Pharmacy's sole employee with access to CSOS, through which Respondent Pharmacy placed electronic orders for schedule II controlled substances, and his signature

[38] As discussed *supra,* Respondent Pharmacy claimed it had produced an initial inventory as Respondent's Exhibit U, but there was no Respondent's Exhibit U in the record and none of Respondent Pharmacy's other exhibits contained an initial inventory. This Agency has applied, and I apply here, the ''adverse inference rule.'' As the D.C. Circuit explained, ''the rule provides that when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him.'' *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. (UAW)* v. *Nat'l Labor Relations Bd.,* 459 F.2d 1329, 1336 (DC Cir. 1972). The Court reiterated this rule in *Huthnance* v. *District of Columbia,* 722 F.3d 371, 378 (DC Cir. 2013). According to this legal principle, Respondent Pharmacy's decision not to provide evidence within its control gives rise to an inference that any such evidence is unfavorable to Respondent Pharmacy.

[39] Although cited by the Government in the OSC, 21 CFR 1305.05(a) has nothing to do with a registrant's obligation to document the date and number of controlled substances received on the purchaser's copy of the 222 Form. Neither the Government nor Respondent Pharmacy addressed this allegation in their posthearing briefs.

appears on 222 Order forms from Respondent Pharmacy. *Compare* GX 22, at 1, 2, 4, 8, 9, 12, *with* GX 23, at 7, 36; Tr. 70–71. In order for Dr. Amadi to lawfully order controlled substances, Ms. Amadi would have needed to grant power of attorney to Dr. Amadi. [40] Respondent Pharmacy did not have any powers of attorney on file. Tr. 62; Resp Posthearing, at 10 (admitting Ms. Amadi never executed a power of attorney to Dr. Amadi). Without the requisite power of attorney allowing Dr. Amadi to order controlled substances, his doing so violated 21 CFR 1305.05(a).

Accordingly, I find that there is substantial evidence to support the Government's allegation that Respondent Pharmacy violated 21 CFR 1305.05(a).

C. Summary of the Public Interest Factors

As found above, Respondent Pharmacy and Cedar Hill filled controlled substance prescriptions for dozens of patients in violation of their corresponding responsibility and Texas law. Respondent Pharmacy also violated numerous federal and state record keeping requirements related to controlled substances and knowingly violated DEA regulations by employing Dr. Amadi in a position where he had access to controlled substances after Respondent Pharmacy's waiver was denied. Thus, I conclude that Respondent Pharmacy has engaged in misconduct which supports the revocation of its registration. I therefore hold that the Government has established a *prima facie* case that Respondent Pharmacy's continued registration ''would be inconsistent with the public interest.'' 21 U.S.C. 823(f).

IV. Sanction

Where, as here, the Government has met its *prima facie* burden of showing that the respondent's continued registration is inconsistent with the public interest due to its violations pertaining to controlled substance dispensing and recordkeeping, the burden shifts to the respondent to show why it can be entrusted with the responsibility carried by its registration. *Garret Howard Smith, M.D.,* 83 FR 18,882, 18,910 (2018) (citing *Samuel S. Jackson,* 72 FR 23,848, 23,853 (2007)). DEA cases have repeatedly found that when a registrant has committed acts inconsistent with the public interest, ''the Respondent is required not only to accept responsibility for [the established] misconduct, but also to demonstrate what corrective measures [have been] undertaken to prevent the reoccurrence of similar acts.'' *Holiday CVS,* 77 FR at 62,339 (internal quotations omitted). *See, also, Hoxie* v. *Drug Enf't Admin.,* 419 F.3d 477, 483 (6th Cir. 2005); *Ronald Lynch, M.D.,* 75 FR 78,745, 78,749, 78,754 (2010) (holding that respondent's attempts to minimize misconduct undermined acceptance of responsibility); *Medicine Shoppe-Jonesborough,* 73 FR 364, 387 (2008) (noting that the respondent did not acknowledge recordkeeping problems, let alone more serious violations of federal law, and concluding that revocation was warranted).

The issue of trust is necessarily a fact-dependent determination based on the circumstances presented by the individual respondent; therefore, the Agency looks at factors, such as the acceptance of responsibility and the credibility of that acceptance as it relates to the probability of repeat violations. *Jeffrey Stein, M.D.,* 84 FR 46,968, 46,972 (2019). A registrant's candor during the investigation and hearing is an important factor in determining acceptance of responsibility and the appropriate sanction, *Garret Howard Smith, M.D.,* 83 FR at 18,910 (collecting cases); as is whether the registrant's acceptance of responsibility is unequivocal, *Lon F. Alexander, M.D.,* 82 FR 49,704, 49,728 (2017) (collecting cases). In determining whether and to what extent a sanction is appropriate, consideration must be given to both the egregiousness of the offense established by the Government's evidence and the Agency's interest in both specific and general deterrence. *Wesley Pope,* 82 FR 14,944, 14,985 (2017) (citing *Joseph Gaudio,* 74 FR 10,083, 10,095 (2009)); *David A. Ruben, M.D.,* 78 FR 38,363, 38,364 (2013). *Cf. McCarthy* v. *SEC,* 406 F.3d 179, 188–89 (2d Cir. 2005) (upholding SEC's express adoption of ''deterrence, both specific and general as a component in analyzing the remedial efficacy of sanctions.'').

Regarding all of these matters, I agree with the analyses and conclusions contained in the Recommended Decision. RD, at 101–04. I agree with the ALJ that there is nothing in the record that suggests Respondent Pharmacy has accepted responsibility for its actions. Dr. Amadi took no responsibility for his actions or the actions of Respondent Pharmacy's other pharmacists during his testimony, and Respondent Pharmacy's owner, Ms. Amadi, did not appear at the hearing. A review of Respondent Pharmacy's Posthearing Brief and its Exceptions to the Recommended Decision also give no hint of acceptance of responsibility. Further, even if Respondent Pharmacy had unequivocally accepted responsibility for all its unlawfulness such that I would reach the matter of remedial measures, Respondent Pharmacy has not presented any remedial measures for me to consider.

The ALJ found that the record supports the imposition of a sanction. RD, at 105. I agree that is the appropriate result on the record in this case.

The egregiousness of Respondent Pharmacy's conduct and the interests of specific and general deterrence support a sanction of revocation. Respondent Pharmacy and Cedar Hill filled approximately 200 prescriptions that contained red flags of diversion and abuse sufficiently flagrant that they provide substantial evidence that the pharmacists knowingly filled prescriptions that lacked a legitimate medical purpose. The red flags surrounding the Cedar Hill prescriptions were so egregious the ALJ found that they support a conclusion that Cedar Hill was involved in the diversion of controlled substances. RD, at 103. Respondent Pharmacy also knowingly employed Dr. Amadi in a position where he had access to controlled substances, even after Respondent Pharmacy's request for a waiver was denied. As the ALJ found ''[s]uch a knowing violation totally undercuts any suggestion that the [Respondent] Pharmacy can be entrusted with the responsibilities inherent to a DEA certificate of registration.'' RD, at 103.

''Past performance is the best predictor of future performance,'' *ALRA Labs, Inc.* v. *Drug Enf't Admin.,* 54 F.3d 450, 452 (7th Cir. 1995), and there is nothing in the record that lends support to the proposition that Respondent Pharmacy's future behavior will deviate in any positive respect from its past behavior. Due to the fact that Respondent Pharmacy has accepted no responsibility nor offered any remedial measures, it has given me no reassurances that I can entrust it with a controlled substances registration and no evidence that it will not repeat its egregious behavior.

Regarding general deterrence, the Agency bears the responsibility to deter similar misconduct on the part of others for the protection of the public at large. *David A. Ruben,* 78 FR at 38,385. Based on the number and egregiousness of the established violations in this case, a

[40] 21 CFR 1305.05(d) states that the power of attorney must be executed by the person who signed the most recent application for DEA registration or reregistration. Ms. Amadi signed the application for Respondent Pharmacy's DEA registration. GX 17, at 1.

sanction less than revocation would send a message to the regulated community that compliance with the law is not a condition precedent to maintaining registration.

A balancing of the statutory public interest factors, coupled with consideration of Respondent Pharmacy's failure to accept responsibility, the absence of any evidence of remedial measures to guard against recurrence, and the Agency's interest in deterrence, supports the conclusion that Respondent Pharmacy should not continue to be entrusted with a registration. Accordingly, I shall order the sanctions the Government requested, as contained in the Order below.

V. ORDER

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 824(a), I hereby revoke DEA Certificate of Registration FM3950070 issued to Morning Star Pharmacy & Medical Supply 1. Further, pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 823(f), I hereby deny any pending application of Morning Star Pharmacy & Medical Supply 1 to renew or modify this registration. This order is effective September 18, 2020.

Timothy J. Shea,

Acting Administrator.

[FR Doc. 2020–18083 Filed 8–18–20; 8:45 am]

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

David Mwebe, M.D.; Decision and Order

On August 17, 2018, a former Acting Administrator of the Drug Enforcement Administration (hereinafter, DEA or Government) issued an Order to Show Cause and Immediate Suspension of Registration to David Mwebe, M.D. (hereinafter, Registrant). Government's Request for Final Agency Action Exhibit (hereinafter, RFAAX) 2, at 1 (Order to Show Cause and Immediate Suspension Order (hereinafter, collectively OSC)). The OSC informed Registrant of the immediate suspension of his DEA Certificate of Registration BM9925388 pursuant to 21 U.S.C. 824(d), ''because [his] continued registration constitute[d] an imminent danger to the public health and safety.'' *Id.*

The substantive ground for the proceeding, as alleged in the OSC, is that Registrant's ''continued registration is inconsistent with the public interest, as that term is defined in 21 U.S.C. 823(f).'' *Id.* Specifically, the OSC alleges that Registrant issued at least 42 fraudulent prescriptions for controlled substances, either to himself using various aliases, or to other individuals, which Registrant filled himself in violation of 21 U.S.C. 843(a)(3), 21 CFR 1306.04(a), and Nebraska law. *Id.* at 2 (citing Neb. Rev. St. § 28–418(1)(c) (It is unlawful to ''acquire or obtain or to attempt to acquire or obtain possession of a controlled substance by theft, misrepresentation, fraud, forgery, deception, or subterfuge.'')).

In issuing the OSC, which immediately suspended the registration, the former Acting Administrator concluded that Registrant's ''continued registration is inconsistent with the public interest'' based on a preliminary finding that Registrant ''issued prescriptions for controlled substances that [Registrant] knew were without a legitimate medical purpose and were outside the course of professional practice'' and that were ''indicative of [Registrant's] general illegitimate practice of prescribing controlled substances in violation of State and Federal laws.'' *Id.* at 7. Citing 21 U.S.C. 824(d), he also made the preliminary finding that Registrant's ''continued registration during the pendency of the proceedings would constitute an imminent danger to the public health or safety because of the substantial likelihood that [Registrant] will continue to unlawfully prescribe controlled substances, thereby allowing the diversion of controlled substances unless [Registrant's] DEA COR is suspended.'' *Id.* The former Acting Administrator authorized the DEA Special Agents and Diversion Investigators serving the OSC on Registrant to place under seal or remove for safekeeping all controlled substances Registrant possessed pursuant to the immediately suspended registration. *Id.* (citing 21 U.S.C. 824(f) and 21 CFR 1301.36(f)). The former Acting Administrator also directed those DEA employees to take possession of Registrant's Certificate of Registration BM9925388 [1] and any unused prescription forms. *Id.*

According to the Declaration of a DEA Special Agent from the Philadelphia Field Division, the DEA Special Agent personally served the OSC on Registrant on August 17, 2018. RFAAX 3 (Declaration of Special Agent A). A DEA Diversion Investigator also stated that Registrant called her on August 17, 2018, regarding questions he had about the OSC he had received. RFAAX 4, at 2 (Declaration of DEA Diversion Investigator). Based on the Special Agent's Declaration, the Diversion Investigator's Declaration, and my review of the record, I find that the Government accomplished service of the OSC on Registrant on August 17, 2018.

On April 23, 2019, the Government forwarded a Request for Final Agency Action, along with the evidentiary record for this matter, to my office.[2] The OSC notified Registrant of his right to request a hearing on the allegations or to submit a written statement while waiving his right to a hearing, the procedures for electing each option, and the consequences for failing to elect either option. *Id.* at 7–8 (citing 21 CFR 1301.43(c)). I find that more than thirty days have now passed since the Government accomplished service of the OSC. I further find, based on the Government's written representations, that neither Registrant, nor anyone purporting to represent the Registrant, requested a hearing, or submitted a written statement while waiving Registrant's right to a hearing. Accordingly, I find that Registrant has waived the right to a hearing and the right to submit a written statement. 21 CFR 1301.43(d). I, therefore, issue this Decision and Order based on the record submitted by the Government, which constitutes the entire record before me. 21 CFR 1301.43(e).

Having considered the record in its entirety, I find that the record establishes, by substantial evidence, that Registrant committed acts rendering his continued registration inconsistent with the public interest. I also find that Registrant has submitted no evidence that he accepts responsibility for his failures to meet the responsibilities of a registrant nor presented any evidence of mitigation or remedial measures. Accordingly, I conclude that the appropriate sanctions are (1) for Registrant's DEA registration to be revoked; and (2) for any pending application by Registrant to be denied.

Based on the representations of the Government in its RFAA, I make the following findings of fact.

[1] The OSC identified Registrant's DEA registration number as BW9925388. RFAAX, at 1. The Government has stated that this was a scrivener's error, and the correct number for Registrant's DEA registration, which the Government seeks to revoke, is BM9925388. RFAA, at 2 n.1.

[2] In the RFAA, the Government alleged that, in addition to the allegations in the OSC, Registrant lacks ''authority to handle controlled substances in the state of Nebraska, the state where he is registered with the DEA.'' RFAA at 1. I find it unnecessary to address this allegation as I have found that Registrant's registration should be revoked based on the allegations from the OSC.

I. Findings of Fact

A. Registrant's DEA Registration

Registrant is registered with the DEA as a practitioner in schedules II through V under DEA Certificate of Registration No. BM9925388, at 106 East Wayne Street, P.O. Box 8, Randolph, NE 68771. RFAAX 1 (Registrant's Certificate of Registration). This registration expires on January 31, 2021. *Id.* The registration was suspended pursuant to the Immediate Suspension Order dated August 17, 2018. OSC, at 7.

B. The Investigation of Registrant

DEA investigators began an investigation into Registrant in July 2017 after receiving information that Registrant was selling prescriptions for oxycodone and hydrocodone at a gentleman's club. RFAAX 5 (Declaration of Special Agent B), at 1.

On November 6, 2017, the Nebraska State Patrol (hereinafter, NSP) notified a DEA Special Agent (hereinafter, Special Agent B) that the Norfolk (Nebraska) Police Department (hereinafter, NPD) was summoned to a pharmacy in Norfolk, Nebraska (hereinafter, Pharmacy A) regarding a fraudulent prescription. *Id.* A man had attempted to fill a prescription for Adderall [3] using a driver's license bearing the name ''Joshua Masembe.'' *Id.* The NPD informed Special Agent B that they had run a check of the driver's license number for ''Joshua Masembe'' and discovered that it was associated with Registrant's name, David Mwebe; Registrant's date of birth; and Registrant's home address.[4] *Id.* at 1–2. NPD also informed Special Agent B that Pharmacy A's records showed that ''Joshua Masembe'' had also filled a prescription for Adderall in July 2017. *Id.* at 2. Special Agent B obtained from NSP copies of the two Adderall prescriptions issued to ''Joshua Masembe.'' *Id.,* App. A. The prescriptions were issued by Registrant. *Id.*

1. Interviews With Registrant

On May 30, 2018, Special Agent B, an investigator from the Nebraska Health Department, and an NSP investigator (hereinafter, the Investigators) interviewed Registrant at his DEA registered address. *Id.* at 2. The interview was recorded. *Id.* During the interview, Registrant admitted, *inter alia,* that he had written fraudulent prescriptions, RFAAX 4, App. A (transcript of recorded interview), at 72; taken Adderall that Registrant prescribed to ''Joshua Masembe'' and lied to DEA investigators about doing so, *id.* at 57, 66–67; filled antihypertension, Adderall, and Ritalin prescriptions that were written for ''Peter Senteza,'' *id.* at 55–56; and stolen prescriptions because he could not fill the prescriptions on a monthly basis by himself, *id.* at 68. Registrant told the investigators that he sent his driver's license to ''Peter Senteza'' to be altered, so he could pick up prescriptions written for Registrant's aliases. *Id.* at 57–59. Registrant stated that ''Peter Senteza'' altered Registrant's driver's license to create fake driver's licenses by swapping Registrant's name with the aliases' name. *Id.* Registrant told the investigators that ''Peter Senteza'' lived in Pittsburgh. *Id.* at 57.

Later in the interview, Registrant invited the Investigators to his residence. RFAAX 5, at 2. At his residence, Registrant gave the Investigators three altered Nebraska driver's licenses. *Id.* Two of the licenses bore the name ''Sam Kajubi.'' *Id.* One of these licenses was expired. *Id.* The third license bore the name ''Joshua Masembe.'' *Id.* at 3. All three licenses had Registrant's actual license number, date of birth, and home address. *Id.* at 2–3. They also contained Registrant's picture and identical physical descriptors. *Id.* at 3; *see* RFAAX 5, Appxs. C and D (copies of the three altered Nebraska driver's licenses).

Registrant also provided the Investigators with a box of empty prescription bottles. RFAAX 5, at 3. The box contained two bottles of alprazolam and two bottles of methylphenidate in the name of ''Peter Senteza,'' and three bottles of alprazolam, two bottles of methylphenidate, and one bottle of Adderall in the name of ''Sam Kajubi.'' *Id.;* RFAAX 5, Appxs. E and F (copies of photographs of the empty bottles). The labels on the bottles listed Registrant as the prescriber. RFAAX 5, Appxs. E and F.

On June 6, 2018, DEA Special Agent B and the Diversion Investigator met with Registrant at the Nebraska State Patrol Troop B Headquarters. RFAAX 4, at 2. According to the Diversion Investigator, Registrant stated that ''he used Ritalin and Adderall to help him work through long hours'' and ''used alprazolam to take 'power naps' during his long shifts.'' *Id.* The Diversion Investigator asked Registrant to voluntarily surrender his DEA Registration. *Id.* Registrant declined. *Id.*

2. Administrative Subpoenas

On June 15, 2018, DEA served administrative subpoenas on U-Save Pharmacy in Norfolk, Nebraska (hereinafter, U-Save Norfolk) and U-Save Pharmacy in Wayne, Nebraska (hereinafter, U-Save Wayne). RFAAX 5, at 3. The U-Save Norfolk administrative subpoena sought information on ''Peter Senteza,'' including a patient summary of all prescriptions prescribed to ''Peter Senteza.'' *Id.* at App. G. The U-Save Wayne administrative subpoena sought information on ''Sam Kajubi,'' including a patient summary of all prescriptions prescribed to ''Sam Kajubi.'' *Id.* at App. H.

U-Save Norfolk provided DEA with copies of sixteen prescriptions for controlled substances issued by Registrant to ''Peter Senteza'' and a patient profile for ''Peter Senteza'' in response to the administrative subpoena. *Id.* at Appxs. I and K. The U-Save Norfolk records show that Registrant issued, at a minimum, the following prescriptions to ''Peter Senteza:'' (1) Two prescriptions for 30 dosage units of Adderall 30 mg; (2) six prescriptions for 60 dosage units of methylphenidate 20 mg; and (3) eight prescriptions for 60 dosage units of alprazolam 1mg.[5] *Id* at App. I. The prescription labels U-Save Norfolk provided for the ''Peter Senteza'' prescriptions listed Registrant's home address in Osmond, Nebraska,[6] *id.* at 1, 2, 8, 15, 16, and U-Save Norfolk's patient profile for ''Peter Senteza'' also lists Registrant's home address in Osmond, Nebraska, *id.* at App. K.

U-Save Wayne provided DEA with copies of twenty-four prescriptions for controlled substances issued by Registrant to ''Sam Kajubi'' and a patient profile for ''Sam Kajubi'' in response to the administrative subpoena. *Id.* at Appxs. J and L. The U-Save Wayne records show that Registrant issued, at a minimum, the following twenty-four prescriptions for controlled substances to ''Sam Kajubi:'' (1) Three prescriptions for 60 dosage units of Adderall 30 mg; (2) nine

[3] Amphetamine mixture products, which are schedule II controlled substances pursuant to 21 CFR 1308.12(d)(1), are marketed under the brand name ''Adderall,'' and methylphenidate, a schedule II controlled substance pursuant to 21 CFR 1308.12(d)(4), is marketed under the brand name ''Ritalin.'' RFAA, at 3 (citing National Drug Code Directory, available at *https://www.accessdata.fda.gov/scripts/cder/ndc/index.cfm*).

[4] The Government included the license number, date of birth, and address listed on the driver's license for ''Joshua Masembe.'' I am not listing that information publicly in this Decision, because they match Registrant's actual license number, date of birth, and home address.

[5] Alprazolam is a schedule IV controlled substance pursuant to 21 CFR 1308.14(c)(2).

[6] Registrant did not write an address for ''Peter Senteza'' on the hard copies of the prescriptions. RFAAX 5, App. I.

prescriptions for 60 dosage units of methylphenidate 20 mg; (3) one prescription for 30 dosage units of methylphenidate 20 mg; and (4) eleven prescriptions for 60 dosage units of alprazolam 1 mg. *Id.* at App. J. U-Save Wayne's patient profile for ''Sam Kajubi'' lists Registrant's home address in Osmond, Nebraska and the same date of birth as Registrant.[7] *Id.* at App. L.

C. The Government's Allegations

The Government has alleged that on at least forty-two occasions, between July 10, 2014 and March 8, 2018, Registrant ''issued fraudulent prescriptions for controlled substances to either [him]self using various aliases, or to other individuals which [Registrant] filled.'' OSC, at 2. Specifically, the Government alleged that Registrant issued prescriptions for controlled substances that ''were not for a legitimate medical purpose and that were not issued in the usual course of professional practice because [Registrant] issued these prescriptions to [him]self under various aliases, including Sam Kajubi and Joshua Masembe; and impersonated Peter Senteza.'' *Id.*

As discussed above, the pharmacy records from U-Save Wayne, U-Save Norfolk, and Pharmacy A show that Registrant issued at least forty-two prescriptions for controlled substances to ''Sam Kajubi,'' ''Joshua Masembe,'' and ''Peter Senteza.'' The U-Save patient profiles for ''Sam Kajubi'' and ''Peter Senteza'' list Registrant's home address in Osmond, Nebraska, [8] and the person filling the controlled substance prescriptions for ''Joshua Masembe'' at Pharmacy A used an altered driver's license bearing Registrant's license number, home address, and date of birth.

Registrant admitted to the Investigators that he filled prescriptions that he wrote for controlled substances under the names ''Joshua Masembe'' and ''Peter Senteza.'' He told the Investigators that he sent his driver's license to ''Peter Senteza'' to be altered so that Registrant could fill prescriptions that he wrote for his aliases. Registrant provided three of these altered licenses in the names of ''Joshua Masembe'' and ''Sam Kajubi'' to the Investigators. Registrant also had empty prescription bottles for Adderall, alprazolam, and methylphenidate in the names of ''Sam Kajubi'' and ''Peter Senteza'' in his home. Registrant further admitted that he wrote fraudulent prescriptions, stole prescriptions because he could not fill the prescriptions on a monthly basis by himself, and used methylphenidate and Adderall to help him work and alprazolam to take ''power naps'' during his work shifts.

Based on the documentary evidence and Registrant's own admissions, I find that the Government has proven by substantial evidence that Registrant issued and filled controlled substance prescriptions under the aliases of ''Sam Kajubi'' and ''Joshua Masembe'' for personal use and that he issued and filled prescriptions using the name ''Peter Senteza'' for his personal use.

II. Discussion

Under the Controlled Substances Act (CSA), ''[a] registration . . . to . . . distribute[ ] or dispense a controlled substance . . . may be suspended or revoked by the Attorney General upon a finding that the registrant . . . has committed such acts as would render his registration under section 823 of this title inconsistent with the public interest as determined under such section.'' 21 U.S.C. 824(a)(4). In the case of a ''practitioner,'' which is defined in 21 U.S.C. 802(21) to include a ''physician,'' Congress directed the Attorney General to consider the following factors in making the public interest determination:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The [registrant]'s experience in dispensing . . . controlled substances.

(3) The [registrant]'s conviction record under Federal or State laws relating to the . . . distribution[ ] or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety.

21 U.S.C. 823(f). These factors are considered in the disjunctive. *Robert A. Leslie, M.D.,* 68 FR 15,227, 15,230 (2003).

According to Agency decisions, I ''may rely on any one or a combination of factors and may give each factor the weight [I] deem[ ] appropriate in determining whether'' to revoke a registration. *Id.; see also Jones Total Health Care Pharm., LLC* v. *Drug Enf't Admin.,* 881 F.3d 823, 830 (11th Cir. 2018) (citing *Akhtar-Zaidi* v. *Drug Enf't Admin.,* 841 F.3d 707, 711 (6th Cir. 2016); *MacKay* v. *Drug Enf't Admin.,* 664 F.3d 808, 816 (10th Cir. 2011); *Volkman* v. *Drug Enf't Admin.,* 567 F.3d 215, 222 (6th Cir. 2009); *Hoxie* v. *Drug Enf't Admin.,* 419 F.3d 477, 482 (6th Cir. 2005). Moreover, while I am required to consider each of the factors, I ''need not make explicit findings as to each one.'' *MacKay,* 664 F.3d at 816 (quoting *Volkman,* 567 F.3d at 222); *see also Hoxie,* 419 F.3d at 482. ''In short, . . . the Agency is not required to mechanically count up the factors and determine how many favor the Government and how many favor the registrant. Rather, it is an inquiry which focuses on protecting the public interest; what matters is the seriousness of the registrant's misconduct.'' *Jayam Krishna-Iyer, M.D.,* 74 FR 459, 462 (2009). Accordingly, findings under a single factor can support the revocation of a registration. *MacKay,* 664 F.3d at 821.

The Government has the burden of proving that the requirements for revocation of a DEA registration in 21 U.S.C. 824(a) are satisfied. 21 CFR 1301.44(e). When the Government has met its *prima facie* case, the burden then shifts to the respondent to show that revoking registration would not be appropriate, given the totality of the facts and circumstances on the record. *Med. Shoppe-Jonesborough,* 73 FR 364, 387 (2008).

In this matter, while I have considered all of the Factors, the Government's evidence in support of its *prima facie* case is confined to Factors Two and Four.[9] I find the Government has satisfied its *prima facie* burden of showing that Registrant's continued registration would be ''inconsistent with the public interest.'' 21 U.S.C. 824(a)(4).

[7] Registrant only wrote an address for ''Sam Kajubi'' on one of the twenty-four prescriptions U-Save Wayne produced to the Agency. Registrant wrote his own home address as ''Sam Kajubi's'' address on the prescription. RFAAX 5, at App. J, at 6.

[8] Registrant told the Investigators that ''Peter Senteza'' lived in Pittsburgh.

[9] In the RFAA, the Government alleged and provided evidence that the state of Nebraska has revoked Registrant's medical license. RFAA at 1, 9–10, 14–15; RFAAX 4, at Appxs. B and C. I am not considering this evidence under Factor One, because the Government did not notice the issue in the OSC, and I find it unnecessary to reach because Factors Two and Four demonstrate strongly that Registrant's continued registration would be inconsistent with the public interest.

As to Factor Three, there is no evidence in the record that Registrant has a ''conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.'' 21 U.S.C. 823(f)(3). However, as Agency cases have noted, there are a number of reasons why a person who has engaged in criminal misconduct may never have been convicted of an offense under this factor, let alone prosecuted for one. *Dewey C. MacKay, M.D.,* 75 FR 49,956, 49,973 (2010). Agency cases have therefore held that ''the absence of such a conviction is of considerably less consequence in the public interest inquiry'' and is therefore not dispositive. *Id.*

A. Factors Two and/or Four—The Registrant's Experience in Dispensing Controlled Substances and Compliance With Applicable Laws Related to Controlled Substances

The Government has alleged that Registrant violated federal and state laws related to controlled substances when, ''on forty-two occasions, [Registrant] issued fraudulent prescriptions for controlled substances to himself by using various aliases, or to other individuals that he filled himself.'' RFAA, at 11–14.

Under the CSA, ''[i]t shall be unlawful for any person knowingly or intentionally to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge.'' 21 U.S.C. 843(a)(3). Similarly, under Nebraska state law, it is unlawful ''to acquire or obtain or to attempt to acquire or obtain possession of a controlled substance by theft, misrepresentation, fraud, forgery, deception, or subterfuge.'' Neb. Rev. Stat. § 28–418(1)(c)(2016). I find that the Government has established based on uncontroverted evidence that by knowingly issuing controlled substance prescriptions to aliases and other individuals that he filled himself using fraudulent identification documents Registrant violated 21 U.S.C. 843(a)(3) and Neb. Rev. Stat. § 28–418(1)(c).

I also find that the record establishes by substantial evidence that Registrant violated 21 CFR 1306.04(a). Under § 1306.04, a lawful prescription for controlled substances is one that is ''issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.'' 21 CFR 1306.04(a). A practitioner must establish and maintain a legitimate doctor-patient relationship in order to act ''in the usual course of . . . professional practice'' and to issue a prescription for a ''legitimate medical purpose'' under the CSA. *Ralph J. Chambers,* 79 FR 4962, 4970 (2014) (citing *Paul H. Volkman*, 73 FR 30,629, 30,642 (2008), pet. for rev. denied *Volkman* v. *Drug Enf't Admin.,* 567 F.3d 215, 223–24 (6th Cir. 2009)); *see also U.S.* v. *Moore,* 423 U.S. 122, 142–43 (1975) (noting that evidence established that the physician exceeded the bounds of professional practice, when ''he gave inadequate physical examinations or none at all,'' ''ignored the results of the tests he did make,'' and ''took no precautions against . . . misuse and diversion''). Agency decisions have demonstrated that in order for a physician to utilize his registration to dispense controlled substances, there must be a ''valid physician-patient relationship'' and that ''[l]egally, there is absolutely no difference between the sale of an illicit drug on the street and the illicit dispensing of a licit drug by means of a physician's prescription.'' *Mario Avello, M.D.* 70 FR 11,695, 11,697 (2005) (citing *Mark Wade, M.D.,* 69 FR 7018 (2004) and *Floyd A. Santner, M.D.,* 55 FR 37,581 (1990)). Registrant clearly issued the subject fraudulent prescriptions for controlled substances absent a valid physician-patient relationship and thereby violated 21 CFR 1306.04(a).

B. Registrant's Registration is Inconsistent With the Public Interest and Presented an Imminent Danger

The Agency has previously found that practitioners' registrations were inconsistent with the public interest in matters where the practitioners had issued fraudulent prescriptions for themselves. *See, e.g., David W. Bailey, M.D.,* 81 FR 6045, 6047 (2016) (revoking registration of physician who issued controlled prescriptions in his wife's name for personal use); *Ronald Phillips, D.O.,* 61 FR 15,304, 15,305 (1996) (revoking registration of practitioner who admitted to prescribing controlled substances in the names of family and friends, filling the prescriptions himself at pharmacies, and personally using a large portion of the controlled substances); *John V. Scalera,* 78 FR 12,092, 12,098 (2013) (denying application of practitioner who issued controlled substance prescriptions in a deceased relative's name for personal use). Accordingly, I find that the evidence in this matter establishes Registrant ''has committed such acts as would render his registration . . . inconsistent with the public interest.'' *See* 21 U.S.C. 824(a)(4).

For purposes of the imminent danger inquiry, my findings also lead to the conclusion that Registrant has ''fail[ed] . . . to maintain effective controls against diversion or otherwise comply with the obligations of a registrant'' under the CSA. 21 U.S.C. 824(d)(2). The substantial evidence that Registrant was issuing and filling fraudulent prescriptions for controlled substances for his personal use also establishes that there was ''a substantial likelihood [that an] . . . abuse of a controlled substance . . . [would] occur in the absence of the immediate suspension'' of Registrant's registration. *Id.*

III. Sanction

Where, as here, the Government has met its *prima facie* burden of showing that a Registrant's continued registration is inconsistent with the public interest, the burden shifts to the Registrant to show why he can be entrusted with a registration. *Garrett Howard Smith, M.D.,* 83 FR 18,882, 18,910 (2018) (collecting cases). Registrant did not present any evidence of remorse for his past misconduct or evidence of rehabilitative actions taken to correct his past unlawful behavior. Further, he provided no assurances that he would not engage in such conduct in the future. Absent such evidence and such assurances in this matter, I find that continued registration of Registrant is inconsistent with the public interest. Registrant's silence weighs against his continued registration. *Zvi H. Perper, M.D.,* 77 FR 64,131, 64,142 (2012 (citing *Med. Shoppe-Jonesborough,* 73 FR at 387); *see also Samuel S. Jackson,* 72 FR 23,848, 23,853 (2007). Accordingly, I find that the factors weigh in favor of sanction and I shall order the sanctions the Government requested, as contained in the Order below.

IV. Order

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 823(f) and 824(a), I hereby revoke DEA Certificate of Registration BM9925388 issued to David Mwebe, M.D. I further hereby deny any pending application of David Mwebe, M.D., to renew or modify this registration. This Order is effective September 18, 2020.

Timothy J. Shea,

Acting Administrator.

[FR Doc. 2020–18082 Filed 8–18–20; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Judgment Under the Clean Air Act

On August 13, 2020, the Department of Justice lodged a proposed consent judgment with the United States District Court for the Eastern District of New York in the lawsuit entitled *United States of America* v. *Village of Rockville Centre, New York,* Case No. 20–CV–3663.

The United States filed this lawsuit to seek civil penalties and injunctive relief for violations of the Clean Air Act, 42 U.S.C. 7401 *et seq.* (''CAA''). The alleged violations stem from the Village of Rockville Centre's (''Village'') failure to comply with federally-enforceable emissions limits for particulate matter (''PM'') and nitrogen oxide (''NO_X''). The Village operates a 33 megawatt municipal power plant (the ''Power Plant'') that provides electric power to its residents, in part, using diesel engines. The Village operates the Power

Plant primarily during the summer to meet high electricity demands. The Consent Judgment requires the Village to retire high-emission engines, and to institute operational practices and technologies to reduce the PM and NO_X emissions of the Power Plant. The Consent Judgment also requires the Village to pay civil penalties of $110,000.

The publication of this notice opens a period for public comment on the proposed Consent Judgment. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *Village of Rockville Centre, New York,* Civil Action No. 20–CV–3663, D.J. Ref. No. 90–5–2–1–10981. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	*Send them to:*
By email	*pubcomment-ees.enrd@usdoj.gov*
By mail	Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611

During the public comment period, the Consent Judgment may be examined and downloaded at this Justice Department website: *https://www.justice.gov/enrd/consent-decrees.* We will provide a paper copy of the Consent Judgment upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for $8.75 (25 cents per page reproduction cost) payable to the United States Treasury.

Henry Friedman,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2020–18068 Filed 8–18–20; 8:45 am]

BILLING CODE 4410–15–P

NUCLEAR REGULATORY COMMISSION

[NRC–2019–0211]

Information Collection: NRC Form 5, "Occupational Dose Record for a Monitoring Period"

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of submission to the Office of Management and Budget; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) has recently submitted a renewal of an existing collection of information to the Office of Management and Budget (OMB) for review. The information collection is entitled, NRC Form 5, ''Occupational Dose Record for a Monitoring Period.''

DATES: Submit comments by September 18, 2020. Comments received after this date will be considered if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *https://www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: David Cullison, NRC Clearance Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *INFOCOLLECTS.Resource@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2019–0211 when contacting the NRC about the availability of information for this action. You may obtain publicly-available information related to this action by any of the following methods:

- *Federal Rulemaking website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2019–0211. A copy of the collection of information and related instructions may be obtained without charge by accessing Docket ID NRC–2019–0211 on this website.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* A copy of the collection of information and related instructions may be obtained without charge by accessing ADAMS Accession No. ML20023A312. The supporting statement is available in ADAMS under Accession No. ML20192A153.
- *NRC's Clearance Officer:* A copy of the collection of information and related instructions may be obtained without charge by contacting the NRC's Clearance Officer, David Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *INFOCOLLECTS.Resource@NRC.GOV.*

B. Submitting Comments

The NRC cautions you not to include identifying or contact information in comment submissions that you do not want to be publicly disclosed in your comment submission. All comment submissions are posted at *https://www.regulations.gov* and entered into ADAMS. Comment submissions are not routinely edited to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the OMB, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that comment submissions are not routinely edited to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Background

Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the NRC recently submitted a renewal of an existing collection of information to OMB for review entitled, NRC Form 5, ''Occupational Dose Record for a Monitoring Period.'' The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

The NRC published a **Federal Register** notice with a 60-day comment period on this information collection on May 1, 2020 (85 FR 25478).

1. *The title of the information collection:* NRC Form 5, ''Occupational Dose Record for a Monitoring Period.''
2. *OMB approval number:* 3150–0006.
3. *Type of submission:* Extension.
4. *The form number if applicable:* NRC Form 5.
5. *How often the collection is required or requested:* Annually.
6. *Who will be required or asked to respond:* NRC licensees who are

required to comply with part 20 of title 10 of the *Code of Federal Regulations* (10 CFR).

7. *The estimated number of annual responses:* 4,328 responses (182 reporting responses plus 4,146 recordkeepers).

8. *The estimated number of annual respondents:* 4,146 respondents (98 reactors plus 4,048 materials licenses).

9. *An estimate of the total number of hours needed annually to comply with the information collection requirement or request:* 106,906 hours (5,460 hours reporting plus 101,446 hours recordkeeping).

10. *Abstract:* NRC Form 5 is used to record and report the results of individual monitoring for occupational radiation exposure during a monitoring period (one calendar year) to ensure regulatory compliance with annual radiation dose limits specified in 10 CFR 20.1201.

Dated: August 14, 2020.

For the Nuclear Regulatory Commission.

David C. Cullison,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 2020–18125 Filed 8–18–20; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2020–0079]

Information Collection: Material Control and Accounting of Special Nuclear Material

AGENCY: Nuclear Regulatory Commission.

ACTION: Renewal of existing information collection; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) invites public comment on the renewal of Office of Management and Budget (OMB) approval for an existing collection of information. The information collection is entitled, ''Material Control and Accounting of Special Nuclear Material.''

DATES: Submit comments by October 19, 2020. Comments received after this date will be considered if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

ADDRESSES: You may submit comments by any of the following methods:

- *Federal Rulemaking website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2020–0079. For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Mail comments to:* David Cullison, Office of the Chief Information Officer, Mail Stop: T–6 A10M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: David Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *Infocollects.Resource@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2020–0079 when contacting the NRC about the availability of information for this action. You may obtain publicly-available information related to this action by any of the following methods:

- *Federal Rulemaking website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2020–0079. A copy of the collection of information and related instructions may be obtained without charge by accessing Docket ID NRC–2020–0079 on this website.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The supporting statement and burden spreadsheet are available in ADAMS under Accession Nos. ML20168A873 and ML20168A874, respectively.
- *NRC's Clearance Officer:* A copy of the collection of information and related instructions may be obtained without charge by contacting NRC's Clearance Officer, David Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *Infocollects.Resource@nrc.gov.*

B. Submitting Comments

Please include Docket ID NRC–2020–0079 in the subject line of your comment submission, in order to ensure that the NRC is able to make your comment submission available to the public in this docket.

The NRC cautions you not to include identifying or contact information in comment submissions that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *https://www.regulations.gov* as well as enter the comment submissions into ADAMS, and the NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Background

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the NRC is requesting public comment on its intention to request the OMB's approval for the information collection summarized below.

1. *The title of the information collection:* ''10 CFR part 74, Material Control and Accounting of Special Nuclear Material.''

2. *OMB approval number:* 3150–0123.

3. *Type of submission:* Extension.

4. *The form number, if applicable:* Not applicable.

5. *How often the collection is required or requested:* Submission of fundamental nuclear material control plans is a one-time requirement which has been completed by all current licensees as required. However, licensees may submit amendments or revisions to the plans as necessary. Reports are submitted as events occur.

6. *Who will be required or asked to respond:* Persons licensed under part 70 of title 10 of the *Code of Federal Regulations* (10 CFR), who possess and use certain forms and quantities of special nuclear material (SNM).

7. *The estimated number of annual responses:* 174 (17 reporting responses + 157 recordkeepers).

8. *The estimated number of annual respondents:* 157.

9. *The estimated number of hours needed annually to comply with the information collection requirement or request:* 8,909 (669 hours reporting + 8,240 hours recordkeeping).

10. *Abstract:* 10 CFR part 74 establishes requirements for material control and accounting of SNM, and specific performance-based regulations for licensees authorized to possess, use, and produced strategic SNM, and SNM of moderate strategic significance and low strategic significance. The information is used by the NRC to make licensing and regulatory determinations concerning material control of SNM and to satisfy obligations of the United States to the International Atomic Energy Agency. Submission or retention of the information is mandatory for persons subject to the requirements.

III. Specific Requests for Comments

The NRC is seeking comments that address the following questions:

1. Is the proposed collection of information necessary for the NRC to properly perform its functions? Does the information have practical utility?

2. Is the estimate of the burden of the information collection accurate?

3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?

4. How can the burden of the information collection on respondents be minimized, including the use of automated collection techniques or other forms of information technology?

Dated: August 14, 2020.

For the Nuclear Regulatory Commission.

David C. Cullison,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 2020–18123 Filed 8–18–20; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2019–0182]

Information Collection: "License and Radiation Safety Requirements for Well-Logging"

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of submission to the Office of Management and Budget; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) has recently submitted a request for renewal of an existing collection of information to the Office of Management and Budget (OMB) for review. The information collection is entitled, ''License and Radiation Safety Requirements for Well-Logging.''

DATES: Submit comments by September 18, 2020. Comments received after this date will be considered if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *https://www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: David Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *Infocollects.Resource@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2019–0182 when contacting the NRC about the availability of information for this action. You may obtain publicly-available information related to this action by any of the following methods:

- *Federal Rulemaking website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2019–0182.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The supporting statement is available in ADAMS under Accession No. ML20204A780.
- NRC's Clearance Officer: A copy of the collection of information and related instructions may be obtained without charge by contacting NRC's Clearance Officer, David Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *Infocollects.Resource@nrc.gov.*

B. Submitting Comments

The NRC cautions you not to include identifying or contact information in comment submissions that you do not want to be publicly disclosed in your comment submission. All comment submissions are posted at *https://www.regulations.gov* and entered into ADAMS. Comment submissions are not routinely edited to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Background

Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the NRC recently submitted a request for renewal of an existing collection of information to OMB for review entitled, ''License and Radiation Safety Requirements for Well-Logging.'' The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

The NRC published a **Federal Register** notice with a 60-day comment period on this information collection on May 27, 2020 (85 FR 31814).

1. *The title of the information collection:* ''10 CFR part 39, License and Radiation Safety Requirements for Well-Logging.''

2. *OMB approval number:* 3150–0130.

3. *Type of submission:* Extension.

4. *The form number, if applicable:* N/A.

5. *How often the collection is required or requested:* Applications for new licenses and amendments may be submitted at any time (on occasion). Applications for renewal are submitted every 15 years. Reports are submitted as events occur.

6. *Who will be required or asked to respond:* Applicants for and holders of specific licenses authorizing the use of licensed radioactive material for well logging.

7. *The estimated number of annual responses:* 3,804.

8. *The estimated number of annual respondents:* 180.

9. *The estimated number of hours needed annually to comply with the information collection requirement or request:* 40,454.

10. *Abstract:* 10 CFR part 39, establishes radiation safety requirements for the use of radioactive material for well logging. The information in the applications, reports and records is used by the NRC staff to ensure that the health and safety of the public is protected and that licensee possession and use of source and byproduct material is in compliance with license and regulatory requirements.

Dated: August 14, 2020.

For the Nuclear Regulatory Commission.

David C. Cullison,

NRC Clearance Officer,Office of the Chief Information Officer.

[FR Doc. 2020–18124 Filed 8–18–20; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–331; NRC–2020–0189]

NextEra Energy Duane Arnold, LLC; Duane Arnold Energy Center

AGENCY: Nuclear Regulatory Commission.

ACTION: Exemption; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing an exemption in response to a February 25, 2020, as supplemented by letter dated May 29, 2020, request from NextEra Energy Duane Arnold, LLC (NEDA, the licensee). The issuance of the exemption would permit NEDA to use funds from the Duane Arnold Energy Center (DAEC) decommissioning trust fund (DTF) for spent fuel management and site restoration activities and without prior notification of the NRC.

DATES: The exemption was issued on August 12, 2020.

ADDRESSES: Please refer to Docket ID NRC–2020–0189 when contacting the NRC about the availability of information regarding this document. You may obtain publicly available information related to this document using any of the following methods:

- *Federal Rulemaking website:* Go to *https://www.regulations.gov/* and search for Docket ID NRC–2020–0189. Address questions about NRC docket IDs in *Regulations.gov* to Jennifer Borges; telephone: 301–287–9127; email: *Jennifer.Borges@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document.

FOR FURTHER INFORMATION CONTACT: Scott P. Wall, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2855; email: *Scott.Wall@nrc.gov.*

SUPPLEMENTARY INFORMATION: The text of the exemption is attached.

Dated August 13, 2020.

For the Nuclear Regulatory Commission.

Scott P. Wall,

Senior Project Manager, Plant Licensing Branch III, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

Attachment—Exemption

Nuclear Regulatory Commission

Docket No. 50–331

NextEra Energy Duane Arnold, LLC, Duane Arnold Energy Center, Exemption

I. Background

Duane Arnold Energy Center (DAEC) is a single boiling-water reactor located in Linn County, Iowa. Under Renewed Facility Operating License No. DPR–49, DAEC is owned by NextEra Energy Duane Arnold, LLC (NEDA, the licensee) (70%), Central Iowa Power Cooperative (20%), and Corn Belt Power Cooperative (10%) and is operated by NEDA. This license is subject to the rules, regulations, and orders of the U.S. Nuclear Regulatory Commission (NRC, the Commission).

By letter dated January 18, 2019 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML19023A196), NEDA submitted to the NRC a certification in accordance with Section 50.82(a)(1)(i) of Title 10 of the *Code of Federal Regulations* (10 CFR), stating its determination to permanently cease power operations at DAEC in the fourth quarter of 2020. By letter dated March 2, 2020 (ADAMS Accession No. ML20062E489), NEDA updated this certification, stating that it plans to permanently cease power operations at DAEC on October 30, 2020. By letter dated April 2, 2020 (ADAMS Accession No. ML20094F603), NEDA submitted to the NRC a Post-Shutdown Decommissioning Activities Report (PSDAR) and site-specific Decommissioning Cost Estimate (DCE) for DAEC in accordance with 10 CFR 50.82(a)(4)(i).

II. Request/Action

By letter dated February 25, 2020 (ADAMS Accession No. ML20056E054), as supplemented by letter dated May 29, 2020 (ADAMS Accession No. ML20153A371), NEDA submitted to the NRC a request for exemption from specific requirements of 10 CFR 50.82(a)(8)(i)(A) and 10 CFR 50.75(h)(1)(iv). The exemption from 10 CFR 50.82(a)(8)(i)(A) and 10 CFR 50.75(h)(1)(iv) would permit NEDA to make withdrawals from the DAEC Decommissioning Trust Fund (DTF) for spent fuel management and site restoration activities in accordance with the DAEC DCE. The exemption from 10 CFR 50.75(h)(1)(iv) would also permit NEDA to make these withdrawals without prior notification of the NRC, similar to withdrawals for decommissioning activities made in accordance with 10 CFR 50.82(a)(8).

As part of its exemption request, NEDA provided Table 1, ''Annual SAFSTOR Decommissioning Cost Cash Flow for Duane Arnold Energy Center,'' that shows the annual DTF cash flow for DAEC while conducting SAFSTOR decommissioning (*i.e.,* deferred dismantling). Table 1 contains the projected withdrawals from the DTF needed to cover the estimated costs of radiological decommissioning, spent fuel management, and site restoration activities as projected as of the date of the exemption request. Subsequent to its exemption request, NEDA provided the DTF balance and cost estimates for these same activities in its letter dated April 2, 2020 for the DAEC PSDAR and in Enclosure 1 to its March 26, 2020 annual report on the status of decommissioning funding for DAEC (ADAMS Accession No. ML20086L916). On May 29, 2020, NEDA supplemented its request and provided, among other things, the most recently available NEDA DAEC DTF balance. The NRC staff considered each of these submittals in its review of the exemption request.

The requirements of 10 CFR 50.82(a)(8)(i)(A) restrict the use of DTF withdrawals to expenses for legitimate decommissioning activities consistent with the definition of decommissioning that appears in 10 CFR 50.2. The

definition of ''decommission'' in 10 CFR 50.2 is:

To remove a facility or site safely from service and reduce residual radioactivity to a level that permits—

(1) Release of the property for unrestricted use and termination of the license; or

(2) Release of the property under restricted conditions and termination of the license.

This definition does not include activities associated with spent fuel management and site restoration activities. The requirements of 10 CFR 50.75(h)(1)(iv) also restrict the use of DTF disbursements (other than for ordinary administrative costs and other incidental expenses of the fund in connection with the operation of the fund) to decommissioning expenses until final radiological decommissioning is completed. Therefore, an exemption from 10 CFR 50.82(a)(8)(i)(A) and 10 CFR 50.75(h)(1)(iv) is needed to allow NEDA to use funds from the DAEC DTF for spent fuel management and site restoration activities at DAEC. The requirements of 10 CFR 50.75(h)(1)(iv) further provide that, except for withdrawals being made under 10 CFR 50.82(a)(8) or for payments of ordinary administrative costs and other incidental expenses of the fund in connection with the operation of the fund, no disbursement may be made from the DTF without written notice to the NRC at least 30 working days in advance. Therefore, an exemption from 10 CFR 50.75(h)(1)(iv) is also needed to allow NEDA to use funds from the DAEC DTF for spent fuel management and site restoration activities at DAEC without prior NRC notification.

III. Discussion

Pursuant to 10 CFR 50.12, the Commission may, upon application by any interested person or upon its own initiative, grant exemptions from the requirements of 10 CFR part 50 (1) when the exemptions are authorized by law, will not present an undue risk to the public health and safety, and are consistent with the common defense and security; and (2) when any of the special circumstances listed in 10 CFR 50.12(a)(2) are present. These special circumstances include, among other things:

(a) Application of the regulation in the particular circumstances would not serve the underlying purpose of the rule or is not necessary to achieve the underlying purpose of the rule; and

(b) Compliance would result in undue hardship or other costs that are significantly in excess of those contemplated when the regulation was adopted, or that are significantly in excess of those incurred by others similarly situated.

A. Authorized by Law

The requested exemption from 10 CFR 50.82(a)(8)(i)(A) and 10 CFR 50.75(h)(1)(iv) would allow NEDA to use a portion of the funds from the DAEC DTF for spent fuel management and site restoration activities at DAEC without prior notice to the NRC, in the same manner that withdrawals are made under 10 CFR 50.82(a)(8) for decommissioning activities. As stated above, 10 CFR 50.12 allows the NRC to grant exemptions from the requirements of 10 CFR part 50 when the exemptions are authorized by law. The NRC staff has determined, as explained below, that granting the licensee's proposed exemption will not result in a violation of the Atomic Energy Act of 1954, as amended, or the Commission's regulations. Therefore, the exemption is authorized by law.

B. No Undue Risk to Public Health and Safety

The underlying purpose of 10 CFR 50.82(a)(8)(i)(A) and 10 CFR 50.75(h)(1)(iv) is to provide reasonable assurance that adequate funds will be available for the radiological decommissioning of power reactors. Based on the site-specific DCE and the cash flow analysis, use of a portion of the DAEC DTF for spent fuel management and site restoration activities at DAEC will not adversely impact NEDA's ability to complete radiological decommissioning within 60 years and terminate the DAEC license. Furthermore, an exemption from 10 CFR 50.75(h)(1)(iv) to allow the licensee to make withdrawals from the DTF for spent fuel management and site restoration activities without prior written notification to the NRC will not affect the sufficiency of funds in the DTF to accomplish radiological decommissioning because such withdrawals are still constrained by the provisions of 10 CFR 50.82(a)(8)(i)(B)–(C) and are reviewable under the annual reporting requirements of 10 CFR 50.82(a)(8)(v)–(vii).

Based on the above, there are no new accident precursors created by using the DTF in the proposed manner. Thus, the probability and consequences of postulated accidents are not increased. No changes are being made in the types or amounts of effluents that may be released offsite. There is no significant increase in occupational or public radiation exposure. Therefore, the requested exemption will not present an undue risk to public health and safety.

C. Consistent With the Common Defense and Security

The requested exemption would allow NEDA to use funds from the DAEC DTF for spent fuel management and site restoration activities at DAEC. Spent fuel management under 10 CFR 50.54(bb) is an integral part of the planned NEDA decommissioning and license termination process and will not adversely affect NEDA's ability to physically secure the site or protect special nuclear material. This change to enable the use of a portion of the funds from the DTF for spent fuel management and site restoration activities has no relation to security issues. Therefore, the common defense and security is not impacted by the requested exemption.

D. Special Circumstances

Special circumstances, in accordance with 10 CFR 50.12(a)(2)(ii), are present whenever application of the regulation in the particular circumstances is not necessary to achieve the underlying purpose of the regulation.

The underlying purpose of 10 CFR 50.82(a)(8)(i)(A) and 10 CFR 50.75(h)(1)(iv), which restrict withdrawals from DTFs to expenses for radiological decommissioning activities, is to provide reasonable assurance that adequate funds will be available for radiological decommissioning of power reactors and license termination. Strict application of these requirements would prohibit the withdrawal of funds from the DAEC DTF for activities other than radiological decommissioning activities at DAEC, such as for spent fuel management and site restoration activities, until final radiological decommissioning at DAEC has been completed.

The aggregate DAEC DTF balances across all licensed owners as of December 31, 2019 was $568,294,503. The NEDA DAEC DTF balance as of Decemeber 31, 2019 was $454,453,798. This amount represents NEDA's 70% ownership of DAEC. In its letter dated May 29, 2020, NEDA provided an updated NEDA DAEC DTF balance of $416,135,029 as of April 30, 2020. The NEDA analysis projects the total radiological decommissioning cost of DAEC to be approximately $724,688,000 in 2018 dollars. As required by 10 CFR 50.54(bb), NEDA estimated the costs associated with spent fuel management at DAEC to be $259,466,000 in 2018 dollars.

The NRC staff performed an independent cash flow analysis of the DAEC DTF over the 60-year SAFSTOR

period (assuming an annual real rate of return of 2 percent, as allowed by 10 CFR 50.75(e)(1)(ii)) and determined the projected earnings of the DTF. The NRC staff confirmed that the current funds in the DTF and projected earnings provide reasonable assurance of adequate funding to complete all NRC-required radiological decommissioning activities, and also to pay for spent fuel management and site restoration activities. Therefore, the NRC staff finds that NEDA has provided reasonable assurance that adequate funds will be available for the radiological decommissioning of DAEC, even with the disbursement of funds from the DTF for spent fuel management and site restoration activities. Consequently, the NRC staff concludes that application of the requirements of 10 CFR 50.82(a)(8)(i)(A) and 10 CFR 50.75(h)(1)(iv) that funds from the DTF only be used for radiological decommissioning activities and not for spent fuel management and site restoration activities is not necessary to achieve the underlying purpose of the rule. Thus, special circumstances are present supporting approval of the exemption request.

In its submittal, NEDA also requested exemption from the requirement of 10 CFR 50.75(h)(1)(iv) concerning prior written notification to the NRC of withdrawals from the DTF to fund activities other than radiological decommissioning. The underlying purpose of notifying the NRC prior to withdrawal of funds from the DTF is to provide opportunity for NRC intervention, when deemed necessary, if the withdrawals are for expenses other than those authorized by 10 CFR 50.75(h)(1)(iv) and 10 CFR 50.82(a)(8) that could result in there being insufficient funds in the DTF to accomplish radiological decommissioning.

By granting the exemption to 10 CFR 50.75(h)(1)(iv) and 10 CFR 50.82(a)(8)(i)(A), the NRC staff considers that withdrawals consistent with the licensee's submittal dated February 25, 2020, as supplemented by letter dated May 29, 2020, are authorized. As stated previously, the NRC staff has determined that there are sufficient funds in the DTF to complete radiological decommissioning activities as well as to conduct spent fuel management and site restoration activities consistent with the PSDAR, DCE, and the February 25, 2020, as supplemented by letter dated May 29, 2020, exemption request. Pursuant to the requirements in 10 CFR 50.82(a)(8)(v) and (vii), licensees are required to monitor and annually report to the NRC the status of the DTF and the licensee's funding for spent fuel management. These reports provide the NRC staff with awareness of, and the ability to take action on, any actual or potential funding deficiencies. Additionally, 10 CFR 50.82(a)(8)(vi) requires that the annual financial assurance status report must include additional financial assurance to cover the estimated cost of completion if the sum of the balance of any remaining decommissioning funds, plus earnings on such funds calculated at not greater than a 2-percent real rate of return, together with the amount provided by other financial assurance methods being relied upon, does not cover the estimated cost to complete the decommissioning. The requested exemption would not allow the withdrawal of funds from the DTF for any other purpose that is not currently authorized in the regulations without prior notification to the NRC. Therefore, the granting of the exemption to 10 CFR 50.75(h)(1)(iv) to allow the licensee to make withdrawals from the DTF to cover authorized expenses for spent fuel management and site restoration activities without prior written notification to the NRC will still meet the underlying purpose of the regulation.

Special circumstances, in accordance with 10 CFR 50.12(a)(2)(iii), are present whenever compliance would result in undue hardship or other costs that are significantly in excess of those contemplated when the regulation was adopted, or that are significantly in excess of those incurred by others similarly situated. The licensee states that the DTF contains funds in excess of the estimated costs of radiological decommissioning and that these excess funds are needed for spent fuel management and site restoration activities. The NRC does not preclude the use of funds from the decommissioning trust in excess of those needed for radiological decommissioning for other purposes, such as spent fuel management or site restoration activities.

The NRC has stated that funding for spent fuel management and site restoration activities may be commingled in the DTF, provided that the licensee is able to identify and account for the radiological decommissioning funds separately from the funds set aside for spent fuel management and site restoration activities (see NRC Regulatory Issue Summary 2001–07, Rev. 1, ''10 CFR 50.75 Reporting and Recordkeeping for Decommissioning Planning,'' dated January 8, 2009 (ADAMS Accession No. ML083440158), and Regulatory Guide 1.184, Revision 1, ''Decommissioning of Nuclear Power Reactors,'' dated October 2013 (ADAMS Accession No. ML13144A840)). Preventing access to those excess funds in the DTF because spent fuel management and site restoration activities are not associated with radiological decommissioning would create an unnecessary financial burden without any corresponding safety benefit. The adequacy of the DTF to cover the cost of activities associated with spent fuel management and site restoration, in addition to radiological decommissioning, is supported by the site-specific decommissioning cost analysis. If the licensee cannot use its DTF for spent fuel management and site restoration activities, it would need to obtain additional funding that would not be recoverable from the DTF, or the licensee would have to modify its decommissioning approach and methods. The NRC staff concludes that either outcome would impose an unnecessary and undue burden significantly in excess of that contemplated when 10 CFR 50.82(a)(8)(i)(A) and 10 CFR 50.75(h)(1)(iv) were adopted.

The underlying purposes of 10 CFR 50.82(a)(8)(i)(A) and 10 CFR 50.75(h)(1)(iv) would be achieved by allowing NEDA to use a portion of the DAEC DTF for spent fuel management and site restoration activities without prior NRC notification, and compliance with the regulations would result in an undue hardship or other costs that are significantly in excess of those contemplated when the regulations were adopted. Thus, the special circumstances required by 10 CFR 50.12(a)(2)(ii) and 10 CFR 50.12(a)(2)(iii) exist and support the approval of the requested exemption.

E. Environmental Considerations

In accordance with 10 CFR 51.31(a), the Commission has determined that the granting of the exemption will not have a significant effect on the quality of the human environment (see Environmental Assessment and Finding of No Significant Impact published in the **Federal Register** on August 4, 2020 (85 FR 47255).

IV. Conclusions

In consideration of the above, the NRC staff finds that the proposed exemption confirms the adequacy of funding in the DAEC DTF, considering growth, to complete radiological decommissioning of the site and to terminate the license and also to cover estimated spent fuel management and site restoration activities.

Accordingly, the Commission has determined that, pursuant to 10 CFR 50.12(a), the exemption is authorized by law, will not present an undue risk to public health and safety, and is consistent with the common defense and security. Also, special circumstances are present. Therefore, the Commission hereby grants NEDA an exemption from the requirements of 10 CFR 50.82(a)(8)(i)(A) and 10 CFR 50.75(h)(1)(iv) to allow use of a portion of the funds from the DAEC DTF for spent fuel management and site restoration activities in accordance with the DAEC PSDAR and DCE, dated April 2, 2020. Additionally, the Commission hereby grants NEDA an exemption from the requirement of 10 CFR 50.75(h)(1)(iv) to allow such withdrawals without prior NRC notification.

This exemption is effective upon issuance.

Dated: 12th day of August 2020.

For the Nuclear Regulatory Commission.

Craig G. Erlanger,
Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2020–18078 Filed 8–18–20; 8:45 am]

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NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–456; 50–457; NRC–2020–0180]

Exelon Generation Company, LLC; Braidwood Station, Units 1 and 2

AGENCY: Nuclear Regulatory Commission.

ACTION: License amendment application; opportunity to provide comments, request a hearing, and to petition for leave to intervene.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is considering issuance of an amendment to Renewed Facility Operating License Nos. NPF–72 and NPF–77, issued to Exelon Generation Company, LLC, for operation of the Braidwood Station, Units 1 and 2. The proposed amendment is contained in the licensee's letter dated July 15, 2020, and would change Technical Specifications (TS) Surveillance Requirement (SR) 3.7.9.2 to allow an ultimate heat sink (UHS) temperature of less than or equal to 102.8 degrees Fahrenheit (°F) through September 30, 2020. The proposed amendment would also permanently extend the completion time for the Required Action of both Braidwood Station, Units 1 and 2, to be placed in Mode 3 within 12 hours when the UHS is inoperable due to average water temperature.

DATES: Submit comments by September 18, 2020. Comments received after this date will be considered if it is practical to do so, but the Commission is able to ensure consideration only for comments received before this date. A request for a hearing or petition for leave to intervene must be filed by October 19, 2020.

ADDRESSES: You may submit comments by any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2020–0180. Address questions about NRC docket IDs in *Regulations.gov* to Jennifer Borges; telephone: 301–287–9127; email: *Jennifer.Borges@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Mail comments to:* Office of Administration, Mail Stop: TWFN–7–A60M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Program Management, Announcements and Editing Staff.

For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Joel S. Wiebe, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–6606, email: *Joel.Wiebe@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2020–0180 when contacting the NRC about the availability of information for this action. You may obtain publicly-available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2020–0180.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The proposed license amendment request, dated July 15, 2020, is available in ADAMS under Accession No. ML20197A434.

B. Submitting Comments

Please include Docket ID NRC–2020–0180 in your comment submission.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *https://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Introduction

The NRC is considering issuance of amendments to Renewed Facility Operating License Nos. NPF–72 and NPF–77, issued to Exelon Generation Company, LLC, for operation of the Braidwood Station, Units 1 and 2, located in Will County Illinois.

The proposed amendments would change TS SR 3.7.9.2 to allow a UHS temperature of less than or equal to 102.8 °F through September 30, 2020. The proposed amendments would also permanently extend the completion time for the Required Action of both Braidwood Station, Units 1 and 2, to be placed in Mode 3 within 12 hours when the UHS is inoperable due to average water temperature. Before any issuance of the proposed license amendment, the NRC will need to make the findings required by the Atomic Energy Act of 1954, as amended (the Act), and NRC's regulations.

The NRC has made a proposed determination that the license amendment request involves no significant hazards consideration. Under the NRC's regulations in § 50.92 of title 10 of the *Code of Federal Regulations* (10 CFR), this means that operation of the facility in accordance with the proposed amendment would not: (1) Involve a significant increase in the probability or consequences of an

accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The likelihood of a malfunction of any systems, structures or components (SSCs) supported by the Ultimate Heat Sink (UHS) is not significantly increased by increasing the allowable UHS temperature from ≤ 102 °F to ≤ 102.8 °F or extending the time for both Unit 1 and Unit 2 to be placed in Mode 3 to 12 hours. The UHS provides a heat sink for process and operating heat from safety related components during a transient or accident, as well as during normal operation. The proposed change does not make any physical changes to any plant SSCs, nor does it alter any of the assumptions or conditions upon which the UHS is designed. The UHS is not an initiator of any analyzed accident. All equipment supported by the UHS has been evaluated to demonstrate that their performance and operation remains as described in the UFSAR with no increase in probability of failure or malfunction.

The SSCs credited to mitigate the consequences of postulated design basis accidents remain capable of performing their design basis function. The change in maximum UHS temperature has been evaluated using the UFSAR described methods to demonstrate that the UHS remains capable of removing normal operating and post-accident heat. The change in UHS temperature and resulting containment response following a postulated design basis accident has been demonstrated to not be impacted. Additionally, all the UHS supported equipment, credited in the accident analysis to mitigate an accident, has been shown to continue to perform their design function as described in the UFSAR.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated. The proposed change does not introduce any new modes of plant operation, change the design function of any SSC, or change the mode of operation of any SSC. There are no new equipment failure modes or malfunctions created as affected SSCs continue to operate in the same manner as previously evaluated and have been evaluated to perform as designed at the increased UHS temperature and as assumed in the accident analysis. Additionally, accident initiators remain as described in the UFSAR and no new accident initiators are postulated as a result of the increase in UHS temperature.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The proposed change continues to ensure that the maximum temperature of the cooling water supplied to the plant SSCs during a UHS design basis event remains within the evaluated equipment limits and capabilities assumed in the accident analysis. The proposed change does not result in any changes to plant equipment function, including setpoints and actuations. All equipment will function as designed in the plant safety analysis without any physical modifications. The proposed change does not alter a limiting condition for operation, limiting safety system setting, or safety limit specified in the Technical Specifications.

The proposed change does not adversely impact the UHS inventory required to be available for the UFSAR described design basis accident involving the worst case 30-day period including losses for evaporation and seepage to support safe shutdown and cooldown of both Braidwood Station units. Additionally, the structural integrity of the UHS is not impacted and remains acceptable following the change, thereby ensuring that the assumptions for both UHS temperature and inventory remain valid.

Therefore, since there is no adverse impact of this proposed change on the Braidwood Station safety analysis, there is no reduction in the margin of safety of the plant.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the license amendment request involves a no significant hazards consideration.

The NRC is seeking public comments on this proposed determination that the license amendment request involves no significant hazards consideration. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendments until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendments before expiration of the 60-day notice period if the Commission concludes the amendments involve no significant hazards consideration. In addition, the Commission may issue the amendments prior to the expiration of the 30-day comment period if circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility. If the Commission takes action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. If the Commission makes a final no significant hazards consideration determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

III. Opportunity To Request a Hearing and Petition for Leave To Intervene

Within 60 days after the date of publication of this notice, any persons (petitioner) whose interest may be affected by this action may file a request for a hearing and petition for leave to intervene (petition) with respect to the action. Petitions shall be filed in accordance with the Commission's ''Agency Rules of Practice and Procedure'' in 10 CFR part 2. Interested persons should consult a current copy of 10 CFR 2.309. The NRC's regulations are accessible electronically from the NRC Library on the NRC's website at *https://www.nrc.gov/reading-rm/doc-collections/cfr/*. If a petition is filed, the Commission or a presiding officer will rule on the petition and, if appropriate, a notice of a hearing will be issued.

As required by 10 CFR 2.309(d) the petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements for standing: (1) The name, address, and telephone number of the petitioner; (2) the nature of the petitioner's right to be made a party to the proceeding; (3) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the petitioner's interest.

In accordance with 10 CFR 2.309(f), the petition must also set forth the specific contentions which the petitioner seeks to have litigated in the proceeding. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner must provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to the specific sources and documents on which the petitioner intends to rely to support its position on the issue. The petition must

include sufficient information to show that a genuine dispute exists with the applicant or licensee on a material issue of law or fact. Contentions must be limited to matters within the scope of the proceeding. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner who fails to satisfy the requirements at 10 CFR 2.309(f) with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene. Parties have the opportunity to participate fully in the conduct of the hearing with respect to resolution of that party's admitted contentions, including the opportunity to present evidence, consistent with the NRC's regulations, policies, and procedures.

Petitions must be filed no later than 60 days from the date of publication of this notice. Petitions and motions for leave to file new or amended contentions that are filed after the deadline will not be entertained absent a determination by the presiding officer that the filing demonstrates good cause by satisfying the three factors in 10 CFR 2.309(c)(1)(i) through (iii). The petition must be filed in accordance with the filing instructions in the ''Electronic Submissions (E-Filing)'' section of this document.

If a hearing is requested, and the Commission has not made a final determination on the issue of no significant hazards consideration, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to establish when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendments and make them immediately effective, notwithstanding the request for a hearing. Any hearing would take place after issuance of the amendments. If the final determination is that the amendment request involves a significant hazards consideration, then any hearing held would take place before the issuance of the amendments unless the Commission finds an imminent danger to the health or safety of the public, in which case it will issue an appropriate order or rule under 10 CFR part 2.

A State, local governmental body, Federally-recognized Indian Tribe, or agency thereof, may submit a petition to the Commission to participate as a party under 10 CFR 2.309(h)(1). The petition should state the nature and extent of the petitioner's interest in the proceeding. The petition should be submitted to the Commission no later than 60 days from the date of publication of this notice. The petition must be filed in accordance with the filing instructions in the ''Electronic Submissions (E-Filing)'' section of this document, and should meet the requirements for petitions set forth in this section, except that under 10 CFR 2.309(h)(2) a State, local governmental body, or Federally-recognized Indian Tribe, or agency thereof does not need to address the standing requirements in 10 CFR 2.309(d) if the facility is located within its boundaries. Alternatively, a State, local governmental body, Federally-recognized Indian Tribe, or agency thereof may participate as a non-party under 10 CFR 2.315(c).

If a hearing is granted, any person who is not a party to the proceeding and is not affiliated with or represented by a party may, at the discretion of the presiding officer, be permitted to make a limited appearance pursuant to the provisions of 10 CFR 2.315(a). A person making a limited appearance may make an oral or written statement of his or her position on the issues but may not otherwise participate in the proceeding. A limited appearance may be made at any session of the hearing or at any prehearing conference, subject to the limits and conditions as may be imposed by the presiding officer. Details regarding the opportunity to make a limited appearance will be provided by the presiding officer if such sessions are scheduled.

IV. Electronic Submissions (E-Filing)

All documents filed in NRC adjudicatory proceedings, including a request for hearing and petition for leave to intervene (petition), any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities that request to participate under 10 CFR 2.315(c), must be filed in accordance with the NRC's E-Filing rule (72 FR 49139; August 28, 2007, as amended at 77 FR 46562; August 3, 2012). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Detailed guidance on making electronic submissions may be found in the Guidance for Electronic Submissions to the NRC and on the NRC website at *https://www.nrc.gov/site-help/e-submittals.html.* Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least 10 days prior to the filing deadline, the participant should contact the Office of the Secretary by email at *hearing.docket@nrc.gov,* or by telephone at 301–415–1677, to (1) request a digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign submissions and access the E-Filing system for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a petition or other adjudicatory document (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals/getting-started.html.* Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit adjudicatory documents. Submissions must be in Portable Document Format (PDF). Additional guidance on PDF submissions is available on the NRC's public website at *https://www.nrc.gov/site-help/electronic-sub-ref-mat.html.* A filing is considered complete at the time the document is submitted through the NRC's E Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E Filing system time-stamps the document and sends the submitter an email notice confirming receipt of the document. The E-Filing system also distributes an email notice that provides access to the document to the NRC's Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the document on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before adjudicatory documents are filed so that they can obtain access to the documents via the E-Filing system.

A person filing electronically using the NRC's adjudicatory E-Filing system may seek assistance by contacting the

NRC's Electronic Filing Help Desk through the ''Contact Us'' link located on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals.html,* by email to *MSHD.Resource@nrc.gov,* or by a toll-free call at 1 866–672–7640. The NRC Electronic Filing Help Desk is available between 9 a.m. and 6 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing stating why there is good cause for not filing electronically and requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing adjudicatory documents in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in the NRC's electronic hearing docket which is available to the public at *https://adams.nrc.gov/ehd,* unless excluded pursuant to an order of the Commission or the presiding officer. If you do not have an NRC-issued digital ID certificate as described above, click ''cancel'' when the link requests certificates and you will be automatically directed to the NRC's electronic hearing dockets where you will be able to access any publicly available documents in a particular hearing docket. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or personal phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. For example, in some instances, individuals provide home addresses in order to demonstrate proximity to a facility or site. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

For further details with respect to this action, see the application for license amendment dated July 15, 2020.

Attorney for licensee: Tamra Domeyer, Associate General Counsel, Exelon Generation Company, LLC, 4300 Winfield Road, Warrenville, IL 60555.

NRC Branch Chief: Nancy L. Salgado.

Dated: August 13, 2020.

For the Nuclear Regulatory Commission.

Joel S. Wiebe,

Senior Project Manager, Licensing Projects Branch III, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2020–18106 Filed 8–18–20; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–454; 50–455; NRC–2020–0173]

Exelon Generation Company, LLC; Byron Station, Unit Nos. 1 and 2

AGENCY: Nuclear Regulatory Commission.

ACTION: License amendment application; opportunity to comment, request a hearing, and petition for leave to intervene; order imposing procedures.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is considering the issuance of amendments to Renewed Facility Operating License Nos. NPF–37 and NPF–66, issued to Exelon Generation Company, LLC (Exelon, or the licensee) for operation of Byron Station, Unit Nos. 1 and 2. The proposed amendments would revise technical specification requirements to provide a one-time extension for Byron Station, Unit No. 2 steam generator (SG) tube inspections. The amendments are necessary to avoid conflicts with the Centers for Disease Control and Prevention (CDC) recommendations regarding social distancing to prevent the spread of the Coronavirus Disease 2019 (COVID–19) virus. For this amendment request, the NRC proposes to determine that it involves no significant hazards consideration. Because this amendment request contains sensitive unclassified non-safeguards information (SUNSI), an order imposes procedures to obtain access to SUNSI for contention preparation.

DATES: Submit comments by September 18, 2020. A request for a hearing or petitions for leave to intervene must be filed by October 19, 2020. Any potential party as defined in § 2.4 of title 10 of the *Code of Federal Regulations* (10 CFR), who believes access to SUNSI is necessary to respond to this notice must request document access by August 31, 2020.

ADDRESSES: You may submit comments by any of the following methods:

- *Federal Rulemaking website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2020–0173. Address questions about NRC docket IDs in *Regulations.gov* to Jennifer Borges; telephone: 301–287–9127; email: *Jennifer.Borges@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Mail comments to:* Office of Administration, Mail Stop: TWFN–7–A60M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Program Management, Announcements and Editing Staff.

For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Joel S. Wiebe, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington DC 20555–0001; telephone: 301–415–6606, email: *Joel.Wiebe@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2020–0173 when contacting the NRC about the availability of information for this action. You may obtain publicly-available information related to this action by any of the following methods:

- *Federal Rulemaking website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2020–0173.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR)

reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* Exelon's proposed license amendment request for Byron Station Unit Nos. 1 and 2, dated July 10, 2020, is available in ADAMS Package Accession No. ML20196L732.

B. Submitting Comments

Please include Docket ID NRC–2020–0173 in your comment submission.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *https://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Introduction

The NRC is considering issuance of amendments to Renewed Facility Operating License Nos. NPF–37 and NPF–66, issued to Exelon, for operation of the Byron Station, Unit Nos. 1 and 2, located in Ogle County, Illinois.

The proposed amendments would provide a one-time extension of SG tube inspections for Byron Station, Unit No. 2, to allow these inspections to be conducted after three operating cycles instead of after the currently required two operating cycles. Because both Byron Station Unit Nos. 1 and 2 share technical specifications, the proposed amendments would amend both Byron Station's renewed facility operating licenses, and would accordingly increment the amendment number for Byron Station, Unit No. 1.

In its license amendment request, Exelon observed that the CDC issued recommendations advising isolation activities (*e.g.,* social distancing, group size limitations, self-quarantining, etc.) to prevent the spread of the COVID–19 virus. Exelon further stated that the nature of the SG inspections conflicts with these recommendations because the SG inspections would require workers to be in constant proximity to each other in a hot and radiological environment that exponentially increases the likelihood of individuals contracting COVID–19 and potentially inducing a rapid spread. Additionally, Exelon noted that SG inspections require a specialty vendor that maintains unique and complex qualifications. Accordingly, losing these resources due to a virus spread would cause a situation where the proper technical knowledge would not be available to satisfactorily complete this work (*e.g.,* a minimal 14-day isolation for likely multiple individuals based on having to work in close proximity to each other for the work).

Before any issuance of the proposed license amendment, the NRC will need to make the findings required by the Atomic Energy Act of 1954, as amended (the Act), and NRC's regulations.

The NRC has made a proposed determination that this license amendment request involves no significant hazards consideration. Under the NRC's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed one-time change will defer the SG inspection to be performed after three operating cycles. This change does not physically change the SGs, the plant, or the way the SGs or plant are operated. This change also does not change the design of the SG Inspection frequencies and inspection activities are not an initiator to a SG tube rupture accident, or any other accident previously evaluated. As a result, the probability of an accident previously evaluated is not significantly increased. The SG tubes inspected by the SG Program continue to be required to meet the SG Program performance criteria and to be capable of performing any functions assumed in the accident analysis. As a result, the consequences of any accident previously evaluated are not significantly increased.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed one-time change will defer the SG inspection to be performed after three operating cycles. The proposed change does not alter the design function or operation of the SGs or the ability of an SG to perform its design function. The SG tubes continue to be required to meet the SG Program performance criteria. An analysis has been performed which evaluates all credible failure modes. This analysis resulted in no new or different kind of accident then has been previously evaluated. The proposed change does not create the possibility of a new or different kind of accident due to credible new failure mechanisms, malfunctions, or accident initiators that not considered in the design and licensing bases.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The proposed one-time change will defer the SG inspection to be performed after three operating cycles. The proposed change does not change any of the controlling values of parameters used to avoid exceeding regulatory or licensing limits. The proposed change does not affect a design basis or safety limit, or any controlling value for a parameter established in the UFSAR [Updated Final Safety Analysis Report] or the license.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the license amendment request involves a no significant hazards consideration.

The NRC is seeking public comments on this proposed determination that the license amendment request involves no significant hazards consideration. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendment before expiration of the 60-day notice period if the Commission concludes the amendment involves no significant hazards consideration. In addition, the Commission may issue the amendment prior to the expiration of the 30-day comment period if circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example, in prevention of either resumption of operation or of increase in power output up to the plant's

licensed power level. If the Commission takes action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. If the Commission makes a final no significant hazards consideration determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

III. Opportunity To Request a Hearing and Petition for Leave To Intervene

Within 60 days after the date of publication of this notice, any persons (petitioner) whose interest may be affected by this action may file a request for a hearing and petition for leave to intervene (petition) with respect to the action. Petitions shall be filed in accordance with the Commission's ''Agency Rules of Practice and Procedure'' in 10 CFR part 2. Interested persons should consult a current copy of 10 CFR 2.309. The NRC's regulations are accessible electronically from the NRC Library on the NRC's website at *https://www.nrc.gov/reading-rm/doc-collections/cfr/.* If a petition is filed, the Commission or a presiding officer will rule on the petition and, if appropriate, a notice of a hearing will be issued.

As required by 10 CFR 2.309(d) the petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements for standing: (1) The name, address, and telephone number of the petitioner; (2) the nature of the petitioner's right to be made a party to the proceeding; (3) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the petitioner's interest.

In accordance with 10 CFR 2.309(f), the petition must also set forth the specific contentions which the petitioner seeks to have litigated in the proceeding. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner must provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to the specific sources and documents on which the petitioner intends to rely to support its position on the issue. The petition must include sufficient information to show that a genuine dispute exists with the applicant or licensee on a material issue of law or fact. Contentions must be limited to matters within the scope of the proceeding. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner who fails to satisfy the requirements at 10 CFR 2.309(f) with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene. Parties have the opportunity to participate fully in the conduct of the hearing with respect to resolution of that party's admitted contentions, including the opportunity to present evidence, consistent with the NRC's regulations, policies, and procedures.

Petitions must be filed no later than 60 days from the date of publication of this notice. Petitions and motions for leave to file new or amended contentions that are filed after the deadline will not be entertained absent a determination by the presiding officer that the filing demonstrates good cause by satisfying the three factors in 10 CFR 2.309(c)(1)(i) through (iii). The petition must be filed in accordance with the filing instructions in the ''Electronic Submissions (E-Filing)'' section of this document.

If a hearing is requested, and the Commission has not made a final determination on the issue of no significant hazards consideration, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to establish when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, then any hearing held would take place before the issuance of the amendment unless the Commission finds an imminent danger to the health or safety of the public, in which case it will issue an appropriate order or rule under 10 CFR part 2.

A State, local governmental body, Federally-recognized Indian Tribe, or agency thereof, may submit a petition to the Commission to participate as a party under 10 CFR 2.309(h)(1). The petition should state the nature and extent of the petitioner's interest in the proceeding. The petition should be submitted to the Commission no later than 60 days from the date of publication of this notice. The petition must be filed in accordance with the filing instructions in the ''Electronic Submissions (E-Filing)'' section of this document, and should meet the requirements for petitions set forth in this section, except that, under 10 CFR 2.309(h)(2), a State, local governmental body, or Federally-recognized Indian Tribe, or agency thereof does not need to address the standing requirements in 10 CFR 2.309(d) if the facility is located within its boundaries. Alternatively, a State, local governmental body, Federally-recognized Indian Tribe, or agency thereof may participate as a non-party under 10 CFR 2.315(c).

If a hearing is granted, any person who is not a party to the proceeding and is not affiliated with or represented by a party may, at the discretion of the presiding officer, be permitted to make a limited appearance pursuant to the provisions of 10 CFR 2.315(a). A person making a limited appearance may make an oral or written statement of his or her position on the issues but may not otherwise participate in the proceeding. A limited appearance may be made at any session of the hearing or at any prehearing conference, subject to the limits and conditions as may be imposed by the presiding officer. Details regarding the opportunity to make a limited appearance will be provided by the presiding officer if such sessions are scheduled.

IV. Electronic Submissions (E-Filing)

All documents filed in NRC adjudicatory proceedings, including a request for hearing and petition for leave to intervene (petition), any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities that request to participate under 10 CFR 2.315(c), must be filed in accordance with the NRC's E-Filing rule (72 FR 49139; August 28, 2007, as amended at 77 FR 46562; August 3, 2012). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Detailed guidance on making electronic submissions may be found in the Guidance for Electronic Submissions to the NRC and on the NRC website at *https://www.nrc.gov/site-help/e-submittals.html.* Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least 10 days prior to the filing deadline, the participant should contact the Office of the Secretary by email at *hearing.docket@nrc.gov,* or by telephone at 301–415–1677, to (1) request a digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign submissions and access the E-Filing system for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a petition or other adjudicatory document (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals/getting-started.html.* Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit adjudicatory documents. Submissions must be in Portable Document Format (PDF). Additional guidance on PDF submissions is available on the NRC's public website at *https://www.nrc.gov/site-help/electronic-sub-ref-mat.html.* A filing is considered complete at the time the document is submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time (ET) on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an email notice confirming receipt of the document. The E-Filing system also distributes an email notice that provides access to the document to the NRC's Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the document on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before adjudicatory documents are filed so that they can obtain access to the documents via the E-Filing system.

A person filing electronically using the NRC's adjudicatory E-Filing system may seek assistance by contacting the NRC's Electronic Filing Help Desk through the ''Contact Us'' link located on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals.html,* by email to *MSHD.Resource@nrc.gov,* or by a toll-free call at 1–866–672–7640. The NRC Electronic Filing Help Desk is available between 9 a.m. and 6 p.m., ET, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing stating why there is good cause for not filing electronically and requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing adjudicatory documents in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in the NRC's electronic hearing docket which is available to the public at *https://adams.nrc.gov/ehd,* unless excluded pursuant to an order of the Commission or the presiding officer. If you do not have an NRC-issued digital ID certificate as described above, click ''cancel'' when the link requests certificates and you will be automatically directed to the NRC's electronic hearing dockets where you will be able to access any publicly available documents in a particular hearing docket. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or personal phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. For example, in some instances, individuals provide home addresses in order to demonstrate proximity to a facility or site. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

For further details with respect to this action, see the application for license amendment dated July 10, 2020.

Attorney for licensee: Tamra Domeyer, Associate General Counsel, Exelon Generation Company, LLC, 4300 Winfield Road, Warrenville, IL 60555.

NRC Branch Chief: Nancy L. Salgado.

Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information for Contention Preparation

A. This Order contains instructions regarding how potential parties to this proceeding may request access to documents containing SUNSI.

B. Within 10 days after publication of this notice of hearing and opportunity to petition for leave to intervene, any potential party who believes access to SUNSI is necessary to respond to this notice may request access to SUNSI. A ''potential party'' is any person who intends to participate as a party by demonstrating standing and filing an admissible contention under 10 CFR 2.309. Requests for access to SUNSI submitted later than 10 days after publication of this notice will not be considered absent a showing of good cause for the late filing, addressing why the request could not have been filed earlier.

C. The requestor shall submit a letter requesting permission to access SUNSI to the Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, and provide a copy to the Deputy General Counsel for Hearings and Administration, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. The expedited delivery or courier mail address for both offices is: U.S. Nuclear Regulatory Commission, 11555 Rockville Pike, Rockville, Maryland 20852. The email address for the Office of the Secretary and the Office of the General Counsel are *Hearing.Docket@nrc.gov* and *RidsOgc MailCenter.Resource@nrc.gov,* respectively.[1] The request must include the following information:

[1] While a request for hearing or petition to intervene in this proceeding must comply with the

Continued

(1) A description of the licensing action with a citation to this **Federal Register** notice;

(2) The name and address of the potential party and a description of the potential party's particularized interest that could be harmed by the action identified in C.(1); and

(3) The identity of the individual or entity requesting access to SUNSI and the requestor's basis for the need for the information in order to meaningfully participate in this adjudicatory proceeding. In particular, the request must explain why publicly available versions of the information requested would not be sufficient to provide the basis and specificity for a proffered contention.

D. Based on an evaluation of the information submitted under paragraph C.(3), the NRC staff will determine within 10 days of receipt of the request whether:

(1) There is a reasonable basis to believe the petitioner is likely to establish standing to participate in this NRC proceeding; and

(2) The requestor has established a legitimate need for access to SUNSI.

E. If the NRC staff determines that the requestor satisfies both D.(1) and D.(2) above, the NRC staff will notify the requestor in writing that access to SUNSI has been granted. The written notification will contain instructions on how the requestor may obtain copies of the requested documents, and any other conditions that may apply to access to those documents. These conditions may include, but are not limited to, the signing of a Non-Disclosure Agreement or Affidavit, or Protective Order [2] setting forth terms and conditions to prevent the unauthorized or inadvertent disclosure of SUNSI by each individual who will be granted access to SUNSI.

F. Filing of Contentions. Any contentions in these proceedings that are based upon the information received as a result of the request made for SUNSI must be filed by the requestor no later than 25 days after receipt of (or access to) that information. However, if more than 25 days remain between the petitioner's receipt of (or access to) the information and the deadline for filing all other contentions (as established in the notice of hearing or opportunity for hearing), the petitioner may file its SUNSI contentions by that later deadline.

G. Review of Denials of Access.

(1) If the request for access to SUNSI is denied by the NRC staff after a determination on standing and requisite need, the NRC staff shall immediately notify the requestor in writing, briefly stating the reason or reasons for the denial.

(2) The requestor may challenge the NRC staff's adverse determination by filing a challenge within 5 days of receipt of that determination with: (a) The presiding officer designated in this proceeding; (b) if no presiding officer has been appointed, the Chief Administrative Judge, or if he or she is unavailable, another administrative judge, or an Administrative Law Judge with jurisdiction pursuant to 10 CFR 2.318(a); or (c) if another officer has been designated to rule on information access issues, with that officer.

(3) Further appeals of decisions under this paragraph must be made pursuant to 10 CFR 2.311.

H. Review of Grants of Access. A party other than the requestor may challenge an NRC staff determination granting access to SUNSI whose release would harm that party's interest independent of the proceeding. Such a challenge must be filed within 5 days of the notification by the NRC staff of its grant of access and must be filed with: (a) The presiding officer designated in this proceeding; (b) if no presiding officer has been appointed, the Chief Administrative Judge, or if he or she is unavailable, another administrative judge, or an Administrative Law Judge with jurisdiction pursuant to 10 CFR 2.318(a); or (c) if another officer has been designated to rule on information access issues, with that officer.

If challenges to the NRC staff determinations are filed, these procedures give way to the normal process for litigating disputes concerning access to information. The availability of interlocutory review by the Commission of orders ruling on such NRC staff determinations (whether granting or denying access) is governed by 10 CFR 2.311.[3]

I. The Commission expects that the NRC staff and presiding officers (and any other reviewing officers) will consider and resolve requests for access to SUNSI, and motions for protective orders, in a timely fashion in order to minimize any unnecessary delays in identifying those petitioners who have standing and who have propounded contentions meeting the specificity and basis requirements in 10 CFR part 2. The attachment to this Order summarizes the general target schedule for processing and resolving requests under these procedures.

It is so ordered.

Dated: August 13, 2020.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

Attachment 1—General Target Schedule for Processing and Resolving Requests for Access to Sensitive Unclassified Non-Safeguards Information in This Proceeding

Day	Event/activity
0	Publication of **Federal Register** notice of hearing and opportunity to petition for leave to intervene, including order with instructions for access requests.
10	Deadline for submitting requests for access to Sensitive Unclassified Non-Safeguards Information (SUNSI) with information: Supporting the standing of a potential party identified by name and address; describing the need for the information in order for the potential party to participate meaningfully in an adjudicatory proceeding.
20	U.S. Nuclear Regulatory Commission (NRC) staff informs the requestor of the staff's determination whether the request for access provides a reasonable basis to believe standing can be established and shows need for SUNSI. (NRC staff also informs any party to the proceeding whose interest independent of the proceeding would be harmed by the release of the information.) If NRC staff makes the finding of need for SUNSI and likelihood of standing, NRC staff begins document processing (preparation of redactions or review of redacted documents).

filing requirements of the NRC's ''E-Filing Rule,'' the initial request to access SUNSI under these procedures should be submitted as described in this paragraph.

[2] Any motion for Protective Order or draft Non-Disclosure Affidavit or Agreement for SUNSI must be filed with the presiding officer or the Chief Administrative Judge if the presiding officer has not yet been designated, within 30 days of the deadline for the receipt of the written access request.

[3] Requestors should note that the filing requirements of the NRC's E-Filing Rule (72 FR 49139; August 28, 2007, as amended at 77 FR 46562; August 3, 2012) apply to appeals of NRC staff determinations (because they must be served on a presiding officer or the Commission, as applicable), but not to the initial SUNSI request submitted to the NRC staff under these procedures.

Day	Event/activity
25	If NRC staff finds no ''need'' or no likelihood of standing, the deadline for petitioner/requestor to file a motion seeking a ruling to reverse the NRC staff's denial of access; NRC staff files copy of access determination with the presiding officer (or Chief Administrative Judge or other designated officer, as appropriate). If NRC staff finds ''need'' for SUNSI, the deadline for any party to the proceeding whose interest independent of the proceeding would be harmed by the release of the information to file a motion seeking a ruling to reverse the NRC staff's grant of access.
30	Deadline for NRC staff reply to motions to reverse NRC staff determination(s).
40	(Receipt +30) If NRC staff finds standing and need for SUNSI, deadline for NRC staff to complete information processing and file motion for Protective Order and draft Non-Disclosure Affidavit.
60	Deadline for submitting petition for intervention containing: (i) Demonstration of standing; and (ii) all contentions whose formulation does not require access to SUNSI (+25 Answers to petition for intervention; +7 petitioner/requestor reply).
A	If access granted: Issuance of presiding officer or other designated officer decision on motion for protective order for access to sensitive information (including schedule for providing access and submission of contentions) or decision reversing a final adverse determination by the NRC staff.
A + 3	Deadline for filing executed Non-Disclosure Affidavits. Access provided to SUNSI consistent with decision issuing the protective order.
A + 28	Deadline for submission of contentions whose development depends upon access to SUNSI. However, if more than 25 days remain between the petitioner's receipt of (or access to) the information and the deadline for filing all other contentions (as established in the notice of opportunity to request a hearing and petition for leave to intervene), the petitioner may file its SUNSI contentions by that later deadline.
A + 53	(Contention receipt +25) Answers to contentions whose development depends upon access to SUNSI.
A + 60	(Answer receipt +7) Petitioner/Intervenor reply to answers.
>A + 60	Decision on contention admission.

[FR Doc. 2020–18086 Filed 8–18–20; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 72–1031, 50–369, and 50–370; NRC–2020–0044]

Duke Energy Carolinas, LLC; McGuire Nuclear Station, Units 1 and 2; Independent Spent Fuel Storage Installation

AGENCY: Nuclear Regulatory Commission.

ACTION: Exemption; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing an exemption to Duke Energy Carolinas, LLC (Duke Energy) which would permit Duke Energy to maintain MAGNASTOR® Cask 0FCTKN045 at its McGuire Nuclear Station independent spent fuel storage installation (ISFSI) in a storage condition where the helium density is above the range specified in Certificate of Compliance (CoC) No. 1031, Amendment No. 7, Technical Specification (TS) 3.1.1.

DATES: The exemption became effective on August 19, 2020.

ADDRESSES: Please refer to Docket ID NRC–2020–0044 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document using any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2020–0044. Address questions about NRC docket IDs in *Regulations.gov* to Jennifer Borges-Roman; telephone: 301–287–9127; email: *Jennifer.Borges@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*Begin Web-based ADAMS Search.*'' For problems with ADAMS, please contact the NRC's Public Document Room reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* For the convenience of the reader, instructions about obtaining materials referenced in this document are provided in the ''Availability of Documents'' section.

FOR FURTHER INFORMATION CONTACT: Yen-Ju Chen, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555; telephone: 301–415–1018; email: *Yen-Ju.Chen@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Duke Energy is the holder of Renewed Facility Operating Licenses No. NPF–9 and NPF–17, which authorize operation of the McGuire Nuclear Plant, Units 1 and 2, in Huntersville, North Carolina, pursuant to part 50 of title 10 of the *Code of Federal Regulations* (10 CFR), ''Domestic Licensing of Production and Utilization Facilities.''

Consistent with 10 CFR part 72, subpart K, ''General License for Storage of Spent Fuel at Power Reactor Sites,'' a general license is issued for the storage of spent fuel in an ISFSI at power reactor sites to persons authorized to possess or operate nuclear power reactors under 10 CFR part 50. Duke Energy is authorized to operate nuclear power reactors under 10 CFR part 50 and holds a 10 CFR part 72 general license for storage of spent fuel at the McGuire Nuclear Station ISFSI. Under the terms of the general license, Duke Energy stores spent fuel at its ISFSI using the NAC MAGNASTOR® System in accordance with CoC No. 1031, Amendment No. 7.

II. Request/Action

By a letter dated September 12, 2019 (ADAMS Accession No. ML19270E395), and supplemented on February 3, 2020 (ADAMS Accession No. ML20052D934), and June 15, 2020 (ADAMS Accession No. ML20178A548), Duke Energy requested an exemption from the requirements of 10 CFR 72.212(b)(3), 72.212(b)(5)(i), and 72.212(b)(11) that require Duke Energy to comply with the terms, conditions, and specifications of the CoC No. 1031, Amendment No. 7 (ADAMS Accession No. ML17013A481). If approved, Duke Energy's exemption request would accordingly allow Duke Energy to maintain MAGNASTOR® Cask 0FCTKN045 in a storage condition where the helium density is above the range specified in CoC No. 1031, Amendment No. 7, TS 3.1.1.

On June 4, 2018, then-recently loaded MAGNASTOR® Cask 0FCTKN045 was transported to the McGuire Nuclear Station ISFSI storage pad area. Subsequently, Duke Energy reviewed technical details of the completed

loading procedure and noticed that during the helium backfill process, the two helium mass flow meters for MAGNASTOR® Cask 0FCTKN045 measured significantly different volumes. Further review revealed the cask helium density within MAGNASTOR® Cask 0FCTKN045 exceeded the helium density range specified in CoC No. 1031, Amendment No. 7, TS 3.1.1, Table A3–1, prior to the transport operations. In addition, the TS 3.1.1 corresponding ''Required Actions and Completion Times'' were not performed prior to transport operations, as specified.

Duke Energy conducted an investigation in accordance with the TS Required Action B.1 and completed an analysis as part of the corrective actions per TS Required Action B.2. Duke Energy concluded, for all MAGNASTOR® modes of operation, that Cask 0FCTKN045 is in a safe configuration for continued operation. Duke Energy's analysis concluded that the final helium density for MAGNASTOR® Cask 0FCTKN045 is outside the allowed range of 0.694–0.802 grams/liter specified in CoC No. 1031, Amendment No. 7, TS LCO 3.1.1, Table A3–1, ''Helium Mass Per Unit Volume for MAGNASTOR [transportable storage canister] (TSC),'' and it constitutes a nonconformance with the terms, conditions, and specifications of MAGNASTOR® System CoC No. 1031, Amendment No. 7. The NRC staff has addressed the inspection and enforcement aspects of this nonconformance separately from this exemption request.

III. Discussion

Pursuant to 10 CFR 72.7, the Commission may, upon application by any interested person or upon its own initiative, grant such exemptions from the requirements of the regulations of 10 CFR part 72 as it determines are authorized by law and will not endanger life or property or the common defense and security and are otherwise in the public interest.

Authorized by Law

This exemption would allow Duke Energy to maintain MAGNASTOR® Cask 0FCTKN045 at its McGuire Nuclear Station ISFSI in a storage condition where the helium density is above the range specified in CoC No. 1031, Amendment No. 7, TS 3.1.1. The provisions in 10 CFR part 72 from which Duke Energy is requesting exemption require the licensee to comply with the terms, conditions, and specifications of the CoC for the approved cask model it uses. Section 72.7 allows the NRC to grant exemptions from the requirements of 10 CFR part 72. Issuance of this exemption is consistent with the Atomic Energy Act of 1954, as amended, and is not otherwise inconsistent with NRC's regulations or other applicable laws. Therefore, the exemption is authorized by law.

Will Not Endanger Life or Property or the Common Defense and Security

This exemption would allow Duke Energy to maintain MAGNASTOR® Cask 0FCTKN045 at the McGuire Nuclear Station ISFSI in a storage condition where the helium density is above the range specified in CoC No. 1031, Amendment No. 7, TS 3.1.1. The requested exemption is not related to any aspect of the physical security or defense of the McGuire Nuclear Station ISFSI, therefore granting the exemption would not result in any potential impacts to common defense and security. As detailed in the safety evaluation below, the NRC staff has determined that under the requested exemption, the storage system will continue to meet the safety requirements of 10 CFR part 72 and the offsite dose limits of 10 CFR part 20 and, therefore, will not endanger life or property.

Safety Evaluation

The MAGNASTOR® System has been approved for storage of spent fuel under the conditions of CoC No. 1031. The cask under consideration for exemption (0FCTKN045) was loaded under CoC No. 1031, Amendment No. 7. The requested exemption does not change the fundamental design, components, contents, or safety features of the storage system. The NRC staff has evaluated the potential safety impacts of granting the exemption, as applicable, in the areas of structural integrity, thermal performance, and confinement capability. The evaluation and resulting conclusions are presented below.

Structural Review for the Requested Exemption: The TSC contained in the NAC MAGNASTOR® is required by the MAGNASTOR® TS to be within a specific helium density range of 0.694–0.802 grams/liter while maintaining internal pressures within evaluated pressure limits for normal, off-normal, and accident conditions. The internal pressure limits of the TSC with a helium density range of 0.694–0.802 grams/liter are provided in the MAGNASTOR® Final Safety Analysis Report (FSAR), Revision 6 (ADAMS Accession No. ML20196L776) as 110 psig, 130 psig, and 250 psig for normal, off-normal, and accident conditions, respectively.

In June 2018, Duke Energy found that the TSC contained in the MAGNASTOR® Cask 0FCTKN045 is filled with a helium density up to 1.082 grams/liter, which is higher than the helium density specified in the TS. As a result, Duke Energy recalculated the internal pressures of the TSC due to the helium density of 1.082 grams/liter using the same method described in the MAGNASTOR® FSAR, Revision 6. The new internal pressures of the TSC were found to be 142.1 psig, 158 psig, and 265 psig for normal, off-normal, and accident conditions, respectively. Using these new internal pressures, Duke Energy calculated new component stress intensities at the most critical cross section (where it has the lowest reported factor of safety) in the TSC to demonstrate the adequacy of the TSC's structural design under normal, off-normal, and accident conditions.

Duke Energy used the results of the ANSYS finite element (FE) structural analysis and a linear superposition of hand calculations to calculate component stresses in the TSC. The ANSYS FE analysis and its results were previously reviewed and accepted by the staff, and they are provided in the MAGNASTOR® FSAR, Revision 6. Based on the calculated stresses at the critical location of the TSC from the previous ANSYS FE analysis, the new stresses at the same critical location of the TSC were recalculated by: (i) Adding the induced stresses due to the increased pressures from the helium density increase, and (ii) subtracting the reduced stresses due to the decreased weight of the TSC. For the second factor regarding the stress reduction from the weight of the TSC, Duke Energy stated that the actual weight of the TSC is 77,000 lbs, while the weight of the TSC in the MAGNASTOR® FSAR, Revision 6 that was used as a bounding weight in the previous ANSYS FE analysis was 90,000 lbs. The staff reviewed the methodology used to calculate the revised stresses of the TSC and finds it acceptable because the superposition method is an acceptable approach in engineering practice and the revised calculations considered the actual weight and helium density.

Using the methodology described above, Duke Energy calculated component stresses and stress intensities at the critical location of the TSC and provided the factor of safety, which is a ratio of the allowable stress intensity with respect to the actual stress intensity, for normal, off-normal, and accident conditions. The staff reviewed Duke Energy's analysis and stress calculation and finds that the results of the stress calculation show

that all calculated factors of safety are greater than 1.0, which meets the design criteria for the TSC specified in the MAGNASTOR® FSAR, Revision 6. Revision 6 uses the design criteria required by the American Society of Mechanical Engineers (ASME) Boiler and Pressure Vessel Code (B&PV) Division I, Section III, Subsection NB. Thus, the staff determines that Duke Energy's stress calculation and its results are acceptable.

The staff concludes that, with the helium density higher than that specified in the TS, the design of the TSC continues to meet the design criteria of the ASME B&PV Code, as specified in the MAGNASTOR® FSAR, Revision 6. The TSC is designed to accommodate the combined loads (*i.e.,* dead weight, internal pressure, handling load, and impacts from natural phenomena) in normal, off-normal, and accident conditions with an adequate margin of safety. The total stresses at the critical location of the TSC under the combined loads during normal, off-normal, accident conditions are acceptable and are found to be within the limits in the ASME B&PV Code, as specified in the MAGNASTOR® FSAR Revision 6. Therefore, the staff finds that the MAGNASTOR® Cask 0FCTKN045 continues to maintain its structural integrity and meet the structural requirements of 10 CFR part 72 and the offsite dose limits of 10 CFR part 20.

Confinement Review for the Requested Exemption: According to the MAGNASTOR® System FSAR Revision 5 (ADAMS Accession No. ML17132A265), the confinement boundary includes a lid welded consistent with Interim Staff Guidance-18, ''The Design and Testing of Lid Welds on Austenitic Stainless Steel Canisters as the Confinement Boundary for Spent Fuel Storage'' (ADAMS Accession No. ML082750469). The remaining confinement boundary is tested to a ''leaktight'' criteria per the American National Standard Institute N14.5 standard. Duke Energy stated in its exemption request that the increased helium pressure within the TSC was used to compute updated factors of safety due to revised stress intensities. The calculations were updated for the most critical cross sections for the bounding load cases of each of the four service levels evaluated in the design basis MAGNASTOR® TSC structural evaluation. The service levels are taken from the ASME B&PV Code, and correspond to different conditions of operation. Duke Energy stated that the updated factors of safety for Service Level A, Service Level B, Service Level C, and Service Level D conditions were greater than one. Therefore, Duke Energy determined that MAGNASTOR® Cask 0FCTKN045 is safe because it continues to meet the structural criteria used to evaluate the MAGNASTOR® system.

The NRC staff reviewed the exemption request and concludes that the cask confinement performance is not affected by the increased helium pressure because, according to Duke Energy's analysis and the staff's structural evaluation, the integrity of the TSC is maintained and, therefore, there would be no release from the canister.

The NRC staff finds that the confinement function of MAGNASTOR® Cask 0FCTKN045, loaded under CoC No. 1031, Amendment No. 7, addressed in the exemption request remains in compliance with 10 CFR 72.236(d) and (l) and the offsite dose limits of 10 CFR part 20.

Thermal Review for the Requested Exemption: According to Duke Energy's analysis in the exemption request, the higher helium density (1.082 g/L) and pressure of MAGNASTOR® Cask 0FCTKN045 have a positive effect on the thermal performance of the vertical-oriented TSC confining the spent fuel. In addition, in the February 2020 submittal (ADAMS Accession No. ML20052D934), Duke Energy noted that MAGNASTOR® Cask 0FCTKN045 has a decay heat load of less than 30 kW which is less than the design basis heat load for the MAGNASTOR® system of 35.5 kW. Duke Energy analyzed a MAGNASTOR® canister with a 30 kW heat load and helium density of 1.082 g/L. The results were a 575 °F maximum fuel temperature, which is less than the design basis temperature (718 °F) found in Table 4.4–3 of the MAGNASTOR® System FSAR, Revision 7 (ADAMS Accession No. ML15265A419). The staff concludes that the positive effects of the higher pressure and the lower heat load in the canister would reduce the actual temperatures and increase the margin between the actual temperatures and the design temperatures.

The NRC staff reviewed the exemption request and concludes that the cask thermal performance is not affected by the higher helium density because it would not adversely affect thermal performance and, according to Duke Energy's analysis and the staff's structural evaluation, the integrity of the TSC is maintained. The integrity of the primary confinement boundary ensures that the spent fuel is stored in an inert environment and with unaffected heat transfer characteristics that keep peak cladding temperatures below allowable limits.

The NRC staff finds that the thermal function of MAGNASTOR® Cask 0FCTKN045, loaded under CoC No. 1031, Amendment No. 7, addressed in the exemption request remains in compliance with 10 CFR 72.236 (b) and (f) and the offsite dose limits of 10 CFR part 20.

Otherwise in the Public Interest

The proposed exemption is to maintain MAGNASTOR® Cask 0FCTKN045 at McGuire Nuclear Station ISFSI in the storage condition where the helium density is above the range specified in CoC No. 1031, Amendment No. 7, TS 3.1.1. The NRC staff notes that in this condition there will be no operations involving the opening of the storage canister, which confines the spent nuclear fuel, and there will be no operations involving the opening of the MAGNASTOR® cask.

In considering whether granting the exemption is in the public interest, the NRC staff also considered the alternative of not granting the exemption. If the exemption were not granted, in order to comply with the CoC, Duke Energy would have to unload MAGNASTOR® Cask 0FCTKN045 to restore compliance with helium density in the TS. This would subject onsite personnel to additional radiation exposure, generate additional contaminated waste, increase the risk of a possible fuel handling accident, and increase the risk of a possible heavy load handling accident.

Approving the requested exemption reduces the opportunity for a release of radioactive material compared to the alternative to the proposed action, while continuing to provide reasonable assurance of public health and safety. Therefore, the staff concludes that approving the exemption is in the public interest.

Environmental Consideration

The NRC staff also considered whether there would be any significant environmental impacts associated with the exemption. For this proposed action, the NRC staff performed an environmental assessment pursuant to 10 CFR 51.30. The environmental assessment concluded that the proposed action would not significantly impact the quality of the human environment. The NRC staff concluded that the proposed action would not result in any changes in the types or amounts of any radiological or non-radiological effluents that may be released offsite, and there is no significant increase in occupational or public radiation exposure because of the proposed

action. The Environmental Assessment and the Finding of No Significant Impact was published on July 22, 2020 (85 FR 44329).

IV. Availability of Documents

The documents identified in the following table are available to interested persons through one or more of the following methods, as indicated.

Document	ADAMS accession No.
Duke Energy Carolinas, LLC (Duke Energy), McGuire Nuclear Station, Units 1 and 2, Independent Spent Fuel Storage Installation (ISFSI), Exemption Request for NAC MAGNASTOR® Cask Loaded to Incorrect Helium Backfill Density, dated September 12, 2019.	ML19270E395.
Duke Energy Carolinas, LLC (Duke Energy), McGuire Nuclear Station, Response to NRG Request for Additional Information (RAI) Regarding NAC MAGNASTOR® Cask Loaded to Incorrect Helium Backfill Density, dated February 3, 2020.	ML20052D934.
Duke Energy Carolinas, LLC (Duke Energy), McGuire Nuclear Station, Response to NRC Request for Additional Information (RAI) Regarding NAC MAGNASTOR® Cask Loaded to Incorrect Helium Backfill Density, dated June 5, 2020.	ML20178A548.
NAC International, MAGNASTOR® Cask System, Certificate of Compliance No. 1031, Amendment No. 7 ..	ML17013A481.
Final Safety Analysis Report, Revision 6 for MAGNASTOR® Cask System	ML20196L776.
Final Safety Analysis Report, Revision 5 for MAGNASTOR® Cask System	ML17132A265.
Interim Staff Guidance, ISG–18, Revision 1, ''The Design and Testing of Lid Welds on Austenitic Stainless Steel Canisters as the Confinement Boundary for Spent Fuel Storage''.	ML082750469.
Final Safety Analysis Report, Revision 7 for MAGNASTOR® Cask System	ML15265A419.

The NRC may post materials related to this document, including public comments, on the Federal rulemaking website at *https://www.regulations.gov* under Docket ID NRC–2020–0044. The Federal rulemaking website allows you to receive alerts when changes or additions occur in a docket folder. To subscribe: (1) Navigate to the docket folder (NRC–2020–0044); (2) click the ''Sign up for Email Alerts'' link; and (3) enter your email address and select how frequently you would like to receive emails (daily, weekly, or monthly).

V. Conclusion

Based on the above considerations, the NRC has determined that, pursuant to 10 CFR 72.7, the exemption is authorized by law, will not endanger life or property or the common defense and security, and is otherwise in the public interest. Therefore, the NRC grants Duke Energy an exemption from the requirements of 10 CFR 72.212(b)(3), 72.212(b)(5)(i), and 72.212(b)(11) with respect to the ongoing storage of MAGNASTOR® Cask 0FCTKN045.

This exemption is effective upon issuance.

Dated: August 14, 2020.

For the Nuclear Regulatory Commission.

John B. McKirgan,

Chief, Storage and Transportation Branch, Division of Fuel Management, Office of Nuclear Material Safety, and Safeguards.

[FR Doc. 2020–18151 Filed 8–18–20; 8:45 am]

BILLING CODE 7590–01–P

PEACE CORPS

Information Collection Request; Submission for OMB Review

AGENCY: Peace Corps.

ACTION: 60-Day notice and request for comments.

SUMMARY: The Peace Corps will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval. The purpose of this notice is to allow 60 days for public comment in the **Federal Register** preceding submission to OMB. We are conducting this process in accordance with the Paperwork Reduction Act of 1995.

DATES: Submit comments on or before October 19, 2020.

ADDRESSES: Comments should be addressed to Virginia Burke, FOIA/Privacy Act Officer. Virginia Burke can be contacted by email at *pcfr@peacecorps.gov.* Email comments must be made in text and not in attachments.

FOR FURTHER INFORMATION CONTACT: Virginia Burke at the Peace Corps address above.

SUPPLEMENTARY INFORMATION:

Title: Onboarding Portal for Peace Corps Volunteer Applicants.

OMB Control Number: 0420–0563.

Type of Request: Revision.

Affected Public: Individuals.

Form Number: PC–2174.

Respondents Obligation to Reply: Voluntary.

Respondents: Individuals.

Burden to the Public:

Estimated burden (hours) of the collection of information:

a. *Number of respondents:* 5000.

b. *Frequency of response:* one time.

c. *Completion time:* 60 minutes.

d. *Annual burden hours:* 5000 hours.

General Description of Collection: The Peace Corps uses the Onboarding Portal to collect essential administrative information from invitees for use during Peace Corps Volunteer service, including such information as first, middle and last name, birthdate, Social Security number, primary contact information, designated emergency contact names an contact information, legal history updates, direct deposit information associated with a bank account, student loan history, and life insurance designations. The information is used by the Peace Corps to establish specific services for invitees for the purposes of supporting the Peace Corps Volunteer during service.

Request for Comment: Peace Corps invites comments on whether the proposed collections of information are necessary for proper performance of the functions of the Peace Corps, including whether the information will have practical use; the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the information to be collected; and, ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

This notice is issued in Washington, DC, on August 14, 2020.

Virginia Burke,

FOIA/Privacy Act Officer, Management.

[FR Doc. 2020–18146 Filed 8–18–20; 8:45 am]

BILLING CODE 6051–01–P

OFFICE OF PERSONNEL MANAGEMENT

Submission for Review: 3206–0233, Civil Service Retirement System Survivor Annuitant Express Pay Application for Death Benefits, RI 25–51

AGENCY: Office of Personnel Management.

ACTION: 30-Day notice and request for comments.

SUMMARY: The Retirement Services, Office of Personnel Management (OPM) offers the general public and other Federal agencies the opportunity to comment on a revised information collection request (ICR), Civil Service Retirement System Survivor Annuitant Express Pay Application for Death Benefits, RI 25–51.

DATES: Comments are encouraged and will be accepted until September 18, 2020.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW, Washington, DC 20503, Attention: Desk Officer for the Office of Personnel Management or sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: A copy of this information collection, with applicable supporting documentation, may be obtained by contacting the Retirement Services Publications Team, Office of Personnel Management, 1900 E Street NW, Room 3316–L, Washington, DC 20415, Attention: Cyrus S. Benson, or sent via electronic mail to *Cyrus.Benson@opm.gov* or faxed to (202) 606–0910 or via telephone at (202) 606–4808.

SUPPLEMENTARY INFORMATION: As required by the Paperwork Reduction Act of 1995, (Pub. L. 104–13, 44 U.S.C. chapter 35) as amended by the Clinger-Cohen Act (Pub. L. 104–106), OPM is soliciting comments for this collection. The information collection (OMB No. 3206–0233) was previously published in the **Federal Register** on March 23, 2020, at 85 FR 16393, allowing for a 60-day public comment period. No comments were received for this collection. The purpose of this notice is to allow an additional 30 days for public comments. The Office of Management and Budget is particularly interested in comments that:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
3. Enhance the quality, utility, and clarity of the information to be collected; and
4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

RI 25–51 is used by the Civil Service Retirement System solely to pay benefits to the widow(er) of an annuitant. This application is intended for use in immediately authorizing payments to an annuitant's widow or widower, based on the report of death, when our records show the decedent elected to provide benefits for the applicant.

Analysis

Agency: Retirement Operations, Retirement Services, Office of Personnel Management.

Title: Civil Service Retirement System Survivor Annuitant Express Pay Application for Death Benefits.

OMB Number: 3206–0233.

Frequency: On occasion.

Affected Public: Individual or Households.

Number of Respondents: 34,800.

Estimated Time per Respondent: 30 minutes.

Total Burden Hours: 17,400 hours.

Office of Personnel Management.

Alexys Stanley,

Regulatory Affairs Analyst.

[FR Doc. 2020–18053 Filed 8–18–20; 8:45 am]

BILLING CODE 6325–38–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:* August 19, 2020.

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 August 12, 2020, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & First-Class Package Service Contract 157 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2020–219, CP2020–247.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2020–18179 Filed 8–18–20; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* August 19, 2020.

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 August 3, 2020, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Contract 644 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2020–207, CP2020–235.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2020–18185 Filed 8–18–20; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—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:* August 19, 2020.

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 August 7, 2020, it filed with the Postal Regulatory Commission a *USPS Request to Add First-Class Package Service Contract 111 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2020–213, CP2020–241.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2020–18191 Filed 8–18–20; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express 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:* August 19, 2020.

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 August 12, 2020, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express Contract 82 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2020–220, CP2020–248.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2020–18180 Filed 8–18–20; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* August 19, 2020.

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 August 11, 2020, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Contract 649 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2020–217, CP2020–245.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2020–18178 Filed 8–18–20; 8:45 am]

BILLING CODE 7710–12–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:* August 19, 2020.

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 August 3, 2020, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & First-Class Package Service Contract 154 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2020–208, CP2020–236.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2020–18186 Filed 8–18–20; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* August 19, 2020.

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 August 5, 2020, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Contract 646 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2020–210, CP2020–238.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2020–18188 Filed 8–18–20; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* August 19, 2020.

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 August 10, 2020, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Contract 648 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2020–215, CP2020–243.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2020–18176 Filed 8–18–20; 8:45 am]

BILLING CODE 7710–12–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:* August 19, 2020.

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 August 7, 2020, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & First-Class Package Service Contract 155 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2020–211, CP2020–239.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2020–18189 Filed 8–18–20; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* August 19, 2020.

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 August 7, 2020, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Contract 647 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2020–214, CP2020–242.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2020–18175 Filed 8–18–20; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* August 19, 2020.

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 August 5, 2020, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Contract 645 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2020–209, CP2020–237.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2020–18187 Filed 8–18–20; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express 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:* August 19, 2020.

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 August 11, 2020, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express Contract 81 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2020–216, CP2020–244.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2020–18177 Filed 8–18–20; 8:45 am]

BILLING CODE 7710–12–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:* August 19, 2020.

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 August 7, 2020, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & First-Class Package Service Contract 156 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2020–212, CP2020–240.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2020–18190 Filed 8–18–20; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–89540; File No. SR-CboeEDGX–2020–039]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Fee Schedule

August 13, 2020.

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 August

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

3, 2020, Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') 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

Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') is filing with the Securities and Exchange Commission (''Commission'') a proposed rule change to amend the fee schedule. 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://markets.cboe.com/us/options/regulation/rule_filings/edgx/*), 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

The Exchange proposes to amend its fee schedule in connection with its Retail Volume Tiers.

The Exchange first notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. More specifically, the Exchange is only one of 13 registered equities exchanges, as well as a number of alternative trading systems and other off-exchange venues that do not have similar self-regulatory responsibilities under the Exchange Act, to which market participants may direct their order flow. Based on publicly available information, no single registered equities exchange has more than 20% of the market share.[4] Thus, in such a low-concentrated and highly competitive market, no single equities exchange possesses significant pricing power in the execution of order flow.

The Exchange in particular operates a ''Maker-Taker'' model whereby it pays credits to members that add liquidity and assesses fees to those that remove liquidity. The Exchange's Fees Schedule sets forth the standard rebates and rates applied per share for orders that provide and remove liquidity, respectively. Particularly, for securities at or above $1.00, the Exchange provides a standard rebate of $0.0017 per share for orders that add liquidity and assesses a fee of $0.0027 per share for orders that remove liquidity, and for securities below $1.00, the Exchange provides a standard rebate of $0.00003 per share for orders that add liquidity and assesses a standard fee of 30% of dollar value per share for orders that remove liquidity. The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow, or discontinue to reduce use of certain categories of products, in response to fee changes. Accordingly, competitive forces constrain the Exchange's transaction fees, and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable.

In response to the competitive environment, the Exchange also offers tiered pricing which provides Members opportunities to qualify for higher rebates or reduced fees where certain volume criteria and thresholds are met. Tiered pricing provides incremental incentives for Members to strive for higher or different tier levels by offering increasingly higher discounts or enhanced benefits for satisfying increasingly more stringent criteria or different criteria. Pursuant to footnote 3 of the fee schedule, the Exchange currently offers Retail Volume Tiers which provide Retail Member Organizations (''RMOs'')[5] an opportunity to receive an enhanced rebate from the standard rebate for Retail Orders[6] that add liquidity (*i.e.,* yielding fee code ''ZA''[7]). Currently, the Retail Volume Tiers offer three levels of criteria difficulty and incentive opportunities in which RMOs may qualify for enhanced rebates for Retail Orders. The tier structures are designed to encourage RMOs to increase their order flow in order to receive an enhanced rebate on their liquidity adding orders, and the Exchange now proposes to amend existing Retail Volume Tier 2 in footnote 3 of the fee schedule and renumber it to Retail Volume Tier 3. Additionally the Exchange proposes to renumber existing Retail Volume Tier 3 to Retail Volume Tier 2.

Currently, Retail Volume Tier 2 provides a rebate of $0.0037 per share to RMOs that add a Retail Order Average Daily Volume (''ADV'')[8] (*i.e.,* yielding fee code ZA) of equal to or greater than 0.50% of the Total Consolidated Volume (''TCV'').[9] Now, the Exchange proposes to increase the rebate to $0.0038 per share. The proposed criteria under existing Retail Volume Tier 2 is designed to encourage RMOs to increase retail order flow on the Exchange. The Exchange notes that the proposed Retail Volume Tier 3 is available to all RMOs and is competitively achievable for all RMOs that submit liquidity adding retail order flow, in that, all firms that submit the requisite liquidity adding retail order flow could compete to meet the tier. Additionally, the Exchange proposes to renumber existing Retail Volume Tier 3 to Retail Volume Tier 2, and renumber the amended Retail Volume Tier 2 to Retail Volume Tier 3. Such renumbering will provide the Retail Volume Tiers in order from smallest rebate to largest rebate, which is consistent with the organization of the Exchange's Fee Schedule.

The Exchange believes the proposed opportunity to receive an enhanced rebate on qualifying Retail Orders incentivizes an increase in overall order flow to the Exchange. It provides liquidity adding RMOs on the Exchange a further incentive to contribute to a deeper, more liquid market, and liquidity executing Members on the Exchange a further incentive to increase transactions and take execution opportunities provided by such increased liquidity, together providing for overall enhanced price discovery and price improvement opportunities on the Exchange. As such, this benefits all Members by contributing towards a robust and well-balanced market ecosystem.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with

[4] *See* Cboe Global Markets, U.S. Equities Market Volume Summary, Month-to-Date (July 29, 2020), available at *https://markets.cboe.com/us/equities/market_statistics/*.

[5] A ''Retail Member Organization'' or ''RMO'' is a Member (or a division thereof) that has been approved by the Exchange under this Rule to submit Retail Orders. *See* EDGX Rule 11.21(a)(1).

[6] A ''Retail Order'' is an agency or riskless principal order that meets the criteria of FINRA Rule 5320.03 that originates from a natural person and is submitted to the Exchange by a Retail Member Organization, provided that no change is made to the terms of the order with respect to price or side of market and the order does not originate from a trading algorithm or any other computerized methodology. *See* EDGX Rule 11.21(a)(2).

[7] Appended to Retail Orders that add liquidity to EDGX and offered a rebate of $0.0032 per share.

[8] ADV means average daily volume calculated as the number of shares added to, removed from, or routed by, the Exchange, or any combination or subset thereof, per day. ADV is calculated on a monthly basis.

[9] TCV means total consolidated volume calculated as the volume reported by all exchanges and trade reporting facilities to a consolidated transaction reporting plan for the month for which the fees apply.

the objectives of Section 6 of the Act,[10] in general, and furthers the objectives of Section 6(b)(4),[11] in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Members and issuers and other persons using its facilities. The Exchange also believes that the proposed rule change is consistent with the objectives of 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, and, particularly, is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

As described above, the Exchange operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. The proposed rule change reflects a competitive pricing structure designed to incentivize market participants to direct their order flow to the Exchange, which the Exchange believes would enhance market quality to the benefit of all Members.

In particular, the Exchange believes the proposed amendment is reasonable because it provides an opportunity for RMOs to receive an enhanced rebate on qualifying orders by means of liquidity adding orders and removing or Retail Orders. The Exchange notes that relative volume-based incentives and discounts have been widely adopted by exchanges,[13] including the Exchange,[14] and are reasonable, equitable and non-discriminatory because they are open to all RMOs on an equal basis and provide additional benefits or discounts that are reasonably related to (i) the value to an exchange's market quality and (ii) associated higher levels of market activity, such as higher levels of liquidity provision and/or growth patterns. Additionally, as noted above, the Exchange operates in a highly competitive market. 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 maker-taker 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. These competing pricing schedules, moreover, are presently comparable to those that the Exchange provides, including the pricing of comparable tiers.[15]

Moreover, the Exchange believes the proposed amendment is reasonable because it is designed to encourage overall order flow, that is, both adding and removing orders as a result of the proposed amendment to proposed Retail Volume Tier 3. Indeed, the Exchange notes that greater add volume order flow provides for deeper, more liquid markets and execution opportunities, and greater remove volume order flow increases transactions on the Exchange, which incentivizes liquidity providers to submit additional liquidity and execution opportunities, thus, providing an overall increase in price discovery and transparency on the Exchange. Also, an increase in Retail Order flow, which generally are submitted in smaller sizes, tends to attract Market-Makers, as smaller size orders are easier to hedge. Increased Market-Maker activity facilitates tighter spreads, signaling additional corresponding increase in order flow from other market participants, which contributes towards a robust, well-balanced market ecosystem. Increased overall order flow benefits all investors by deepening the Exchange's liquidity pool, potentially providing even greater execution incentives and opportunities, offering additional flexibility for all investors to enjoy cost savings, supporting the quality of price discovery, promoting market transparency and improving investor protection.

The Exchange believes that the proposal represents an equitable allocation of rebates and is not unfairly discriminatory because all RMOs will continue to be eligible for proposed Retail Volume Tier 3. The proposed tier is designed as an incentive to any and all RMOs interested in meeting the tier criteria to submit additional adding and removing, or Retail, order flow to the Exchange. RMOs will have the opportunity to submit the requisite order flow and will receive the applicable enhanced rebate if the tier criteria is met. The Exchange additionally notes that while the proposed Retail Volume tier is applicable only to RMOs, the Exchange does not believe this application is discriminatory as the Exchange offers similar rebates to non-RMO order flow.[16]

Without having a view of activity on other markets and off-exchange venues, the Exchange has no way of knowing whether this proposed rule change would definitely result in any RMOs qualifying for the proposed amended tier. While the Exchange has no way of predicting with certainty how the proposed change will impact RMO activity, the Exchange anticipates that at least two RMOs will be able to compete for and reach proposed Retail Volume Tier 3. The Exchange also notes that the proposed amended tier will not adversely impact any RMO's pricing or their ability to qualify for other rebate tiers. Rather, should a RMO not meet the criteria for proposed Retail Volume Tier 3, the RMO will merely not receive the corresponding proposed enhanced rebate. Furthermore, the proposed rebate would uniformly apply to all RMOs that meet the required criteria.

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 intramarket or intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. Rather, as discussed above, the Exchange believes that the proposed change would encourage the submission of additional order flow to a public exchange, thereby promoting market depth, execution incentives and enhanced execution opportunities, as well as price discovery and transparency for all Members. As a

[10] 15 U.S.C. 78f.

[11] 15 U.S.C. 78f(b)(4).

[12] 15 U.S.C. 78f.(b)(5).

[13] *See e.g.,* Nasdaq PSX Price List, Rebate to Add Displayed Liquidity (Per Share Executed), which provides rebates to members for adding displayed liquidity over certain thresholds of TCV ranging between $0.0020 and $0.0026; Cboe BZX U.S. Equities Exchange Fee Schedule, Footnote 1, Add Volume Tiers, which provides similar incentives for liquidity adding orders and offers rebates ranging between $0.0018 and $0.0032; Nasdaq Price List, Rebate to Add Displayed Designated Retail Liquidity, which offer rebates of $0.00325 and $0.0033 for Add Displayed Designated Retail Liquidity.

[14] *See generally,* Cboe EDGX U.S. Equities Exchange Fee Schedule, Footnote 1, Add Volume Tiers, which provides incentives for ADV/ADAV order flow as a percentage of TCV and for criteria based on certain other threshold components (*i.e.* Step-Up Add TCV, average OCV, and AIM and Customer orders); and Footnote 3, Retail Volume Tiers, which provides incentives for Retail Step-Up Add TCV and Retail Order ADV as a percentage of TCV.

[15] *See supra* note 13.

[16] Such as the 15 other Add Volume Tiers and the Tape B Volume Tier which provide opportunities to all Members to submit the requisite order flow to receive an enhanced rebate.

result, the Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering competition among orders, which promotes ''more efficient pricing of individual stocks for all types of orders, large and small.'' [17]

The Exchange believes the proposed rule change does not impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. Particularly, the proposed change applies to all RMOs equally in that all RMOs are eligible for the proposed amended tier, have a reasonable opportunity to meet the tier's criteria and will all receive the proposed rebate if such criteria is met. As indicated above, the Exchange does not believe that offering RMOs, specifically, opportunities to meet certain tier criteria for enhanced rebates imposes a burden on intramarket competition as the Exchange offers many similar rebate opportunities for non-RMOs.[18] Overall, the proposed change is designed to attract additional order flow to the Exchange. The Exchange believes that the proposal to increase the proposed Retail Volume Tier 3 rebate would incentivize market participants to direct liquidity removing order flow to the Exchange and, as a result, increase execution opportunities, which would further incentivize the provision of liquidity and continued order flow and improve price transparency on the Exchange. Greater overall order flow and pricing transparency benefits all market participants on the Exchange by generally providing more trading opportunities, enhancing market quality, and continuing to encourage Members to send orders, thereby contributing towards a robust and well-balanced market ecosystem, which benefits all market participants.

Next, the Exchange believes the proposed rule change does not impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. As previously discussed, the Exchange operates in a highly competitive market. Members have numerous alternative venues that they may participate on and direct their order flow, including 12 other equities exchanges and off-exchange venues and alternative trading systems. Additionally, the Exchange represents a small percentage of the overall market. Based on publicly available information, no single equities exchange has more than 20% of the market share.[19] Therefore, no exchange possesses significant pricing power in the execution of order flow. Indeed, participants can readily choose to send their orders to other exchange and off-exchange venues if they deem fee levels at those other venues to be more favorable. Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [20] The fact that this market is competitive has also 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'. . . .''.[21] Accordingly, the Exchange does not believe its proposed fee change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from Members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A) [22] of the Act and subparagraph (f)(2) of Rule 19b–4 [23] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange. At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) [24] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR-CboeEDGX–2020–039 on the subject line.

Paper Comments

- Send paper comments in triplicate to: Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR-CboeEDGX–2020–039. 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

[17] Securities Exchange Act Release No. 51808, 70 FR 37495, 37498–99 (June 29, 2005) (S7–10–04) (Final Rule).

[18] *See supra* note 14.

[19] *See supra* note 6 [sic].

[20] See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

[21] Net Coalition 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).

[22] 15 U.S.C. 78s(b)(3)(A).

[23] 17 CFR 240.19b–4(f)(2).

[24] 15 U.S.C. 78s(b)(2)(B).

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–CboeEDGX–2020–039 and should be submitted on or before September 9, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[25]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–18098 Filed 8–18–20; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–89543; File No. SR–CBOE–2020–071]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing of a Proposed Rule Change To Amend the Fifth Amended and Restated Bylaws of the Exchange's Parent Corporation, Cboe Global Markets, Inc.

August 13, 2020.

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 July 30, 2020, Cboe Exchange, Inc. (the ''Exchange'' or ''Cboe Options'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe Exchange, Inc. (the ''Exchange'' or ''Cboe Options'') proposes to amend the Fifth Amended and Restated Bylaws (the ''Parent Bylaws'') of its parent corporation, Cboe Global Markets, Inc. (''Cboe'' or the ''Parent''). The text of the proposed amendments to the Parent Bylaws 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The proposed rule change amends the Parent Bylaws to improve the governance processes of Cboe, which is organized under the laws of the State of Delaware, and to make certain provisions more consistent with the Delaware General Corporation Law (''DGCL''). The proposed rule change also makes clarifying and cleanup changes to the Parent Bylaws.

Proposed Changes to Article 2—Stockholders

The majority of the proposed changes are being made to amend Section 2.11 (Nomination of Directors) and Section 2.12 (Notice of Business at Annual Meetings) and are generally designed to provide the Board with the most information and advance notice possible in connection with business and nominations at annual and special meetings. Additionally, the Exchange notes the proposed changes reflect the most up-to-date disclosure requirement practices. The proposed changes also combine the existing separate provisions for director nominations and stockholder proposals into one provision. Particularly, the proposed rule change combines current Sections 2.11 and 2.12 into one provision: Proposed Section 2.11 titled ''Notice of Business and Nomination of Directors at Meetings of Stockholders.''[3] Specifically, the proposed rule change delineates proposed Section 2.11 into paragraph (a) governing notice requirements for annual meetings, paragraph (b) governing notice requirements for special meetings,[4] and paragraph (c), which provides for other general procedures and practices in connection with notices. The proposed delineation does not alter the process or definition of either type of meeting, but instead provides for significantly more detailed written notice requirements as well as updates to the manner and timeliness of notices.

First, the proposed change to Section 2.11(a)(i) relocates the provisions regarding ''properly brought'' business from current Section 2.12, and streamlines such provisions to clearly state that the only business that will be conducted at an annual meeting of the stockholders is business that has properly been brought before the meeting and specifies to be ''properly brought'' such business must be included in the Corporation's notice of the meeting and brought pursuant to Rule 14a–8 under the Securities Exchange Act of 1934, (the ''Exchange Act'') (or any successor provision of law) and included in the Corporation's properly brought business. It also proposes to specify the a precise time that the notices must be made by (*i.e.,* delivered to or mailed and received by the Secretary of the Corporation), which is not later than 5:00 p.m. Eastern Time on the 90th day nor earlier than the 120th day (which are the time frames currently in place) prior to such annual meeting.

Next, the proposed rule change adds greater detail regarding the requirements for proper written notice. Particularly, for notice for stockholder proposals for business other than nominations, (proposed Section 2.11(a)(iii)(A)), the proposed rule change provides that such notice must essentially set forth the same information that would be disclosed in a proxy statement, including:

- A reasonably brief description of the business desired to be brought

[25] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The proposed rule change also updates the subsequent section numbering (current 2.13 through 2.16) to reflect this change (proposed 2.12 through 2.15).

[4] *See* Section 2.3 of the Parent Bylaws for a description of Special Meetings.

before the meeting; the text of the proposal or business (including the text of any resolutions proposed for consideration and, in the event that such business includes a proposal to amend the Certificate of Incorporation or the Bylaws of the Corporation, the language of the proposed amendment);

• the reasons for conducting such business at the meeting; a complete and accurate description of any material interest in such business of such stockholder and any Stockholder Associated Person, individually or in the aggregate, including any anticipated benefit to the stockholder and any Stockholder Associated Person therefrom; and

• all other information relating to such proposed business that would be required to be disclosed in a proxy statement or other filing required to be made by the stockholder or any Stockholder Associated Person in connection with the solicitation of proxies in support of such proposed business pursuant to Regulation 14A under the Exchange Act.

Regarding proposed proper written notice for director nominations (proposed Section 2.11(a)(iii)(B)), the notice must include:

• The name, age, business address and residence address of such nominee, (''Proposed Nominee'') (which, the Exchange notes is currently the case);

• the principal occupation or employment of such nominee (which, the Exchange notes is currently the case)

• a completed written questionnaire with respect to the background and qualifications of such Proposed Nominee, which must be completed in a form required by the Corporation and provided to such stockholder within ten days of receiving such request;

• the Proposed Nominee's executed written consent to being named in the proxy statement for the meeting as a director nominee;

• the Proposed Nominee's completed written representation and agreement, which must be completed in a form required by the Corporation and provided to such stockholder within ten days of receiving such request. Importantly, the Proposed Nominee must represent and agree (1) to a ''Voting Commitment'' that the Proposed Nominee is not and will not become party to any agreement, arrangement or understanding with, and has not given any commitment or assurance to, any person or entity as to how such Proposed Nominee, if elected as a director, will act or vote on any issue or question (that has not been disclosed to the Corporation). or any Voting Commitment that could limit or interfere with the Proposed Nominee's ability to comply with fiduciary duties under applicable law, (2) that the Proposed Nominee is not and will not become a party to any agreement, arrangement, or understanding with any person or entity other than the Corporation with respect to any direct or indirect compensation, reimbursement, or indemnification in connection with service or action as a director that has not been disclosed to the Corporation, (3) would comply with all applicable rules of the exchange and Corporation and fiduciary duties under state law, (4) would comply with certain Articles of Incorporation with respect to activities related to any of the Exchanges, (5) intends to serve a full term if elected, and (6) will provide true and correct information in communications to the Corporation and its stockholders and will not omit material information or provide misleading information;

• a description of all direct and indirect compensation and other material monetary agreements, arrangements and understandings during the past three years, and any other material relationships; and

• any other information that would be required to be disclosed statement or other filing required to be made in connection with solicitations of proxies for election of directors in a contested election pursuant to Section 14 of the Exchange Act (which, the Exchange notes is currently the case).

As to the stockholder providing notice, any Stockholder Associated Person and any Proposed Nominee, (proposed Section 2.11(a)(iii)(C)) the proposed proper written notice must provide:

• Name and address of such person (as they appear on the Corporation's books, if applicable) (which, the Exchange notes is currently the case);

• class (which is currently the case) or series and number of shares of capital stock of the Corporation (''Shares'') which are, directly or indirectly, owned beneficially and/or of record by such person, the dates such shares were acquired and the investment intent of such acquisition;

• the name of each nominee holder for, and any pledge by such person or any number of, securities of the Corporation owned beneficially, but not of record;

• short interest, including a definition of what constitutes short interest, wherein a person shall be deemed to have a short interest in a security if such person, directly or indirectly, through any contract, arrangement, understanding, or relationship or otherwise has an opportunity to profit or share in profit derived from decreased value of the subject security;

• a description of any agreement, arrangement or understanding, whether written or oral, (including any derivative or short positions, profit interests, options, warrants, convertible securities, stock appreciation or similar rights, hedging transactions, and borrowed or loaned shares (which, the Exchange notes, is currently the case) or similar rights with an exercise or conversion privilege or a settlement payment or mechanism at a price related to any class or series of capital stock of the Corporation or with a value derived in whole or in part from the value of any class or series of capital stock of the Corporation (a ''Derivative Instrument''), in order to mitigate loss to, manage risk or benefit of share price changes for, or increase or decrease voting power with respect to Shares;

• any rights to dividends on the Shares owned beneficially by such person;

• any proportionate interest [5] in Shares or Derivative Instruments by a general or limited partnership or similar entity in which such person (1) is a general partner or beneficially owns an interest in a general partner, or (2) is the manager, managing member, or beneficially owns an interest in such management, of a limited liability company or similar entity;

• any substantial interest (including, without limitation, any existing or prospective commercial, business or contractual relationship with the Corporation), by security holdings or otherwise, in the Corporation or any of its affiliates;

• a complete and accurate description of all agreements, arrangements or understandings, written or oral, and formal or informal, between or among the stockholder providing notice and any of the Stockholder Associated Persons (collectively, the ''Stockholders''), or the Stockholders with any Proposed Nominee and any other person in connection with (1) any proxy, contract, arrangement, understanding or relationship where either of the Stockholders have the right to vote any Shares, (2) that such individuals may have reached with any stockholder of the Corporation regarding how such stockholder will vote its shares, take other action in support of any Proposed Nominee, or other action by either of the Stockholders, and (3) any other agreements that would be

[5] Interest referred to throughout the proposed stockholder proper written notice may be direct or indirect.

required to be disclosed by either of the Stockholders or any other person or entity pursuant to a Schedule 13D filed pursuant to the Exchange Act

- a complete and accurate description of any performance-related fees to which such person may be entitled as a result of any increase or decrease in the value of Shares or any Derivative Instruments;
- any investment strategy or objective of those who are not an individual and a copy of the prospectus (and other like documents);
- a complete and accurate description of any pending or threatened legal proceeding in which such person is a party or participant involving the Corporation;
- if any agreement, arrangement or understanding has been made to increase or decrease the voting power of such person with respect to any Shares; and
- any other information relating to such person that would be required to be disclosed in a proxy statement or other filing required to be made in connection with solicitations of proxies for such business or the election of any Proposed Nominee, or is otherwise required, pursuant to Section 14 of the Exchange Act.

Further, regarding proposed proper written notice, proposed Section 2.11(a)(iii)(D) simplifies the language in connection with the current requirement that the Stockholders must represent if they intend to deliver a proxy statement and/or form of proxy to holders to approve or adopt the proposed business, elect the Proposed Nominee, and/or otherwise solicit proxies or votes from stockholders in support of such proposed business or Proposed Nominee, making it easier to understand.

Proposed Section 2.11(a)(iii)(E) provides for the current requirement that the stockholder providing notice must represent that it is a holder of record of stock of the Corporation entitled to vote at such meeting and intends to appear in person, and adds that ''in person'' may be virtually, in the case of a meeting held solely by means of remote communication) or by proxy at the meeting to bring such proposed business and/or nominate one or more Proposed Nominee.

Proposed Section 2.11(a)(iii)(F) requires that proper written notice include an acknowledgment that the Corporation does not have to present the business or nomination being brought at the meeting by the stockholder proposing such, if such stockholder does not appear. The proposed rule change also adds that, in addition to the proper written notice information, the Corporation may require any Proposed Nominee to furnish certain other information as the Corporation may reasonably require to determine the eligibility or independence of a Proposed Nominee.

Proposed Section 2.11(b), which, as stated, delineates the provisions governing special meetings of stockholders, amends the procedures governing advance notice of director nominations at a special meeting called by the Board for the election of directors. Currently, notices of a special meeting must be made not less than ninety (90) days nor more than one hundred twenty (120) days prior to the anniversary date of the immediately preceding annual meeting of stockholders; provided, however, that if the annual meeting is not held within thirty (30) days before or more than seventy (70) days after such anniversary date, then such nomination shall have been delivered to or mailed and received by the Secretary not later than the close of business on the 10th day following the date on which public announcement of the annual meeting date was made. The proposed rule change updates this notice procedure to mirror the same procedural language in proposed Section 2.11(a)(ii) (maintaining the same 90- to 120-day notice requirement), but updates the timing requirements to remove the language regarding the 30-day and 70-day time frames around the anniversary date and provides that, if public announcement of the special meeting and the nominees proposed by the Board of Directors to be elected at such meeting is first made less than ninety (90) days prior to the date of the special meeting, notice must be made the tenth (10th) day following the day on which such public announcement is first made. The Exchange believes this proposed timing provision simplifies the timing requirement, making it easier to understand and follow, and also provides ample time to provide notice in advance to stockholders of any scheduled special meeting. Proposed Section 2.11(b) also provides that proper written notice of a special meeting must comply with the requirements, as proposed, laid out in Section 2.11(a)(iii).

Proposed Section 2.11(c) provides, generally, for other procedures and practices in connection with notices, as well as certain defined terms. Proposed Section 2.11(c)(i) provides that a stockholder providing notice must update any notice, if necessary, so that the information provided or required to be provided in a notice is be true and correct (A) as of the record date for determining the stockholders entitled to receive notice of the meeting and (B) as of the date that is ten business days prior to the meeting (or any postponement, adjournment or recess thereof). If an update is required to be made as of the record date for determining the stockholders entitled to receive notice of the meeting then the notice of update must be made not later than five business days after the record date for determining the stockholders entitled to receive notice of such meeting. If an update is required to be made as of the date that is ten business days prior to the meeting (or any postponement, adjournment or recess thereof), then the notice of update must be made no later than seven business days prior to the date for the meeting, if practicable, or, if not practicable, on the first practicable date prior to the meeting or any adjournment, recess or postponement thereof Proposed Section 2.11(c)(ii) provides that if any information submitted pursuant to Section 2.11 is inaccurate in any respect, such information may be deemed not to have been provided in accordance with the Parent Bylaws. As proposed, the stockholder providing the notice has an obligation to notify the Secretary in writing at the principal executive offices of the Corporation of any inaccuracy or change in any such information within two business days of becoming aware of such inaccuracy or change. Additionally, within seven days upon delivery of a written request by the Secretary, the Board of Directors (or a duly authorized committee thereof), any such stockholder is obliged to provide: (A) Written verification, reasonably satisfactory to the Board of Directors, any committee thereof or any authorized officer of the Corporation, to demonstrate the accuracy of any information submitted by the stockholder pursuant to Section 2.11, and (B) a written update of any information pursuant to Section 2.11 as of an earlier date. If the stockholder fails to provide such written verification within such period, the information as to which written verification was requested may be deemed not to have been provided in accordance with Section 2.11. Proposed Section 2.11(c)(iii) provides that a stockholder providing notice must also comply with all applicable requirements of state law and all applicable requirements of the Exchange Act and the rules and regulations thereunder, however, references to the Exchange Act and its rules and regulations will not limit the requirements applicable to stockholder proposals or director nominations

pursuant to Section 2.11. Proposed Section 2.11(c)(iv) updates current language governing failure for the proposing stockholder to appear by adding that virtual appearances are acceptable when such meeting is being held remotely, as well as the flexibility for the Corporation to waive the appearance requirement. The rule change updates this provision and adds this flexibility in light of the ongoing Covid–19 pandemic and the consequential remote working status for many companies, including Cboe. Proposed Section 2.11(c)(v) adds the definition of key terms, along with current definitions, for clarity. Specifically, the proposed rule change defines an ''affiliate'' and ''associate'' as having the respective meanings set forth in Rule 12b–2 under the Exchange Act and ''Stockholder Associated Person'' to mean: Any person who is a member of a ''group'' (used in Rule 13d–5 under the Exchange Act) with or otherwise acting in concert with such stockholder providing notice; any beneficial owner of shares of stock of the Corporation owned of record or beneficially by such stockholder (other than a stockholder that is a depositary); any person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such stockholder or such Stockholder Associated Person and beneficially owns, directly or indirectly, shares of stock of the Corporation; any person that directly, or indirectly through one or more intermediaries, controls such stockholder or any Stockholder Associated Person; and any participant (as defined in paragraphs (a)(ii)–(vi) of Instruction 3 to Item 4 of Schedule 14A, or any successor instructions) with such stockholder or other Stockholder Associated Person in respect of any proposals or nominations, as applicable.

The Exchange notes that many of the proposed rule changes to proposed Section 2.11 are consistent with the bylaws of Cboe's peer financial market/services corporations, Nasdaq, Inc. (''Nasdaq''),[6] Intercontinental Exchange (''ICE''),[7] and/or the CME Group, Inc. (''CME''),[8] including:

- The proposed disclosures required under Regulation 14A for proposed business other than director nominations; director questionnaires;
- consent to be named in the proxy statement as a director nominee;
- a Voting Commitment;
- disclosure of compensation arrangements in connection with service as a director;
- agreement to comply with applicable regulations, organizational documents and policies;
- representation of intent to serve a full term; commitment to provide true and correct facts and to not omit material facts;
- nominee disclosures for contested elections under Section 14;
- required disclosure by a proposing stockholder's 13D group members and related parties;
- disclosure of rights to dividends, short interest, interests held through controlled partnerships or LLCs, and in the Company other than Company common stock;
- disclosure of agreements/arrangements in connection with conferring proxy authority, with any other stockholder regarding voting or supporting the proposal/nominee, with increasing or decreasing voting power, and agreements required to be disclosed on Schedule 13D;
- disclosure of performance-related fees related to the Company's performance;
- disclosure of investment strategy and inclusion of prospectus/offering memorandum;
- disclosure of pending or threatened litigation;
- Special meeting provisions;
- Obligation to update and correct disclosures; and
- Express obligation to appear to present the proposal/nominee.

Additionally, the proposed rule change moves language currently in Section 2.10 providing that the number of nominees for director may not exceed the number of directors to be elected at any meeting to proposed Section 2.11(a) (annual meetings) and Section 2.11(b) (special meetings), therefore adding clarity to the updated Section 2.11 format that this provision continues to apply for both annual and special meetings. The proposed rule change to Section 2.10 also simplifies current language that provides an election may proceed if proper notice is made and received and adds language that nominations may be withdrawn on or prior to the tenth day before the date the Corporation first mails its notice of meeting for such election.

The proposed rule change also amends Section 2.1 (Place of Meetings) by removing language that requires stockholder meetings to be held at the principal place of business of the Company if no location is designated. The Exchange believes that it is appropriate for the Board to retain both control and flexibility over the location and timing of stockholder meetings. The proposed rule change amends Section 2.2 (Annual Meeting) and Section 2.3 (Special Meeting) to provide that the Board may postpone, reschedule or cancel any previously-scheduled annual meeting or special meeting, respectively. The proposed rule change also updates Section 2.7 (Adjournments) to provide that only the presiding person of a stockholder meeting can adjourn the meeting in the absence of a quorum. The proposed changes are intended to provide the Board the flexibility to postpone, recess, reschedule or cancel a stockholder meeting. The Exchange also notes that the proposed rule changes to Sections 2.2, 2.3, and 2.7 are consistent with the bylaws of Cboe's peer corporation, Nasdaq.[9]

The proposed rule change also makes updates to reflect the current best corporate governance practices to certain Sections under Article 2. In particular, it updates the language in Section 2.5 (Voting List) regarding who is required to prepare the voting list. Section 2.5 currently provides that officer who has charge of the stock ledger prepares the voting list and the proposed rule change updates this to provide that the Corporation prepares the voting list. The proposed rule change is consistent with the DGCL and reflects current best practice. The proposed rule change also amends current Section 2.13 (Organization) (proposed Section 2.12), which currently states that that the Board of Directors may appoint any stockholder to act as chairman of any meeting in the absence of the Chairman of the Board, to instead provide that that the Board of Directors may appoint any director of the Corporation to act as chairman of any meeting in the absence of the Chairman of the Board. Also, current Section 2.16 (Conduct of Meetings) (proposed Section 2.15) makes certain changes to expand the procedural authority of the presiding officer of any stockholder meeting, including the right to recess and/or adjourn meetings for any or no reason, and the determination of when the polls will open and close for any given matter to be voted on at the meeting, the removal of any stockholder or individual who refuses to comply with meeting procedures, rules,

[6] *See* By-laws of Nasdaq, Inc., available at *https://listingcenter.nasdaq.com/assets/RuleBook/NASDAQ/rules/Nasdaq_Inc_Corporate_Organization_Nasdaq_Inc.pdf.*

[7] *See* Eighth Amended and Restated Bylaws of Intercontinental Exchange, Inc., available at *https://s2.q4cdn.com/154085107/files/doc_downloads/intercontinental_exchange/bylaws-eighth-amended.pdf.*

[8] *See* Fifteenth Amended and Restated Bylaws of CME Group Inc., available at *https://www.cmegroup.com/rulebook/files/CME-Bylaws.pdf.*

[9] *See supra* note 6.

or guidelines, the restrictions on the use of audio and/or video recording devices and cell phones. This is consistent with best practice and ensures that the presiding officer has the flexibility to take measures, as needed, that ensure meetings are conducted in the most appropriate manner.

Proposed Changes to Article 3—Directors

The proposed rule change amends Section 3.5 (Vacancies) to provide that that vacancies on the Board may be filled exclusively by a majority of the directors. The Exchange notes that stockholders have a common law right under Delaware law to fill director vacancies, unless the Company's Charter or Bylaws explicitly give the Board exclusive authority, therefore, the proposed change is designed to make this right exclusive to the Board. The proposed rule change is consistent with the bylaws of Cboe's peer corporations, Nasdaq and ICE.[10] The proposed rule change to Section 3.10 (Special Meetings) would allow special meetings of the Board to be called with less than 24 hours' notice. Currently, Section 3.10 requires at least 24 hours' notice to directors of special Board meetings. However, there may be circumstances that necessitate an emergency meeting of the Board with less than 24 hours' notice (*e.g.,* in relation to a pending transaction), and therefore, the proposed changes would allow notice on a shorter time frame if necessary and appropriate under the circumstances. The proposed changes to Section 3.13 (Action by Consent) updates language regarding routine filing of consents following an action by the Board. Specifically, the proposed change updates the consents to reflect the same electronic form as minutes are maintained, which is consistent with recent amendments to the DGCL, reflects current best practice.

The proposed change also adds Section 3.15 (Emergency Bylaws). Specifically, the proposed Section 3.15 provides that, notwithstanding anything to the contrary in the Certificate of Incorporation or these Bylaws, in the event there is any emergency, disaster or catastrophe, as referred to in Section 110 of the DGCL, or other similar emergency condition (each, an ''emergency''), and a quorum of the Board of Directors cannot readily be convened for action, this Section 3.15 shall apply, including:

- Any director or Chief Executive Officer, President, Chief Operating Officer, Chief Financial Officer, Treasurer or Secretary of the Corporation may call a meeting of the Board of Directors by any feasible means and with such advance notice as circumstances permit in the judgment of the person calling the meeting. Neither the business to be transacted nor the purpose of any such meeting need be specified in the notice thereof.
- One-third (⅓) of the directors shall constitute a quorum, which may in all cases act by majority vote.
- Directors may take action to appoint one or more of the director or directors to membership on any standing or temporary committees of the Board of Directors as they deem advisable. Directors may also take action to designate one or more of the officers of the Corporation to serve as directors of the Corporation while this Section 3.15 applies.
- To the extent that it considers it practical to do so, the Board of Directors shall manage the business of the Corporation during an emergency in a manner that is consistent with the Certificate of Incorporation and Bylaws. It is recognized, however, that in an emergency it may not always be practical to act in this manner and this Section 3.15 is intended to and does hereby empower the Board of Directors with the maximum authority possible under the DGCL, and all other applicable law, to conduct the interim management of the affairs of the Corporation in an emergency in what it considers to be in the best interests of the Corporation.
- No director, officer or employee acting in good faith in accordance with this Section 3.15 or otherwise pursuant to Section 110 of the DGCL shall be liable except for willful misconduct.
- This Section 3.15 shall continue to apply until such time following the emergency when it is feasible for at least a majority of the directors of the Corporation immediately prior to the emergency to resume management of the business of the Corporation.
- The Board of Directors may modify, amend or add to the provisions of this Section 3.15 in order to make any provision that may be practical or necessary given the circumstances of the emergency.
- The provisions of this Section 3.15 shall be subject to repeal or change by further action of the Board of Directors or by action of the stockholders, but no such repeal or change shall modify the provisions of paragraph (e) of this Section 3.15 with regard to action taken prior to the time of such repeal or change.

The Exchange notes that these proposed changes are largely consistent with the DGCL and are designed to allow the Board and the Corporation to continue to function in the case of an emergency, such as a pandemic or an act of terrorism. The Exchange believes the ongoing COVID–19 pandemic, as well as similar potential events, demonstrate the need for Emergency Bylaws and notes that a number of companies are adopting (or at least considering) emergency bylaws to relax Board requirements when directors may be unavailable due to emergency conditions, such as the pandemic.

Proposed Changes to Article 4—Committees

The proposed rule change to Section 4.1 (Designation of Committees) adds language that provides the Board with additional rights in their ability to designate committees and committee alternates and specifies that such committees may exercise all powers and authority of the Board in the management of the business. Specifically, the proposed language provides that the Board of Directors may designate one or more committees, each committee to consist of one or more of the directors of the Corporation. The Board of Directors may designate one or more directors as alternate members of any committee, who may replace any absent or disqualified member at any meeting of the committee. In the absence or disqualification of a member of the committee, the member or members thereof present at any meeting and not disqualified from voting, whether or not he, she or they constitute a quorum, may unanimously appoint another member of the Board of Directors to act at the meeting in place of any such absent or disqualified member. Any such committee, to the extent permitted by law and to the extent provided in the resolution of the Board of Directors, shall have and may exercise all the powers and authority of the Board of Directors in the management of the business and affairs of the Corporation, and may authorize the seal of the Corporation, if any, to be affixed to all papers which may require it. The proposed rule change provides additional detail regarding the specific authority of the Board to designate members of the committees and their general powers and authority to manage the Corporation, as well as the power invested in the voting members regarding the appointment of a member of the Board to act in a circumstance of disqualification. The proposed language is consistent with the DGCL and reflects current best practice.

The proposed rule changes to Section 4.2 (The Executive Committee) removes language that lists out specific actions or

[10] *See supra* notes 6 and 7.

matters that are not to be handled by the Executive Committee under Delaware law, including amending the Certificate of Incorporation, adopting an agreement of merger or consolidation, approving a sale, lease or exchange of all or substantially all of the Corporation's property and assets, or approval of a dissolution of the Corporation or revocation of a dissolution. The proposed change, instead, replaces this list with reference to matters under the DGCL to be submitted to stockholders for approval. The Exchange believes that the proposed change, while being consistent with the DGCL, removes ambiguous and potentially unnecessarily limiting language that lists the circumstances that could not be handled by the Executive Committee that required stockholder approval and replaces it with broader reference to the DGCL.

The proposed change to Section 4.5 (The Nominating and Governance Committee) reduces the minimum size requirement of the Nominating and Governance Committee (''N&G Committee'') from a minimum of five members to three members. This proposed rule change is intended to provide the Board additional flexibility when populating the N&G Committee and is consistent with the minimum number of members required on other Board committees.[11]

Proposed Changes to Article 8—Notices

The proposed rule change in Section 8.1 (Notices) replaces language in paragraph (e) that requires that stockholders opt-in to email notice with language that instead allows stockholders to opt-out of email notice or not receive email notice if such notice is prohibited by the DGCL. The proposed rule change also updates Section 8.2 (Electronic Notice) to reflect this change. The proposed rule change also removes the provision in Section 8.1 paragraph (c) which provides that notice may be given by messenger or overnight courier service if the delivery method does not require payment of the messenger or courier service fee to deliver the notice by the person to whom the notice is addressed. The proposed rule change then adds to paragraph (c) that notice is deemed to have been given via this method at the earlier of when the notice is received or left at the stockholder's or director's address. The proposed change is consistent with the DGCL.

Proposed Rule Changes to Article 11 (Forum for Adjudication of Disputes)

The proposed rule changes to Article 11 add clarifying provisions and additional detail regarding the exclusive forum. The proposed changes are designed to update the exclusive forum bylaw to reflect current best practices. Specifically, the proposed rule change adds that, among the existing actions listed, the Court of Chancery of the State of Delaware will be the sole and exclusive forum for any action asserting an ''internal corporate claim'' (defined in the DGCL). The proposed rule change also provides that, in the event that the Delaware Court of Chancery lacks subject matter jurisdiction over any such action or proceeding, the sole and exclusive forum for such action or proceeding shall be another state or federal court located within the State of Delaware. The proposed rule change provides that any person or entity purchasing or otherwise acquiring any interest in shares of capital stock of the Corporation is deemed to have notice of and consented to the provisions of Article 1, including exclusive personal jurisdiction in the Delaware Court or Chancery and having service of process made, even if an action (within the scope of Article 11) is filed in a court other than a court located within the State of Delaware. Additionally, the proposed rule change makes clear that the existence of any prior consent to, or selection of, an alternative forum by the Corporation shall not act as a waiver of the Corporation's ongoing consent right in Article 11 and that failure to enforce the foregoing provisions would cause the Corporation irreparable harm and the Corporation is entitled to equitable relief, including injunctive relief and specific performance, to enforce Article 11. It also clarifies that a claim may be made against the Corporation or any current or former director, officer, other employee, agent or stockholder of the Corporation, and may arise pursuant to the Certificate of Incorporation or these Bylaws, in addition to the DCGL. The proposed rule change is in line with current best practice, and, additionally, the bylaws of Cboe's peer, CME,[12] currently provide for similar language related to foreign actions and specific performance.

Finally, the proposed rule change makes non-substantive edits throughout the above listed Articles of the Parent Bylaws, including updating paragraph lettering and numbering, simplifying language in order to better align it with plain English, update the terms Board of Directors and Exchange Act to be uniform throughout the bylaws (*e.g.,* as opposed to just ''Board'', or ''Securities and Exchange Act'', and the other versions of the Act's name).

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[13] Specifically, the Exchange believes the proposed rule change is consistent with Section 6(b)(1) of the Act,[14] which provides that the Exchange be organized and have the capacity to be able to carry out the purposes of the Act and to enforce compliance by the Exchange's Trading Permit Holders and persons associated with its Trading Permit Holders with the Act, the rules and regulations thereunder, and the rules of the Exchange.

In particular, the Exchange believes the proposed changes overall are designed to improve the governance process of Cboe, as well as update the Parent Bylaws, where applicable, to reflect and track the DCGL and current best practices. Moreover, the Exchange does not believe the proposed rule changes are controversial and indeed are common among public companies, including its peers, Nasdaq, ICE and CME.

Particularly, the proposed rule changes to proposed Section 2.11 in connection with providing notice regarding business and director nominations at annual and special meetings, will enable the Exchange to continue to be organized and have the capacity to be able to carry out the purposes of the Act, because such proposed changes are generally designed to strengthen these provisions by requiring notices (including updates to notices) to disclose to the Board more detailed information than currently required. In this manner, the proposed detailed disclosure requirements would provide the Board with substantially more information by which they may make complete and informed decisions and most appropriately address business before the Board. The Exchange also believes that the proposed rule changes in connection with timely notice, including the 10 days' advanced notice of director nominations (via the required director questionnaire), procedures governing advance notice of director nominations at a special meeting, an obligation to

[11] *See e.g.,* Sections 4.3 and 4.4 of the Parent Bylaws.

[12] *See supra* note 8.

[13] 15 U.S.C. 78f(b).

[14] 15 U.S.C. 78f(b)(1).

update and correct the notice up to 7 days prior to a meeting, and updated timing regarding the 10-day notice of a special meeting less than 90 days from the scheduled meeting, will allow the Board the appropriate time needed to consider and prepare to address all business, nominations, and other issues to be presented before it. As such, the proposed rule changes will ensure that the Board is able to continue to oversee the orderly operation of the corporation, including the Exchange, in a manner the it deems most appropriate. Additionally, and as listed in detail above, the vast majority of the proposed notice requirements are consistent with the bylaws of Cboe's peer corporations, CME, ICE, and/or Nasdaq, as well as in line with current best practices. The proposed changes are also all consistent with the DCGL.

Moreover, the proposed changes are intended to provide the Board with additional flexibility and more appropriate governance procedures in addressing various circumstances, which will enable the Exchange to continue to be organized and have the capacity to be able to carry out the purposes of the Act. In particular, the proposed rule changes would allow the Board to retain both control and flexibility over the location and timing of stockholder meetings, would allow the Board to postpone, recess, reschedule or cancel a stockholder meeting, would allow only the presiding person of a stockholder meeting to adjourn and reset a stockholder meeting date in the absence of quorum, would allow for shorter notice in order for the Board to call a special meeting, would allow the Board and the Corporation to continue to function (including remotely) in the case of an emergency, such as the ongoing COVID–19 pandemic, and would provide the Board with increased flexibility in populating the Nomination and Governance Committee. Each of these proposed changes is designed to assist the Exchange in most effectively and efficiently managing evolving corporate matters as they arise, many of which are highly complex and may be time sensitive. Additionally, as indicated above, a majority of the proposed changes align certain Sections in the Parent Bylaws with current best practices and with the DCGL (as well as a change in accordance with Delaware common law) and are also consistent with bylaw provisions of Cboe's peer corporations. Accordingly, the Exchange believes the proposed changes are widely accepted as appropriate governance measures.

Lastly, the proposed nonsubstantive changes to the Parent Bylaws provide additional clarity within the Parent Bylaws and make them easier to understand. By making certain provisions read more in plain English, updating paragraph lettering and numbering, making certain terms uniform and simplifying language throughout, the proposed nonsubstantive changes benefit investors by providing more clarity and reduced complexity within the Parent Bylaws and making the Parent Bylaw [sic] better organized and easier to follow thus reducing potential investor confusion.

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 proposed rule change is not intended to address competitive issues but rather is concerned solely with updating the Parent Bylaws to reflect the changes described above.

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

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

A. By order approve or disapprove such proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2020–071 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–2020–071. 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–2020–071 and should be submitted on or before September 9, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–18095 Filed 8–18–20; 8:45 am]

BILLING CODE 8011–01–P

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–89547; File No. SR–C2–2020–011]

Self-Regulatory Organizations; Cboe C2 Exchange, Inc.; Notice of Filing of a Proposed Rule Change to Amend the Fifth Amended and Restated Bylaws of the Exchange's Parent Corporation, Cboe Global Markets, Inc.

August 13, 2020.

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 July 30, 2020, Cboe C2 Exchange, Inc. (the ''Exchange'' or ''C2'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe C2 Exchange, Inc. (the ''Exchange'' or ''C2 Options'') proposes to amend the Fifth Amended and Restated Bylaws (the ''Parent Bylaws'') of its parent corporation, Cboe Global Markets, Inc. (''Cboe'' or the ''Parent''). The text of the proposed amendments to the Parent Bylaws is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/options/regulation/rule_filings/ctwo/*), 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.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The proposed rule change amends the Parent Bylaws to improve the governance processes of Cboe, which is organized under the laws of the State of Delaware, and to make certain provisions more consistent with the Delaware General Corporation Law (''DGCL''). The proposed rule change also makes clarifying and cleanup changes to the Parent Bylaws.

Proposed Changes to Article 2—Stockholders

The majority of the proposed changes are being made to amend Section 2.11 (Nomination of Directors) and Section 2.12 (Notice of Business at Annual Meetings) and are generally designed to provide the Board with the most information and advance notice possible in connection with business and nominations at annual and special meetings. Additionally, the Exchange notes the proposed changes reflect the most up-to-date disclosure requirement practices. The proposed changes also combine the existing separate provisions for director nominations and stockholder proposals into one provision. Particularly, the proposed rule change combines current Sections 2.11 and 2.12 into one provision: proposed Section 2.11 titled ''Notice of Business and Nomination of Directors at Meetings of Stockholders.''[3] Specifically, the proposed rule change delineates proposed Section 2.11 into paragraph (a) governing notice requirements for annual meetings, paragraph (b) governing notice requirements for special meetings,[4] and paragraph (c), which provides for other general procedures and practices in connection with notices. The proposed delineation does not alter the process or definition of either type of meeting, but instead provides for significantly more detailed written notice requirements as well as updates to the manner and timeliness of notices.

First, the proposed change to Section 2.11(a)(i) relocates the provisions regarding ''properly brought'' business from current Section 2.12, and streamlines such provisions to clearly state that the only business that will be conducted at an annual meeting of the stockholders is business that has properly been brought before the meeting and specifies to be ''properly brought'' such business must be included in the Corporation's notice of the meeting and brought pursuant to Rule 14a–8 under the Securities Exchange Act of 1934, (the ''Exchange Act'') (or any successor provision of law) and included in the Corporation's properly brought business. It also proposes to specify the a precise time that the notices must be made by (*i.e.,* delivered to or mailed and received by the Secretary of the Corporation), which is not later than 5:00 p.m. Eastern Time on the 90th day nor earlier than the 120th day (which are the time frames currently in place) prior to such annual meeting.

Next, the proposed rule change adds greater detail regarding the requirements for proper written notice. Particularly, for notice for stockholder proposals for business other than nominations, (proposed Section 2.11(a)(iii)(A)), the proposed rule change provides that such notice must essentially set forth the same information that would be disclosed in a proxy statement, including:

- A reasonably brief description of the business desired to be brought before the meeting; the text of the proposal or business (including the text of any resolutions proposed for consideration and, in the event that such business includes a proposal to amend the Certificate of Incorporation or the Bylaws of the Corporation, the language of the proposed amendment);
- the reasons for conducting such business at the meeting; a complete and accurate description of any material interest in such business of such stockholder and any Stockholder Associated Person, individually or in the aggregate, including any anticipated benefit to the stockholder and any Stockholder Associated Person therefrom; and
- all other information relating to such proposed business that would be required to be disclosed in a proxy statement or other filing required to be made by the stockholder or any Stockholder Associated Person in connection with the solicitation of proxies in support of such proposed business pursuant to Regulation 14A under the Exchange Act.

Regarding proposed proper written notice for director nominations (proposed Section 2.11(a)(iii)(B)), the notice must include:

- The name, age, business address and residence address of such nominee, (''Proposed Nominee'') (which, the Exchange notes is currently the case);

[3] The proposed rule change also updates the subsequent section numbering (current 2.13 through 2.16) to reflect this change (proposed 2.12 through 2.15).

[4] *See* Section 2.3 of the Parent Bylaws for a description of Special Meetings.

• the principal occupation or employment of such nominee (which, the Exchange notes is currently the case)

• a completed written questionnaire with respect to the background and qualifications of such Proposed Nominee, which must be completed in a form required by the Corporation and provided to such stockholder within ten days of receiving such request;

• the Proposed Nominee's executed written consent to being named in the proxy statement for the meeting as a director nominee;

• the Proposed Nominee's completed written representation and agreement, which must be completed in a form required by the Corporation and provided to such stockholder within ten days of receiving such request. Importantly, the Proposed Nominee must represent and agree (1) to a ''Voting Commitment'' that the Proposed Nominee is not and will not become party to any agreement, arrangement or understanding with, and has not given any commitment or assurance to, any person or entity as to how such Proposed Nominee, if elected as a director, will act or vote on any issue or question (that has not been disclosed to the Corporation). or any Voting Commitment that could limit or interfere with the Proposed Nominee's ability to comply with fiduciary duties under applicable law, (2) that the Proposed Nominee is not and will not become a party to any agreement, arrangement, or understanding with any person or entity other than the Corporation with respect to any direct or indirect compensation, reimbursement, or indemnification in connection with service or action as a director that has not been disclosed to the Corporation, (3) would comply with all applicable rules of the exchange and Corporation and fiduciary duties under state law, (4) would comply with certain Articles of Incorporation with respect to activities related to any of the Exchanges, (5) intends to serve a full term if elected, and (6) will provide true and correct information in communications to the Corporation and its stockholders and will not omit material information or provide misleading information;

• a description of all direct and indirect compensation and other material monetary agreements, arrangements and understandings during the past three years, and any other material relationships; and

• any other information that would be required to be disclosed statement or other filing required to be made in connection with solicitations of proxies for election of directors in a contested election pursuant to Section 14 of the Exchange Act (which, the Exchange notes is currently the case).

As to the stockholder providing notice, any Stockholder Associated Person and any Proposed Nominee, (proposed Section 2.11(a)(iii)(C)) the proposed proper written notice must provide:

• Name and address of such person (as they appear on the Corporation's books, if applicable) (which, the Exchange notes is currently the case);

• class (which is currently the case) or series and number of shares of capital stock of the Corporation (''Shares'') which are, directly or indirectly, owned beneficially and/or of record by such person, the dates such shares were acquired and the investment intent of such acquisition;

• the name of each nominee holder for, and any pledge by such person or any number of, securities of the Corporation owned beneficially, but not of record;

• short interest, including a definition of what constitutes short interest, wherein a person shall be deemed to have a short interest in a security if such person, directly or indirectly, through any contract, arrangement, understanding, or relationship or otherwise has an opportunity to profit or share in profit derived from decreased value of the subject security;

• a description of any agreement, arrangement or understanding, whether written or oral, (including any derivative or short positions, profit interests, options, warrants, convertible securities, stock appreciation or similar rights, hedging transactions, and borrowed or loaned shares (which, the Exchange notes, is currently the case) or similar rights with an exercise or conversion privilege or a settlement payment or mechanism at a price related to any class or series of capital stock of the Corporation or with a value derived in whole or in part from the value of any class or series of capital stock of the Corporation (a ''Derivative Instrument''), in order to mitigate loss to, manage risk or benefit of share price changes for, or increase or decrease voting power with respect to Shares;

• any rights to dividends on the Shares owned beneficially by such person;

• any proportionate interest [5] in Shares or Derivative Instruments by a general or limited partnership or similar entity in which such person (1) is a general partner or beneficially owns an interest in a general partner, or (2) is the manager, managing member, or beneficially owns an interest in such management, of a limited liability company or similar entity;

• any substantial interest (including, without limitation, any existing or prospective commercial, business or contractual relationship with the Corporation), by security holdings or otherwise, in the Corporation or any of its affiliates;

• a complete and accurate description of all agreements, arrangements or understandings, written or oral, and formal or informal, between or among the stockholder providing notice and any of the Stockholder Associated Persons (collectively, the ''Stockholders''), or the Stockholders with any Proposed Nominee and any other person in connection with (1) any proxy, contract, arrangement, understanding or relationship where either of the Stockholders have the right to vote any Shares, (2) that such individuals may have reached with any stockholder of the Corporation regarding how such stockholder will vote its shares, take other action in support of any Proposed Nominee, or other action by either of the Stockholders, and (3) any other agreements that would be required to be disclosed by either of the Stockholders or any other person or entity pursuant to a Schedule 13D filed pursuant to the Exchange Act

• a complete and accurate description of any performance-related fees to which such person may be entitled as a result of any increase or decrease in the value of Shares or any Derivative Instruments;

• any investment strategy or objective of those who are not an individual and a copy of the prospectus (and other like documents);

• a complete and accurate description of any pending or threatened legal proceeding in which such person is a party or participant involving the Corporation;

• if any agreement, arrangement or understanding has been made to increase or decrease the voting power of such person with respect to any Shares; and

• any other information relating to such person that would be required to be disclosed in a proxy statement or other filing required to be made in connection with solicitations of proxies for such business or the election of any Proposed Nominee, or is otherwise required, pursuant to Section 14 of the Exchange Act.

Further, regarding proposed proper written notice, proposed Section 2.11(a)(iii)(D) simplifies the language in

[5] Interest referred to throughout the proposed stockholder proper written notice may be direct or indirect.

connection with the current requirement that the Stockholders must represent if they intend to deliver a proxy statement and/or form of proxy to holders to approve or adopt the proposed business, elect the Proposed Nominee, and/or otherwise solicit proxies or votes from stockholders in support of such proposed business or Proposed Nominee, making it easier to understand.

Proposed Section 2.11(a)(iii)(E) provides for the current requirement that the stockholder providing notice must represent that it is a holder of record of stock of the Corporation entitled to vote at such meeting and intends to appear in person, and adds that ''in person'' may be virtually, in the case of a meeting held solely by means of remote communication) or by proxy at the meeting to bring such proposed business and/or nominate one or more Proposed Nominee.

Proposed Section 2.11(a)(iii)(F) requires that proper written notice include an acknowledgment that the Corporation does not have to present the business or nomination being brought at the meeting by the stockholder proposing such, if such stockholder does not appear. The proposed rule change also adds that, in addition to the proper written notice information, the Corporation may require any Proposed Nominee to furnish certain other information as the Corporation may reasonably require to determine the eligibility or independence of a Proposed Nominee.

Proposed Section 2.11(b), which, as stated, delineates the provisions governing special meetings of stockholders, amends the procedures governing advance notice of director nominations at a special meeting called by the Board for the election of directors. Currently, notices of a special meeting must be made not less than ninety (90) days nor more than one hundred twenty (120) days prior to the anniversary date of the immediately preceding annual meeting of stockholders; provided, however, that if the annual meeting is not held within thirty (30) days before or more than seventy (70) days after such anniversary date, then such nomination shall have been delivered to or mailed and received by the Secretary not later than the close of business on the 10th day following the date on which public announcement of the annual meeting date was made. The proposed rule change updates this notice procedure to mirror the same procedural language in proposed Section 2.11(a)(ii) (maintaining the same 90- to 120-day notice requirement), but updates the timing requirements to remove the language regarding the 30-day and 70-day time frames around the anniversary date and provides that, if public announcement of the special meeting and the nominees proposed by the Board of Directors to be elected at such meeting is first made less than ninety (90) days prior to the date of the special meeting, notice must be made the tenth (10th) day following the day on which such public announcement is first made. The Exchange believes this proposed timing provision simplifies the timing requirement, making it easier to understand and follow, and also provides ample time to provide notice in advance to stockholders of any scheduled special meeting. Proposed Section 2.11(b) also provides that proper written notice of a special meeting must comply with the requirements, as proposed, laid out in Section 2.11(a)(iii).

Proposed Section 2.11(c) provides, generally, for other procedures and practices in connection with notices, as well as certain defined terms. Proposed Section 2.11(c)(i) provides that a stockholder providing notice must update any notice, if necessary, so that the information provided or required to be provided in a notice is be true and correct (A) as of the record date for determining the stockholders entitled to receive notice of the meeting and (B) as of the date that is ten business days prior to the meeting (or any postponement, adjournment or recess thereof). If an update is required to be made as of the record date for determining the stockholders entitled to receive notice of the meeting then the notice of update must be made not later than five business days after the record date for determining the stockholders entitled to receive notice of such meeting. If an update is required to be made as of the date that is ten business days prior to the meeting (or any postponement, adjournment or recess thereof), then the notice of update must be made no later than seven business days prior to the date for the meeting, if practicable, or, if not practicable, on the first practicable date prior to the meeting or any adjournment, recess or postponement thereof Proposed Section 2.11(c)(ii) provides that if any information submitted pursuant to Section 2.11 is inaccurate in any respect, such information may be deemed not to have been provided in accordance with the Parent Bylaws. As proposed, the stockholder providing the notice has an obligation to notify the Secretary in writing at the principal executive offices of the Corporation of any inaccuracy or change in any such information within two business days of becoming aware of such inaccuracy or change. Additionally, within seven days upon delivery of a written request by the Secretary, the Board of Directors (or a duly authorized committee thereof), any such stockholder is obliged to provide: (A) Written verification, reasonably satisfactory to the Board of Directors, any committee thereof or any authorized officer of the Corporation, to demonstrate the accuracy of any information submitted by the stockholder pursuant to Section 2.11, and (B) a written update of any information pursuant to Section 2.11 as of an earlier date. If the stockholder fails to provide such written verification within such period, the information as to which written verification was requested may be deemed not to have been provided in accordance with Section 2.11. Proposed Section 2.11(c)(iii) provides that a stockholder providing notice must also comply with all applicable requirements of state law and all applicable requirements of the Exchange Act and the rules and regulations thereunder, however, references to the Exchange Act and its rules and regulations will not limit the requirements applicable to stockholder proposals or director nominations pursuant to Section 2.11. Proposed Section 2.11(c)(iv) updates current language governing failure for the proposing stockholder to appear by adding that virtual appearances are acceptable when such meeting is being held remotely, as well as the flexibility for the Corporation to waive the appearance requirement. The rule change updates this provision and adds this flexibility in light of the ongoing Covid-19 pandemic and the consequential remote working status for many companies, including Cboe. Proposed Section 2.11(c)(v) adds the definition of key terms, along with current definitions, for clarity. Specifically, the proposed rule change defines an ''affiliate'' and ''associate'' as having the respective meanings set forth in Rule 12b–42 under the Exchange Act and ''Stockholder Associated Person'' to mean: any person who is a member of a ''group'' (used in Rule 13d–5 under the Exchange Act) with or otherwise acting in concert with such stockholder providing notice; any beneficial owner of shares of stock of the Corporation owned of record or beneficially by such stockholder (other than a stockholder that is a depositary); any person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such stockholder or such

Stockholder Associated Person and beneficially owns, directly or indirectly, shares of stock of the Corporation; any person that directly, or indirectly through one or more intermediaries, controls such stockholder or any Stockholder Associated Person; and any participant (as defined in paragraphs (a)(ii)–(vi) of Instruction 3 to Item 4 of Schedule 14A, or any successor instructions) with such stockholder or other Stockholder Associated Person in respect of any proposals or nominations, as applicable.

The Exchange notes that many of the proposed rule changes to proposed Section 2.11 are consistent with the bylaws of Cboe's peer financial market/services corporations, Nasdaq, Inc (''Nasdaq''),[6] Intercontinental Exchange (''ICE''),[7] and/or the CME Group, Inc. (''CME''),[8] including:

- the proposed disclosures required under Regulation 14A for proposed business other than director nominations; director questionnaires;
- consent to be named in the proxy statement as a director nominee;
- a Voting Commitment;
- disclosure of compensation arrangements in connection with service as a director;
- agreement to comply with applicable regulations, organizational documents and policies;
- representation of intent to serve a full term; commitment to provide true and correct facts and to not omit material facts;
- nominee disclosures for contested elections under Section 14;
- required disclosure by a proposing stockholder's 13D group members and related parties;
- disclosure of rights to dividends, short interest, interests held through controlled partnerships or LLCs, and in the Company other than Company common stock;
- disclosure of agreements/arrangements in connection with conferring proxy authority, with any other stockholder regarding voting or supporting the proposal/nominee, with increasing or decreasing voting power, and agreements required to be disclosed on Schedule 13D;
- disclosure of performance-related fees related to the Company's performance;
- disclosure of investment strategy and inclusion of prospectus/offering memorandum;
- disclosure of pending or threatened litigation;
- Special meeting provisions;
- Obligation to update and correct disclosures; and
- Express obligation to appear to present the proposal/nominee.

Additionally, the proposed rule change moves language currently in Section 2.10 providing that the number of nominees for director may not exceed the number of directors to be elected at any meeting to proposed Section 2.11(a) (annual meetings) and Section 2.11(b) (special meetings), therefore adding clarity to the updated Section 2.11 format that this provision continues to apply for both annual and special meetings. The proposed rule change to Section 2.10 also simplifies current language that provides an election may proceed if proper notice is made and received and adds language that nominations may be withdrawn on or prior to the tenth day before the date the Corporation first mails its notice of meeting for such election.

The proposed rule change also amends Section 2.1 (Place of Meetings) by removing language that requires stockholder meetings to be held at the principal place of business of the Company if no location is designated. The Exchange believes that it is appropriate for the Board to retain both control and flexibility over the location and timing of stockholder meetings. The proposed rule change amends Section 2.2 (Annual Meeting) and Section 2.3 (Special Meeting) to provide that the Board may postpone, reschedule or cancel any previously-scheduled annual meeting or special meeting, respectively. The proposed rule change also updates Section 2.7 (Adjournments) to provide that only the presiding person of a stockholder meeting can adjourn the meeting in the absence of a quorum. The proposed changes are intended to provide the Board the flexibility to postpone, recess, reschedule or cancel a stockholder meeting. The Exchange also notes that the proposed rule changes to Sections 2.2, 2.3, and 2.7 are consistent with the bylaws of Cboe's peer corporation, Nasdaq.[9]

The proposed rule change also makes updates to reflect the current best corporate governance practices to certain Sections under Article 2. In particular, it updates the language in Section 2.5 (Voting List) regarding who is required to prepare the voting list. Section 2.5 currently provides that officer who has charge of the stock ledger prepares the voting list and the proposed rule change updates this to provide that the Corporation prepares the voting list. The proposed rule change is consistent with the DGCL and reflects current best practice. The proposed rule change also amends current Section 2.13 (Organization) (proposed Section 2.12), which currently states that that the Board of Directors may appoint any stockholder to act as chairman of any meeting in the absence of the Chairman of the Board, to instead provide that that the Board of Directors may appoint any director of the Corporation to act as chairman of any meeting in the absence of the Chairman of the Board. Also, current Section 2.16 (Conduct of Meetings) (proposed Section 2.15) makes certain changes to expand the procedural authority of the presiding officer of any stockholder meeting, including the right to recess and/or adjourn meetings for any or no reason, and the determination of when the polls will open and close for any given matter to be voted on at the meeting, the removal of any stockholder or individual who refuses to comply with meeting procedures, rules, or guidelines, the restrictions on the use of audio and/or video recording devices and cell phones. This is consistent with best practice and ensures that the presiding officer has the flexibility to take measures, as needed, that ensure meetings are conducted in the most appropriate manner.

Proposed Changes to Article 3—Directors

The proposed rule change amends Section 3.5 (Vacancies) to provide that that vacancies on the Board may be filled exclusively by a majority of the directors. The Exchange notes that stockholders have a common law right under Delaware law to fill director vacancies, unless the Company's Charter or Bylaws explicitly give the Board exclusive authority, therefore, the proposed change is designed to make this right exclusive to the Board. The proposed rule change is consistent with the bylaws of Cboe's peer corporations, Nasdaq and ICE.[10] The proposed rule change to Section 3.10 (Special Meetings) would allow special meetings of the Board to be called with less than 24 hours' notice. Currently, Section 3.10 requires at least 24 hours' notice to directors of special Board meetings.

[6] *See* By-laws of Nasdaq, Inc., available at *https://listingcenter.nasdaq.com/assets/RuleBook/NASDAQ/rules/Nasdaq_Inc_Corporate_Organization_Nasdaq_Inc.pdf.*

[7] *See* Eighth Amended and Restated Bylaws of Intercontinental Exchange, Inc., available at *https://s2.q4cdn.com/154085107/files/doc_downloads/intercontinental_exchange/bylaws-eighth-amended.pdf.*

[8] *See* Fifteenth Amended and Restated Bylaws of CME Group Inc., available at *https://www.cmegroup.com/rulebook/files/CME-Bylaws.pdf.*

[9] *See supra* note 6.

[10] *See supra* notes 6 and 7.

However, there may be circumstances that necessitate an emergency meeting of the Board with less than 24 hours' notice (*e.g.,* in relation to a pending transaction), and therefore, the proposed changes would allow notice on a shorter time frame if necessary and appropriate under the circumstances. The proposed changes to Section 3.13 (Action by Consent) updates language regarding routine filing of consents following an action by the Board. Specifically, the proposed change updates the consents to reflect the same electronic form as minutes are maintained, which is consistent with recent amendments to the DGCL, reflects current best practice.

The proposed change also adds Section 3.15 (Emergency Bylaws). Specifically, the proposed Section 3.15 provides that, notwithstanding anything to the contrary in the Certificate of Incorporation or these Bylaws, in the event there is any emergency, disaster or catastrophe, as referred to in Section 110 of the DGCL, or other similar emergency condition (each, an ''emergency''), and a quorum of the Board of Directors cannot readily be convened for action, this Section 3.15 shall apply., including:

- Any director or Chief Executive Officer, President, Chief Operating Officer, Chief Financial Officer, Treasurer or Secretary of the Corporation may call a meeting of the Board of Directors by any feasible means and with such advance notice as circumstances permit in the judgment of the person calling the meeting. Neither the business to be transacted nor the purpose of any such meeting need be specified in the notice thereof.
- One-third (⅓) of the directors shall constitute a quorum, which may in all cases act by majority vote.
- Directors may take action to appoint one or more of the director or directors to membership on any standing or temporary committees of the Board of Directors as they deem advisable. Directors may also take action to designate one or more of the officers of the Corporation to serve as directors of the Corporation while this Section 3.15 applies.
- To the extent that it considers it practical to do so, the Board of Directors shall manage the business of the Corporation during an emergency in a manner that is consistent with the Certificate of Incorporation and Bylaws. It is recognized, however, that in an emergency it may not always be practical to act in this manner and this Section 3.15 is intended to and does hereby empower the Board of Directors with the maximum authority possible under the DGCL, and all other applicable law, to conduct the interim management of the affairs of the Corporation in an emergency in what it considers to be in the best interests of the Corporation.
- No director, officer or employee acting in good faith in accordance with this Section 3.15 or otherwise pursuant to Section 110 of the DGCL shall be liable except for willful misconduct.
- This Section 3.15 shall continue to apply until such time following the emergency when it is feasible for at least a majority of the directors of the Corporation immediately prior to the emergency to resume management of the business of the Corporation.
- The Board of Directors may modify, amend or add to the provisions of this Section 3.15 in order to make any provision that may be practical or necessary given the circumstances of the emergency.
- The provisions of this Section 3.15 shall be subject to repeal or change by further action of the Board of Directors or by action of the stockholders, but no such repeal or change shall modify the provisions of paragraph (e) of this Section 3.15 with regard to action taken prior to the time of such repeal or change.

The Exchange notes that these proposed changes are largely consistent with the DGCL and are designed to allow the Board and the Corporation to continue to function in the case of an emergency, such as a pandemic or an act of terrorism. The Exchange believes the ongoing COVID–19 pandemic, as well as similar potential events, demonstrate the need for Emergency Bylaws and notes that a number of companies are adopting (or at least considering) emergency bylaws to relax Board requirements when directors may be unavailable due to emergency conditions, such as the pandemic.

Proposed Changes to Article 4—Committees

The proposed rule change to Section 4.1 (Designation of Committees) adds language that provides the Board with additional rights in their ability to designate committees and committee alternates and specifies that such committees may exercise all powers and authority of the Board in the management of the business. Specifically, the proposed language provides that the Board of Directors may designate one or more committees, each committee to consist of one or more of the directors of the Corporation. The Board of Directors may designate one or more directors as alternate members of any committee, who may replace any absent or disqualified member at any meeting of the committee. In the absence or disqualification of a member of the committee, the member or members thereof present at any meeting and not disqualified from voting, whether or not he, she or they constitute a quorum, may unanimously appoint another member of the Board of Directors to act at the meeting in place of any such absent or disqualified member. Any such committee, to the extent permitted by law and to the extent provided in the resolution of the Board of Directors, shall have and may exercise all the powers and authority of the Board of Directors in the management of the business and affairs of the Corporation, and may authorize the seal of the Corporation, if any, to be affixed to all papers which may require it. The proposed rule change provides additional detail regarding the specific authority of the Board to designate members of the committees and their general powers and authority to manage the Corporation, as well as the power invested in the voting members regarding the appointment of a member of the Board to act in a circumstance of disqualification. The proposed language is consistent with the DGCL and reflects current best practice.

The proposed rule changes to Section 4.2 (The Executive Committee) removes language that lists out specific actions or matters that are not to be handled by the Executive Committee under Delaware law, including amending the Certificate of Incorporation, adopting an agreement of merger or consolidation, approving a sale, lease or exchange of all or substantially all of the Corporation's property and assets, or approval of a dissolution of the Corporation or revocation of a dissolution. The proposed change, instead, replaces this list with reference to matters under the DGCL to be submitted to stockholders for approval. The Exchange believes that the proposed change, while being consistent with the DGCL, removes ambiguous and potentially unnecessarily limiting language that lists the circumstances that could not be handled by the Executive Committee that required stockholder approval and replaces it with broader reference to the DGCL.

The proposed change to Section 4.5 (The Nominating and Governance Committee) reduces the minimum size requirement of the Nominating and Governance Committee (''N&G Committee'') from a minimum of five members to three members. This proposed rule change is intended to provide the Board additional flexibility when populating the N&G Committee and is consistent with the minimum

number of members required on other Board committees.[11]

Proposed Changes to Article 8—Notices

The proposed rule change in Section 8.1 (Notices) replaces language in paragraph (e) that requires that stockholders opt-in to email notice with language that instead allows stockholders to opt-out of email notice or not receive email notice if such notice is prohibited by the DGCL. The proposed rule change also updates Section 8.2 (Electronic Notice) to reflect this change. The proposed rule change also removes the provision in Section 8.1 paragraph (c) which provides that notice may be given by messenger or overnight courier service if the delivery method does not require payment of the messenger or courier service fee to deliver the notice by the person to whom the notice is addressed. The proposed rule change then adds to paragraph (c) that notice is deemed to have been given via this method at the earlier of when the notice is received or left at the stockholder's or director's address. The proposed change is consistent with the DGCL.

Proposed Rule Changes to Article 11 (Forum for Adjudication of Disputes)

The proposed rule changes to Article 11 add clarifying provisions and additional detail regarding the exclusive forum. The proposed changes are designed to update the exclusive forum bylaw to reflect current best practices. Specifically, the proposed rule change adds that, among the existing actions listed, the Court of Chancery of the State of Delaware will be the sole and exclusive forum for any action asserting an ''internal corporate claim'' (defined in the DGCL). The proposed rule change also provides that, in the event that the Delaware Court of Chancery lacks subject matter jurisdiction over any such action or proceeding, the sole and exclusive forum for such action or proceeding shall be another state or federal court located within the State of Delaware. The proposed rule change provides that any person or entity purchasing or otherwise acquiring any interest in shares of capital stock of the Corporation is deemed to have notice of and consented to the provisions of Article 1, including exclusive personal jurisdiction in the Delaware Court or Chancery and having service of process made, even if an action (within the scope of Article 11) is filed in a court other than a court located within the State of Delaware. Additionally, the proposed rule change makes clear that the existence of any prior consent to, or selection of, an alternative forum by the Corporation shall not act as a waiver of the Corporation's ongoing consent right in Article 11 and that failure to enforce the foregoing provisions would cause the Corporation irreparable harm and the Corporation is entitled to equitable relief, including injunctive relief and specific performance, to enforce Article 11. It also clarifies that a claim may be made against the Corporation or any current or former director, officer, other employee, agent or stockholder of the Corporation, and may arise pursuant to the Certificate of Incorporation or these Bylaws, in addition to the DCGL. The proposed rule change is in line with current best practice, and, additionally, the bylaws of Cboe's peer, CME,[12] currently provide for similar language related to foreign actions and specific performance.

Finally, the proposed rule change makes non-substantive edits throughout the above listed Articles of the Parent Bylaws, including updating paragraph lettering and numbering, simplifying language in order to better align it with plain English, update the terms Board of Directors and Exchange Act to be uniform throughout the bylaws (*e.g.,* as opposed to just ''Board'', or ''Securities and Exchange Act'', and the other versions of the Act's name).

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[13] Specifically, the Exchange believes the proposed rule change is consistent with Section 6(b)(1) of the Act,[14] which provides that the Exchange be organized and have the capacity to be able to carry out the purposes of the Act and to enforce compliance by the Exchange's Trading Permit Holders and persons associated with its Trading Permit Holders with the Act, the rules and regulations thereunder, and the rules of the Exchange.

In particular, the Exchange believes the proposed changes overall are designed to improve the governance process of Cboe, as well as update the Parent Bylaws, where applicable, to reflect and track the DCGL and current best practices. Moreover, the Exchange does not believe the proposed rule changes are controversial and indeed are common among public companies, including its peers, Nasdaq, ICE and CME.

Particularly, the proposed rule changes to proposed Section 2.11 in connection with providing notice regarding business and director nominations at annual and special meetings, will enable the Exchange to continue to be organized and have the capacity to be able to carry out the purposes of the Act, because such proposed changes are generally designed to strengthen these provisions by requiring notices (including updates to notices) to disclose to the Board more detailed information than currently required. In this manner, the proposed detailed disclosure requirements would provide the Board with substantially more information by which they may make complete and informed decisions and most appropriately address business before the Board. The Exchange also believes that the proposed rule changes in connection with timely notice, including the 10 days' advanced notice of director nominations (via the required director questionnaire), procedures governing advance notice of director nominations at a special meeting, an obligation to update and correct the notice up to 7 days prior to a meeting, and updated timing regarding the 10-day notice of a special meeting less than 90 days from the scheduled meeting, will allow the Board the appropriate time needed to consider and prepare to address all business, nominations, and other issues to be presented before it. As such, the proposed rule changes will ensure that the Board is able to continue to oversee the orderly operation of the corporation, including the Exchange, in a manner the it deems most appropriate. Additionally, and as listed in detail above, the vast majority of the proposed notice requirements are consistent with the bylaws of Cboe's peer corporations, CME, ICE, and/or Nasdaq, as well as in line with current best practices. The proposed changes are also all consistent with the DCGL.

Moreover, the proposed changes are intended to provide the Board with additional flexibility and more appropriate governance procedures in addressing various circumstances, which will enable the Exchange to continue to be organized and have the capacity to be able to carry out the purposes of the Act. In particular, the proposed rule changes would allow the Board to retain both control and flexibility over the location and timing of stockholder meetings, would allow the Board to postpone, recess, reschedule or cancel a stockholder

[11] *See e.g.,* Sections 4.3 and 4.4 of the Parent Bylaws.

[12] *See supra* note 8.

[13] 15 U.S.C. 78f(b).

[14] 15 U.S.C. 78f(b)(1).

meeting, would allow only the presiding person of a stockholder meeting to adjourn and reset a stockholder meeting date in the absence of quorum, would allow for shorter notice in order for the Board to call a special meeting, would allow the Board and the Corporation to continue to function (including remotely) in the case of an emergency, such as the ongoing COVID–19 pandemic, and would provide the Board with increased flexibility in populating the Nomination and Governance Committee. Each of these proposed changes is designed to assist the Exchange in most effectively and efficiently managing evolving corporate matters as they arise, many of which are highly complex and may be time sensitive. Additionally, as indicated above, a majority of the proposed changes align certain Sections in the Parent Bylaws with current best practices and with the DCGL (as well as a change in accordance with Delaware common law) and are also consistent with bylaw provisions of Cboe's peer corporations. Accordingly, the Exchange believes the proposed changes are widely accepted as appropriate governance measures.

Lastly, the proposed nonsubstantive changes to the Parent Bylaws provide additional clarity within the bylaws and make them easier to understand. By making certain provisions read more in plain English, updating paragraph lettering and numbering, making certain terms uniform and simplifying language throughout, the proposed nonsubstantive changes benefit investors by providing more clarity and reduced complexity within the Parent Bylaws and making the Parent Bylaw [sic] better organized and easier to follow thus reducing potential investor confusion.

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 proposed rule change is not intended to address competitive issues but rather is concerned solely with updating the Parent Bylaws to reflect the changes described above.

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

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

A. by order approve or disapprove such proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–C2–2020–011 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–C2–2020–011. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–C2–2020–011 and should be submitted on or before September 9, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–18094 Filed 8–18–20; 8:45 am]

BILLING CODE 8011–01–P

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meetings

TIME AND DATE: Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, the Securities and Exchange Commission will hold an Open Meeting on Wednesday, September 16, 2020 at 10:00 a.m.

PLACE: The meeting will be held via remote means and/or at the Commission's headquarters, 100 F Street NE, Washington, DC 20549.

STATUS: This meeting will begin at 10:00 a.m. (ET) and will be open to the public via audio webcast only on the Commission's website at *www.sec.gov.*

MATTERS TO BE CONSIDERED: The Commission will consider whether to modernize and enhance the efficiency of the shareholder-proposal process for the benefit of all shareholders by adopting amendments to certain procedural requirements for the submission of shareholder proposals and the provision relating to resubmitted proposals under Rule 14a–8. The amendments being considered seek to modernize the system for the first time in over 35 years and reflect many years of engagement by Commission staff with investors, issuers and other market participants.

CONTACT PERSON FOR MORE INFORMATION: For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact Vanessa A. Countryman, Office of the Secretary, at (202) 551–5400.

Dated: August 14, 2020.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2020–18218 Filed 8–17–20; 11:15 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–89549; File No. SR–CboeBYX–2020–022]

Self-Regulatory Organizations; Cboe BYX Exchange, Inc.; Notice of Filing of a Proposed Rule Change To Amend the Fifth Amended and Restated Bylaws of the Exchange's Parent Corporation, Cboe Global Markets, Inc.

August 13, 2020.

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 July 30, 2020, Cboe BYX Exchange, Inc. (the ''Exchange'' or ''BYX'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe BYX Exchange, Inc. (the ''Exchange'' or ''BYX'') proposes to amend the Fifth Amended and Restated Bylaws (the ''Parent Bylaws'') of its parent corporation, Cboe Global Markets, Inc. (''Cboe'' or the ''Parent''). The text of the proposed amendments to the Parent Bylaws is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/equities/regulation/rule_filings/byx/*), 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The proposed rule change amends the Parent Bylaws to improve the governance processes of Cboe, which is organized under the laws of the State of Delaware, and to make certain provisions more consistent with the Delaware General Corporation Law (''DGCL''). The proposed rule change also makes clarifying and cleanup changes to the Parent Bylaws.

Proposed Changes to Article 2—Stockholders

The majority of the proposed changes are being made to amend Section 2.11 (Nomination of Directors) and Section 2.12 (Notice of Business at Annual Meetings) and are generally designed to provide the Board with the most information and advance notice possible in connection with business and nominations at annual and special meetings. Additionally, the Exchange notes the proposed changes reflect the most up-to-date disclosure requirement practices. The proposed changes also combine the existing separate provisions for director nominations and stockholder proposals into one provision. Particularly, the proposed rule change combines current Sections 2.11 and 2.12 into one provision: proposed Section 2.11 titled ''Notice of Business and Nomination of Directors at Meetings of Stockholders.''[3] Specifically, the proposed rule change delineates proposed Section 2.11 into paragraph (a) governing notice requirements for annual meetings, paragraph (b) governing notice requirements for special meetings[4], and paragraph (c), which provides for other general procedures and practices in connection with notices. The proposed delineation does not alter the process or definition of either type of meeting, but instead provides for significantly more detailed written notice requirements as well as updates to the manner and timeliness of notices.

First, the proposed change to Section 2.11(a)(i) relocates the provisions regarding ''properly brought'' business from current Section 2.12, and streamlines such provisions to clearly state that the only business that will be conducted at an annual meeting of the stockholders is business that has properly been brought before the meeting and specifies to be ''properly brought'' such business must be included in the Corporation's notice of the meeting and brought pursuant to Rule 14a–8 under the Securities Exchange Act of 1934, (the ''Exchange Act'') (or any successor provision of law) and included in the Corporation's properly brought business. It also proposes to specify the a precise time that the notices must be made by (*i.e.,* delivered to or mailed and received by the Secretary of the Corporation), which is not later than 5:00 p.m. Eastern Time on the 90th day nor earlier than the 120th day (which are the time frames currently in place) prior to such annual meeting.

Next, the proposed rule change adds greater detail regarding the requirements for proper written notice. Particularly, for notice for stockholder proposals for business other than nominations, (proposed Section 2.11(a)(iii)(A)), the proposed rule change provides that such notice must essentially set forth the same information that would be disclosed in a proxy statement, including:

- A reasonably brief description of the business desired to be brought before the meeting; the text of the proposal or business (including the text of any resolutions proposed for consideration and, in the event that such business includes a proposal to amend the Certificate of Incorporation or the Bylaws of the Corporation, the language of the proposed amendment);
- the reasons for conducting such business at the meeting; a complete and accurate description of any material interest in such business of such stockholder and any Stockholder Associated Person, individually or in the aggregate, including any anticipated benefit to the stockholder and any Stockholder Associated Person therefrom; and
- all other information relating to such proposed business that would be required to be disclosed in a proxy statement or other filing required to be made by the stockholder or any Stockholder Associated Person in connection with the solicitation of proxies in support of such proposed business pursuant to Regulation 14A under the Exchange Act.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The proposed rule change also updates the subsequent section numbering (current 2.13 through 2.16) to reflect this change (proposed 2.12 through 2.15).

[4] *See* Section 2.3 of the Parent Bylaws for a description of Special Meetings.

Regarding proposed proper written notice for director nominations (proposed Section 2.11(a)(iii)(B)), the notice must include:

• The name, age, business address and residence address of such nominee, (''Proposed Nominee'') (which, the Exchange notes is currently the case);

• the principal occupation or employment of such nominee (which, the Exchange notes is currently the case)

• a completed written questionnaire with respect to the background and qualifications of such Proposed Nominee, which must be completed in a form required by the Corporation and provided to such stockholder within ten days of receiving such request;

• the Proposed Nominee's executed written consent to being named in the proxy statement for the meeting as a director nominee;

• the Proposed Nominee's completed written representation and agreement, which must be completed in a form required by the Corporation and provided to such stockholder within ten days of receiving such request. Importantly, the Proposed Nominee must represent and agree (1) to a ''Voting Commitment'' that the Proposed Nominee is not and will not become party to any agreement, arrangement or understanding with, and has not given any commitment or assurance to, any person or entity as to how such Proposed Nominee, if elected as a director, will act or vote on any issue or question (that has not been disclosed to the Corporation). or any Voting Commitment that could limit or interfere with the Proposed Nominee's ability to comply with fiduciary duties under applicable law, (2) that the Proposed Nominee is not and will not become a party to any agreement, arrangement, or understanding with any person or entity other than the Corporation with respect to any direct or indirect compensation, reimbursement, or indemnification in connection with service or action as a director that has not been disclosed to the Corporation, (3) would comply with all applicable rules of the exchange and Corporation and fiduciary duties under state law, (4) would comply with certain Articles of Incorporation with respect to activities related to any of the Exchanges, (5) intends to serve a full term if elected, and (6) will provide true and correct information in communications to the Corporation and its stockholders and will not omit material information or provide misleading information;

• a description of all direct and indirect compensation and other material monetary agreements, arrangements and understandings during the past three years, and any other material relationships; and

• any other information that would be required to be disclosed statement or other filing required to be made in connection with solicitations of proxies for election of directors in a contested election pursuant to Section 14 of the Exchange Act (which, the Exchange notes is currently the case).

As to the stockholder providing notice, any Stockholder Associated Person and any Proposed Nominee, (proposed Section 2.11(a)(iii)(C)) the proposed proper written notice must provide:

• Name and address of such person (as they appear on the Corporation's books, if applicable) (which, the Exchange notes is currently the case);

• class (which is currently the case) or series and number of shares of capital stock of the Corporation (''Shares'') which are, directly or indirectly, owned beneficially and/or of record by such person, the dates such shares were acquired and the investment intent of such acquisition;

• the name of each nominee holder for, and any pledge by such person or any number of, securities of the Corporation owned beneficially, but not of record;

• short interest, including a definition of what constitutes short interest, wherein a person shall be deemed to have a short interest in a security if such person, directly or indirectly, through any contract, arrangement, understanding, or relationship or otherwise has an opportunity to profit or share in profit derived from decreased value of the subject security;

• a description of any agreement, arrangement or understanding, whether written or oral, (including any derivative or short positions, profit interests, options, warrants, convertible securities, stock appreciation or similar rights, hedging transactions, and borrowed or loaned shares (which, the Exchange notes, is currently the case) or similar rights with an exercise or conversion privilege or a settlement payment or mechanism at a price related to any class or series of capital stock of the Corporation or with a value derived in whole or in part from the value of any class or series of capital stock of the Corporation (a ''Derivative Instrument'')), in order to mitigate loss to, manage risk or benefit of share price changes for, or increase or decrease voting power with respect to Shares;

• any rights to dividends on the Shares owned beneficially by such person;

• any proportionate interest [5] in Shares or Derivative Instruments by a general or limited partnership or similar entity in which such person (1) is a general partner or beneficially owns an interest in a general partner, or (2) is the manager, managing member, or beneficially owns an interest in such management, of a limited liability company or similar entity;

• any substantial interest (including, without limitation, any existing or prospective commercial, business or contractual relationship with the Corporation), by security holdings or otherwise, in the Corporation or any of its affiliates;

• a complete and accurate description of all agreements, arrangements or understandings, written or oral, and formal or informal, between or among the stockholder providing notice and any of the Stockholder Associated Persons (collectively, the ''Stockholders''), or the Stockholders with any Proposed Nominee and any other person in connection with (1) any proxy, contract, arrangement, understanding or relationship where either of the Stockholders have the right to vote any Shares, (2) that such individuals may have reached with any stockholder of the Corporation regarding how such stockholder will vote its shares, take other action in support of any Proposed Nominee, or other action by either of the Stockholders, and (3) any other agreements that would be required to be disclosed by either of the Stockholders or any other person or entity pursuant to a Schedule 13D filed pursuant to the Exchange Act

• a complete and accurate description of any performance-related fees to which such person may be entitled as a result of any increase or decrease in the value of Shares or any Derivative Instruments;

• any investment strategy or objective of those who are not an individual and a copy of the prospectus (and other like documents);

• a complete and accurate description of any pending or threatened legal proceeding in which such person is a party or participant involving the Corporation;

• if any agreement, arrangement or understanding has been made to increase or decrease the voting power of such person with respect to any Shares; and

• any other information relating to such person that would be required to be disclosed in a proxy statement or

[5] Interest referred to throughout the proposed stockholder proper written notice may be direct or indirect.

other filing required to be made in connection with solicitations of proxies for such business or the election of any Proposed Nominee, or is otherwise required, pursuant to Section 14 of the Exchange Act.

Further, regarding proposed proper written notice, proposed Section 2.11(a)(iii)(D) simplifies the language in connection with the current requirement that the Stockholders must represent if they intend to deliver a proxy statement and/or form of proxy to holders to approve or adopt the proposed business, elect the Proposed Nominee, and/or otherwise solicit proxies or votes from stockholders in support of such proposed business or Proposed Nominee, making it easier to understand.

Proposed Section 2.11(a)(iii)(E) provides for the current requirement that the stockholder providing notice must represent that it is a holder of record of stock of the Corporation entitled to vote at such meeting and intends to appear in person, and adds that ''in person'' may be virtually, in the case of a meeting held solely by means of remote communication) or by proxy at the meeting to bring such proposed business and/or nominate one or more Proposed Nominee.

Proposed Section 2.11(a)(iii)(F) requires that proper written notice include an acknowledgment that the Corporation does not have to present the business or nomination being brought at the meeting by the stockholder proposing such, if such stockholder does not appear. The proposed rule change also adds that, in addition to the proper written notice information, the Corporation may require any Proposed Nominee to furnish certain other information as the Corporation may reasonably require to determine the eligibility or independence of a Proposed Nominee.

Proposed Section 2.11(b), which, as stated, delineates the provisions governing special meetings of stockholders, amends the procedures governing advance notice of director nominations at a special meeting called by the Board for the election of directors. Currently, notices of a special meeting must be made not less than ninety (90) days nor more than one hundred twenty (120) days prior to the anniversary date of the immediately preceding annual meeting of stockholders; provided, however, that if the annual meeting is not held within thirty (30) days before or more than seventy (70) days after such anniversary date, then such nomination shall have been delivered to or mailed and received by the Secretary not later than the close of business on the 10th day following the date on which public announcement of the annual meeting date was made. The proposed rule change updates this notice procedure to mirror the same procedural language in proposed Section 2.11(a)(ii) (maintaining the same 90- to 120-day notice requirement), but updates the timing requirements to remove the language regarding the 30-day and 70-day time frames around the anniversary date and provides that, if public announcement of the special meeting and the nominees proposed by the Board of Directors to be elected at such meeting is first made less than ninety (90) days prior to the date of the special meeting, notice must be made the tenth (10th) day following the day on which such public announcement is first made. The Exchange believes this proposed timing provision simplifies the timing requirement, making it easier to understand and follow, and also provides ample time to provide notice in advance to stockholders of any scheduled special meeting. Proposed Section 2.11(b) also provides that proper written notice of a special meeting must comply with the requirements, as proposed, laid out in Section 2.11(a)(iii).

Proposed Section 2.11(c) provides, generally, for other procedures and practices in connection with notices, as well as certain defined terms. Proposed Section 2.11(c)(i) provides that a stockholder providing notice must update any notice, if necessary, so that the information provided or required to be provided in a notice is be true and correct (A) as of the record date for determining the stockholders entitled to receive notice of the meeting and (B) as of the date that is ten business days prior to the meeting (or any postponement, adjournment or recess thereof). If an update is required to be made as of the record date for determining the stockholders entitled to receive notice of the meeting then the notice of update must be made not later than five business days after the record date for determining the stockholders entitled to receive notice of such meeting. If an update is required to be made as of the date that is ten business days prior to the meeting (or any postponement, adjournment or recess thereof), then the notice of update must be made no later than seven business days prior to the date for the meeting, if practicable, or, if not practicable, on the first practicable date prior to the meeting or any adjournment, recess or postponement thereof Proposed Section 2.11(c)(ii) provides that if any information submitted pursuant to Section 2.11 is inaccurate in any respect, such information may be deemed not to have been provided in accordance with the Parent Bylaws. As proposed, the stockholder providing the notice has an obligation to notify the Secretary in writing at the principal executive offices of the Corporation of any inaccuracy or change in any such information within two business days of becoming aware of such inaccuracy or change. Additionally, within seven days upon delivery of a written request by the Secretary, the Board of Directors (or a duly authorized committee thereof), any such stockholder is obliged to provide: (A) Written verification, reasonably satisfactory to the Board of Directors, any committee thereof or any authorized officer of the Corporation, to demonstrate the accuracy of any information submitted by the stockholder pursuant to Section 2.11, and (B) a written update of any information pursuant to Section 2.11 as of an earlier date. If the stockholder fails to provide such written verification within such period, the information as to which written verification was requested may be deemed not to have been provided in accordance with Section 2.11. Proposed Section 2.11(c)(iii) provides that a stockholder providing notice must also comply with all applicable requirements of state law and all applicable requirements of the Exchange Act and the rules and regulations thereunder, however, references to the Exchange Act and its rules and regulations will not limit the requirements applicable to stockholder proposals or director nominations pursuant to Section 2.11. Proposed Section 2.11(c)(iv) updates current language governing failure for the proposing stockholder to appear by adding that virtual appearances are acceptable when such meeting is being held remotely, as well as the flexibility for the Corporation to waive the appearance requirement. The rule change updates this provision and adds this flexibility in light of the ongoing Covid-19 pandemic and the consequential remote working status for many companies, including Cboe. Proposed Section 2.11(c)(v) adds the definition of key terms, along with current definitions, for clarity. Specifically, the proposed rule change defines an ''affiliate'' and ''associate'' as having the respective meanings set forth in Rule 12b–2 under the Exchange Act and ''Stockholder Associated Person'' to mean: Any person who is a member of a ''group'' (used in Rule 13d–5 under the Exchange Act) with or otherwise acting in concert with such stockholder

providing notice; any beneficial owner of shares of stock of the Corporation owned of record or beneficially by such stockholder (other than a stockholder that is a depositary); any person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such stockholder or such Stockholder Associated Person and beneficially owns, directly or indirectly, shares of stock of the Corporation; any person that directly, or indirectly through one or more intermediaries, controls such stockholder or any Stockholder Associated Person; and any participant (as defined in paragraphs (a)(ii)–(vi) of Instruction 3 to Item 4 of Schedule 14A, or any successor instructions) with such stockholder or other Stockholder Associated Person in respect of any proposals or nominations, as applicable.

The Exchange notes that many of the proposed rule changes to proposed Section 2.11 are consistent with the bylaws of Cboe's peer financial market/services corporations, Nasdaq, Inc (''Nasdaq''),[6] Intercontinental Exchange (''ICE''),[7] and/or the CME Group, Inc. (''CME''),[8] including:

- The proposed disclosures required under Regulation 14A for proposed business other than director nominations; director questionnaires;
- consent to be named in the proxy statement as a director nominee;
- a Voting Commitment;
- disclosure of compensation arrangements in connection with service as a director;
- agreement to comply with applicable regulations, organizational documents and policies;
- representation of intent to serve a full term; commitment to provide true and correct facts and to not omit material facts;
- nominee disclosures for contested elections under Section 14;
- required disclosure by a proposing stockholder's 13D group members and related parties;
- disclosure of rights to dividends, short interest, interests held through controlled partnerships or LLCs, and in the Company other than Company common stock;
- disclosure of agreements/arrangements in connection with conferring proxy authority, with any other stockholder regarding voting or supporting the proposal/nominee, with increasing or decreasing voting power, and agreements required to be disclosed on Schedule 13D;
- disclosure of performance-related fees related to the Company's performance;
- disclosure of investment strategy and inclusion of prospectus/offering memorandum;
- disclosure of pending or threatened litigation;
- Special meeting provisions;
- Obligation to update and correct disclosures; and
- Express obligation to appear to present the proposal/nominee.

Additionally, the proposed rule change moves language currently in Section 2.10 providing that the number of nominees for director may not exceed the number of directors to be elected at any meeting to proposed Section 2.11(a) (annual meetings) and Section 2.11(b) (special meetings), therefore adding clarity to the updated Section 2.11 format that this provision continues to apply for both annual and special meetings. The proposed rule change to Section 2.10 also simplifies current language that provides an election may proceed if proper notice is made and received and adds language that nominations may be withdrawn on or prior to the tenth day before the date the Corporation first mails its notice of meeting for such election.

The proposed rule change also amends Section 2.1 (Place of Meetings) by removing language that requires stockholder meetings to be held at the principal place of business of the Company if no location is designated. The Exchange believes that it is appropriate for the Board to retain both control and flexibility over the location and timing of stockholder meetings. The proposed rule change amends Section 2.2 (Annual Meeting) and Section 2.3 (Special Meeting) to provide that the Board may postpone, reschedule or cancel any previously-scheduled annual meeting or special meeting, respectively. The proposed rule change also updates Section 2.7 (Adjournments) to provide that only the presiding person of a stockholder meeting can adjourn the meeting in the absence of a quorum. The proposed changes are intended to provide the Board the flexibility to postpone, recess, reschedule or cancel a stockholder meeting. The Exchange also notes that the proposed rule changes to Sections 2.2, 2.3, and 2.7 are consistent with the bylaws of Cboe's peer corporation, Nasdaq.[9]

The proposed rule change also makes updates to reflect the current best corporate governance practices to certain Sections under Article 2. In particular, it updates the language in Section 2.5 (Voting List) regarding who is required to prepare the voting list. Section 2.5 currently provides that officer who has charge of the stock ledger prepares the voting list and the proposed rule change updates this to provide that the Corporation prepares the voting list. The proposed rule change is consistent with the DGCL and reflects current best practice. The proposed rule change also amends current Section 2.13 (Organization) (proposed Section 2.12), which currently states that that the Board of Directors may appoint any stockholder to act as chairman of any meeting in the absence of the Chairman of the Board, to instead provide that that the Board of Directors may appoint any director of the Corporation to act as chairman of any meeting in the absence of the Chairman of the Board. Also, current Section 2.16 (Conduct of Meetings) (proposed Section 2.15) makes certain changes to expand the procedural authority of the presiding officer of any stockholder meeting, including the right to recess and/or adjourn meetings for any or no reason, and the determination of when the polls will open and close for any given matter to be voted on at the meeting, the removal of any stockholder or individual who refuses to comply with meeting procedures, rules, or guidelines, the restrictions on the use of audio and/or video recording devices and cell phones. This is consistent with best practice and ensures that the presiding officer has the flexibility to take measures, as needed, that ensure meetings are conducted in the most appropriate manner.

Proposed Changes to Article 3—Directors

The proposed rule change amends Section 3.5 (Vacancies) to provide that that vacancies on the Board may be filled exclusively by a majority of the directors. The Exchange notes that stockholders have a common law right under Delaware law to fill director vacancies, unless the Company's Charter or Bylaws explicitly give the Board exclusive authority, therefore, the proposed change is designed to make this right exclusive to the Board. The proposed rule change is consistent with the bylaws of Cboe's peer corporations,

[6] *See* By-laws of Nasdaq, Inc., available at *https://listingcenter.nasdaq.com/assets/RuleBook/NASDAQ/rules/Nasdaq_Inc_Corporate_Organization_Nasdaq_Inc.pdf.*

[7] *See* Eighth Amended and Restated Bylaws of Intercontinental Exchange, Inc., available at *https://s2.q4cdn.com/154085107/files/doc_downloads/intercontinental_exchange/bylaws-eighth-amended.pdf.*

[8] *See* Fifteenth Amended and Restated Bylaws of CME Group Inc., available at *https://www.cmegroup.com/rulebook/files/CME-Bylaws.pdf.*

[9] *See supra* note 6.

Nasdaq and ICE.[10] The proposed rule change to Section 3.10 (Special Meetings) would allow special meetings of the Board to be called with less than 24 hours' notice. Currently, Section 3.10 requires at least 24 hours' notice to directors of special Board meetings. However, there may be circumstances that necessitate an emergency meeting of the Board with less than 24 hours' notice (*e.g.,* in relation to a pending transaction), and therefore, the proposed changes would allow notice on a shorter time frame if necessary and appropriate under the circumstances. The proposed changes to Section 3.13 (Action by Consent) updates language regarding routine filing of consents following an action by the Board. Specifically, the proposed change updates the consents to reflect the same electronic form as minutes are maintained, which is consistent with recent amendments to the DGCL, reflects current best practice.

The proposed change also adds Section 3.15 (Emergency Bylaws). Specifically, the proposed Section 3.15 provides that, notwithstanding anything to the contrary in the Certificate of Incorporation or these Bylaws, in the event there is any emergency, disaster or catastrophe, as referred to in Section 110 of the DGCL, or other similar emergency condition (each, an ''emergency''), and a quorum of the Board of Directors cannot readily be convened for action, this Section 3.15 shall apply, including:

- Any director or Chief Executive Officer, President, Chief Operating Officer, Chief Financial Officer, Treasurer or Secretary of the Corporation may call a meeting of the Board of Directors by any feasible means and with such advance notice as circumstances permit in the judgment of the person calling the meeting. Neither the business to be transacted nor the purpose of any such meeting need be specified in the notice thereof.
- One-third (⅓) of the directors shall constitute a quorum, which may in all cases act by majority vote.
- Directors may take action to appoint one or more of the director or directors to membership on any standing or temporary committees of the Board of Directors as they deem advisable. Directors may also take action to designate one or more of the officers of the Corporation to serve as directors of the Corporation while this Section 3.15 applies.
- To the extent that it considers it practical to do so, the Board of Directors shall manage the business of the Corporation during an emergency in a manner that is consistent with the Certificate of Incorporation and Bylaws. It is recognized, however, that in an emergency it may not always be practical to act in this manner and this Section 3.15 is intended to and does hereby empower the Board of Directors with the maximum authority possible under the DGCL, and all other applicable law, to conduct the interim management of the affairs of the Corporation in an emergency in what it considers to be in the best interests of the Corporation.
- No director, officer or employee acting in good faith in accordance with this Section 3.15 or otherwise pursuant to Section 110 of the DGCL shall be liable except for willful misconduct.
- This Section 3.15 shall continue to apply until such time following the emergency when it is feasible for at least a majority of the directors of the Corporation immediately prior to the emergency to resume management of the business of the Corporation.
- The Board of Directors may modify, amend or add to the provisions of this Section 3.15 in order to make any provision that may be practical or necessary given the circumstances of the emergency.
- The provisions of this Section 3.15 shall be subject to repeal or change by further action of the Board of Directors or by action of the stockholders, but no such repeal or change shall modify the provisions of paragraph (e) of this Section 3.15 with regard to action taken prior to the time of such repeal or change.

The Exchange notes that these proposed changes are largely consistent with the DGCL and are designed to allow the Board and the Corporation to continue to function in the case of an emergency, such as a pandemic or an act of terrorism. The Exchange believes the ongoing COVID–19 pandemic, as well as similar potential events, demonstrate the need for Emergency Bylaws and notes that a number of companies are adopting (or at least considering) emergency bylaws to relax Board requirements when directors may be unavailable due to emergency conditions, such as the pandemic.

Proposed Changes to Article 4—Committees

The proposed rule change to Section 4.1 (Designation of Committees) adds language that provides the Board with additional rights in their ability to designate committees and committee alternates and specifies that such committees may exercise all powers and authority of the Board in the management of the business. Specifically, the proposed language provides that the Board of Directors may designate one or more committees, each committee to consist of one or more of the directors of the Corporation. The Board of Directors may designate one or more directors as alternate members of any committee, who may replace any absent or disqualified member at any meeting of the committee. In the absence or disqualification of a member of the committee, the member or members thereof present at any meeting and not disqualified from voting, whether or not he, she or they constitute a quorum, may unanimously appoint another member of the Board of Directors to act at the meeting in place of any such absent or disqualified member. Any such committee, to the extent permitted by law and to the extent provided in the resolution of the Board of Directors, shall have and may exercise all the powers and authority of the Board of Directors in the management of the business and affairs of the Corporation, and may authorize the seal of the Corporation, if any, to be affixed to all papers which may require it. The proposed rule change provides additional detail regarding the specific authority of the Board to designate members of the committees and their general powers and authority to manage the Corporation, as well as the power invested in the voting members regarding the appointment of a member of the Board to act in a circumstance of disqualification. The proposed language is consistent with the DGCL and reflects current best practice.

The proposed rule changes to Section 4.2 (The Executive Committee) removes language that lists out specific actions or matters that are not to be handled by the Executive Committee under Delaware law, including amending the Certificate of Incorporation, adopting an agreement of merger or consolidation, approving a sale, lease or exchange of all or substantially all of the Corporation's property and assets, or approval of a dissolution of the Corporation or revocation of a dissolution. The proposed change, instead, replaces this list with reference to matters under the DGCL to be submitted to stockholders for approval. The Exchange believes that the proposed change, while being consistent with the DGCL, removes ambiguous and potentially unnecessarily limiting language that lists the circumstances that could not be handled by the Executive Committee that required stockholder approval and replaces it with broader reference to the DGCL.

The proposed change to Section 4.5 (The Nominating and Governance

[10] *See supra* notes 6 and 7.

Committee) reduces the minimum size requirement of the Nominating and Governance Committee (''N&G Committee'') from a minimum of five members to three members. This proposed rule change is intended to provide the Board additional flexibility when populating the N&G Committee and is consistent with the minimum number of members required on other Board committees.[11]

Proposed Changes to Article 8—Notices

The proposed rule change in Section 8.1 (Notices) replaces language in paragraph (e) that requires that stockholders opt-in to email notice with language that instead allows stockholders to opt-out of email notice or not receive email notice if such notice is prohibited by the DGCL. The proposed rule change also updates Section 8.2 (Electronic Notice) to reflect this change. The proposed rule change also removes the provision in Section 8.1 paragraph (c) which provides that notice may be given by messenger or overnight courier service if the delivery method does not require payment of the messenger or courier service fee to deliver the notice by the person to whom the notice is addressed. The proposed rule change then adds to paragraph (c) that notice is deemed to have been given via this method at the earlier of when the notice is received or left at the stockholder's or director's address. The proposed change is consistent with the DGCL.

Proposed Rule Changes to Article 11 (Forum for Adjudication of Disputes)

The proposed rule changes to Article 11 add clarifying provisions and additional detail regarding the exclusive forum. The proposed changes are designed to update the exclusive forum bylaw to reflect current best practices. Specifically, the proposed rule change adds that, among the existing actions listed, the Court of Chancery of the State of Delaware will be the sole and exclusive forum for any action asserting an ''internal corporate claim'' (defined in the DGCL). The proposed rule change also provides that, in the event that the Delaware Court of Chancery lacks subject matter jurisdiction over any such action or proceeding, the sole and exclusive forum for such action or proceeding shall be another state or federal court located within the State of Delaware. The proposed rule change provides that any person or entity purchasing or otherwise acquiring any interest in shares of capital stock of the Corporation is deemed to have notice of and consented to the provisions of Article 1, including exclusive personal jurisdiction in the Delaware Court or Chancery and having service of process made, even if an action (within the scope of Article 11) is filed in a court other than a court located within the State of Delaware. Additionally, the proposed rule change makes clear that the existence of any prior consent to, or selection of, an alternative forum by the Corporation shall not act as a waiver of the Corporation's ongoing consent right in Article 11 and that failure to enforce the foregoing provisions would cause the Corporation irreparable harm and the Corporation is entitled to equitable relief, including injunctive relief and specific performance, to enforce Article 11. It also clarifies that a claim may be made against the Corporation or any current or former director, officer, other employee, agent or stockholder of the Corporation, and may arise pursuant to the Certificate of Incorporation or these Bylaws, in addition to the DCGL. The proposed rule change is in line with current best practice, and, additionally, the bylaws of Cboe's peer, CME,[12] currently provide for similar language related to foreign actions and specific performance.

Finally, the proposed rule change makes non-substantive edits throughout the above listed Articles of the Parent Bylaws, including updating paragraph lettering and numbering, simplifying language in order to better align it with plain English, update the terms Board of Directors and Exchange Act to be uniform throughout the bylaws (*e.g.,* as opposed to just ''Board'', or ''Securities and Exchange Act'', and the other versions of the Act's name).

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[13] Specifically, the Exchange believes the proposed rule change is consistent with Section 6(b)(1) of the Act,[14] which provides that the Exchange be organized and have the capacity to be able to carry out the purposes of the Act and to enforce compliance by the Exchange's Trading Permit Holders and persons associated with its Trading Permit Holders with the Act, the rules and regulations thereunder, and the rules of the Exchange.

In particular, the Exchange believes the proposed changes overall are designed to improve the governance process of Cboe, as well as update the Parent Bylaws, where applicable, to reflect and track the DCGL and current best practices. Moreover, the Exchange does not believe the proposed rule changes are controversial and indeed are common among public companies, including its peers, Nasdaq, ICE and CME.

Particularly, the proposed rule changes to proposed Section 2.11 in connection with providing notice regarding business and director nominations at annual and special meetings, will enable the Exchange to continue to be organized and have the capacity to be able to carry out the purposes of the Act, because such proposed changes are generally designed to strengthen these provisions by requiring notices (including updates to notices) to disclose to the Board more detailed information than currently required. In this manner, the proposed detailed disclosure requirements would provide the Board with substantially more information by which they may make complete and informed decisions and most appropriately address business before the Board. The Exchange also believes that the proposed rule changes in connection with timely notice, including the 10 days' advanced notice of director nominations (via the required director questionnaire), procedures governing advance notice of director nominations at a special meeting, an obligation to update and correct the notice up to 7 days prior to a meeting, and updated timing regarding the 10-day notice of a special meeting less than 90 days from the scheduled meeting, will allow the Board the appropriate time needed to consider and prepare to address all business, nominations, and other issues to be presented before it. As such, the proposed rule changes will ensure that the Board is able to continue to oversee the orderly operation of the corporation, including the Exchange, in a manner the it deems most appropriate. Additionally, and as listed in detail above, the vast majority of the proposed notice requirements are consistent with the bylaws of Cboe's peer corporations, CME, ICE, and/or Nasdaq, as well as in line with current best practices. The proposed changes are also all consistent with the DCGL.

Moreover, the proposed changes are intended to provide the Board with additional flexibility and more appropriate governance procedures in

[11] *See e.g.,* Sections 4.3 and 4.4 of the Parent Bylaws.

[12] *See supra* note 8.

[13] 15 U.S.C. 78f(b).

[14] 15 U.S.C. 78f(b)(1).

addressing various circumstances, which will enable the Exchange to continue to be organized and have the capacity to be able to carry out the purposes of the Act. In particular, the proposed rule changes would allow the Board to retain both control and flexibility over the location and timing of stockholder meetings, would allow the Board to postpone, recess, reschedule or cancel a stockholder meeting, would allow only the presiding person of a stockholder meeting to adjourn and reset a stockholder meeting date in the absence of quorum, would allow for shorter notice in order for the Board to call a special meeting, would allow the Board and the Corporation to continue to function (including remotely) in the case of an emergency, such as the ongoing COVID–19 pandemic, and would provide the Board with increased flexibility in populating the Nomination and Governance Committee. Each of these proposed changes is designed to assist the Exchange in most effectively and efficiently managing evolving corporate matters as they arise, many of which are highly complex and may be time sensitive. Additionally, as indicated above, a majority of the proposed changes align certain Sections in the Parent Bylaws with current best practices and with the DCGL (as well as a change in accordance with Delaware common law) and are also consistent with bylaw provisions of Cboe's peer corporations. Accordingly, the Exchange believes the proposed changes are widely accepted as appropriate governance measures.

Lastly, the proposed nonsubstantive changes to the Parent Bylaws provide additional clarity within the Parent Bylaws and make them easier to understand. By making certain provisions read more in plain English, updating paragraph lettering and numbering, making certain terms uniform and simplifying language throughout, the proposed nonsubstantive changes benefit investors by providing more clarity and reduced complexity within the Parent Bylaws and making the Parent Bylaw [sic] better organized and easier to follow thus reducing potential investor confusion.

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 proposed rule change is not intended to address competitive issues but rather is concerned solely with updating the Parent Bylaws to reflect the changes described above.

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

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

A. By order approve or disapprove such proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CboeBYX–2020–022 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–CboeBYX–2020–022. 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–CboeBYX–2020–022 and should be submitted on or before September 9, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–18101 Filed 8–18–20; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–89539; File No. SR–CboeEDGA–2020–023]

Self-Regulatory Organizations; Cboe EDGA Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Fee Schedule

August 13, 2020.

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 August 3, 2020, Cboe EDGA Exchange, Inc. (the ''Exchange'' or ''EDGA'') 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.

[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.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe EDGA Exchange, Inc. (the ''Exchange'' or ''EDGA'') is filing with the Securities and Exchange Commission (''Commission'') a proposed rule change to amend the fee schedule. 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://markets.cboe.com/us/equities/regulation/rule_filings/edga/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its fee schedule in connection with its Add/Remove Volume Tiers, as well as a fee code, effective August 3, 2020.

The Exchange first notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. More specifically, the Exchange is only one of 13 registered equities exchanges, as well as a number of alternative trading systems and other off-exchange venues that do not have similar self-regulatory responsibilities under the Exchange Act, to which market participants may direct their order flow. Based on publicly available information,[4] no single registered equities exchange has more than 18% of the market share. Thus, in such a low-concentrated and highly competitive market, no single equities exchange possesses significant pricing power in the execution of order flow. The Exchange in particular operates a ''Taker-Maker'' model whereby it pays credits to members that remove liquidity and assesses fees to those that add liquidity. The Exchange's fee schedule sets forth the standard rebates and rates applied per share for orders that provide and remove liquidity, respectively. Particularly, for securities at or above $1.00, the Exchange provides a standard rebate of $0.0018 per share for orders that remove liquidity and assesses a fee of $0.0030 per share for orders that add liquidity. The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow, or discontinue or reduce use of certain categories of products, in response to fee changes. Accordingly, competitive forces constrain the Exchange's transaction fees, and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable.

In response to the competitive environment described above, the Exchange offers tiered pricing which provides Members opportunities to qualify for higher rebates or reduced fees where certain volume criteria and thresholds are met. Tiered pricing provides incremental incentives for Members to strive for higher or different tier levels by offering increasingly higher discounts or enhanced benefits for satisfying increasingly more stringent criteria or different criteria. The Exchange currently provides for such tiers pursuant to footnote 7 of the fee schedule, which specifically offers Add/Remove Volume Tiers. To illustrate, Add Volume Tier 1 provides Members an opportunity to receive a reduced fee of $0.0026 for their liquidity adding orders that yield fee codes ''3'',[5] ''4'',[6] ''B'',[7] ''V'',[8] and ''Y''[9] where that Member has an ADAV[10] of greater than or equal to 0.10% of the TCV.[11] Likewise, Remove Volume Tier 1 provides Members an opportunity to receive an enhanced rebate for their liquidity removing orders that yield fee codes ''N'',[12] ''W'',[13] ''6'',[14] and ''BB''[15] where that Member adds or removes an ADV[16] of greater than or equal to 0.05% of the TCV.

Specifically, the Exchanges proposes to amend Add Volume Tiers 2 and 3 and delete Remove Volume Tier 2 under footnote 7. Currently, Tier 2 provides a Member with an opportunity to receive a reduced fee of $0.0022 for qualifying, liquidity adding orders (*i.e.* yielding fee code 3, 4, B, V, or Y) where a Member has an ADAV greater than or equal to 0.45% of the TCV, and Tier 3 provides a Member with an opportunity to receive a reduced fee of $0.0016 for qualifying orders where a Member adds or removes an ADV of greater than or equal to 0.65% of the TCV. The proposed rule change moves the criteria and reduced fee amount currently in Tier 3 to Tier 2 (and removes Tier 2's current reduced fee amount and criteria) and proposes a to adopt new criteria and reduced fee amount in Tier 3. As proposed, new Tier 3 provides a Member a reduced fee of $0.0015 for qualifying orders where a Member adds or removes an ADV of greater than or equal to 0.75% of the TCV. The restructuring of Tier 3 to Tier 2 and the new criteria and reduced fee offered in proposed Tier 3 is designed to provide Members with an additional opportunity to receive a reduced fee on their liquidity adding orders, and thus incentive, to increase their overall order flow, both adding and removing orders, in order to achieve the proposed criteria and receive the reduced fee. Proposed Tier 3 provides liquidity adding Members on the Exchange a further incentive to contribute to a deeper, more liquid market, and liquidity executing Members on the Exchange a further incentive to increase transactions and take execution opportunities provided by such increased liquidity. The Exchange believes that this, in turn, benefits all Members by contributing towards a robust and well-balanced market ecosystem. The Exchange notes the proposed tier is available to all

[4] *See* Cboe Global Markets, U.S. Equities Market Volume Summary, Month-to-Date (July 31, 2020), available at *https://markets.cboe.com/us/equities/market_statistics/*.

[5] Appended to orders that add liquidity to EDGA, pre and post market (Tapes A or C).

[6] Appended to orders that add liquidity to EDGA, pre and post market (Tape B).

[7] Appended to orders that add liquidity to EDGA (Tape B).

[8] Appended to orders that add liquidity to EDGA (Tape A).

[9] Appended to orders that add liquidity to EDGA (Tape C).

[10] ADAV means average daily volume calculated as the number of shares added per day. ADAV is calculated on a monthly basis.

[11] TCV means total consolidated volume calculated as the volume reported by all exchanges and trade reporting facilities to a consolidated transaction reporting plan for the month for which the fees apply.

[12] Appended to orders that remove liquidity from EDGA (Tape C).

[13] Appended to orders that remove liquidity from EDGA (Tape A).

[14] Appended to orders that remove liquidity from EDGA, pre and post market (All Tapes).

[15] Appended to orders that remove liquidity from EDGA (Tape B).

[16] ADV means daily volume calculated as the number of shares added to, removed from, or routed by, the Exchange, or any combination or subset thereof, per day. ADV is calculated on a monthly basis.

Members and are competitively achievable for all Members that submit add and/or remove order flow, in that, all firms that submit the requisite order flow could compete to meet the tier.

The Exchange next proposes to delete Remove Volume Tier 2,[17] which currently provides a Member with an opportunity to receive an enhanced rebate of $0.0028 for qualifying, liquidity removing orders (*i.e.* yielding fee code N, W, 6, or BB) where a Member removes an ADV of greater than or equal to 0.10% of the TCV and has a Step-Up Remove TCV from October 2019 of greater than or equal to 0.05%. The proposed rule change removes this tier as the Exchange has observed that none of its Members have been choosing to meet the criteria in current Tier 2 to achieve an enhanced rebate of $0.0028, but instead, have opted to meet the criteria in current Tier 3 (Tier 2, as amended) to receive an enhanced rebate for the same amount.

Finally, in the Fee Code and Associated Fees table in the Fee Schedule, the Exchange proposes to amend the standard fee applied to orders yielding fee code ''MM'', which is appended to non-displayed orders that add liquidity using Mid-Point Peg, from $0.00080 to $0.0010. The Exchange notes that this is consistent with fees assessed on similar liquidity adding, Mid-Point Peg orders on other equities exchanges and off-exchange venues.[18]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,[19] in general, and furthers the objectives of Section 6(b)(4),[20] in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Members and issuers and other persons using its facilities. The Exchange also believes that the proposed rule change is consistent with the objectives of Section 6(b)(5)[21] 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, and, particularly, is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. The proposed rule change reflects a competitive pricing structure designed to incentivize market participants to direct their order flow to the Exchange, which the Exchange believes would enhance market quality to the benefit of all Members.

In particular, the Exchange believes that the proposed restructured and additional Add Volume Tiers are reasonable because they each provide an additional opportunity for Members to receive a discounted rate by means of liquidity adding and removing orders. The Exchange notes that relative volume-based incentives and discounts have been widely adopted by exchanges[22], including the Exchange[23], and are reasonable, equitable and non-discriminatory because they are open to all members on an equal basis and provide additional benefits or discounts that are reasonably related to (i) the value to an exchange's market quality and (ii) associated higher levels of market activity, such as higher levels of liquidity provision and/or growth patterns. Additionally, as noted above, the Exchange operates in highly competitive market. 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, including schedules of rebates and fees that apply based upon members achieving certain volume and/or growth thresholds, as well as assess similar fees or rebates for similar types of orders, to that of the Exchange. These competing pricing schedules, moreover, are presently comparable to those that the Exchange provides, including the pricing of comparable criteria and/or fees and rebates.[24]

Specifically, the Exchange believes the proposed tier criteria under Add Volume Tier 3 and Remove Volume Tier 3, that is, an ADV threshold component as a percentage of TCV for, is a reasonable means to further incentivize Members to increase their overall order flow to the Exchange by encouraging those Members to strive for the different, incrementally more difficult tier criteria under the proposed tiers to receive a reduced rate and/or enhanced rebate. As such, adopting criteria based on a Member's adding and removing orders will encourage liquidity providing Members to provide for a deeper, more liquid market, and Members executing on the Exchange to increase transactions and take such execution opportunities provided by increased liquidity. The Exchange believes that an increase in overall order flow as a result of the proposed tiers would benefit all investors by deepening the Exchange's liquidity pool, providing greater execution incentives and opportunities, offering additional flexibility for all investors to enjoy cost savings, supporting the quality of price discovery, promoting market transparency and improving investor protection.

In line with the relative difficulty of the proposed criteria for Add Volume Tier 3, the Exchange believes that providing a greater reduced fee is reasonable as it is commensurate with the proposed criteria, that is, it reasonably reflects the scaled difficulty in achieving the ADV threshold as a percentage TCV in Tier 2 (as relocated from current Tier 3) as compared to proposed Tier 3. Also, the proposed reduced fee corresponding to the proposed criteria in Tier 3 does not

[17] And, as a result, updates current Tier 3 to Tier 2.

[18] *See* Nasdaq BX, Inc. Pricing List, ''Fee to Add Liquidity using Order with Midpoint Pegging'', available at *http://www.nasdaqtrader.com/Trader.aspx?id=bx_pricing,* which assesses a fee of $0.0015 for firm orders with Midpoint Pegging adding non-displayed liquidity; *and* Nasdaq PSX, Inc. Pricing List, ''Rebates to Add Non-Displayed Liquidity via an Order with Midpoint Pegging'', available at [sic], which assesses a rebate of $0.0023 for firm orders with Midpoint Pegging adding non-displayed liquidity. The Exchange notes that this is comparable to the fee that it proposes to asses as the standard fee for orders at $0.0030 – the proposed fee at $0.0010 = $0.0020.

[19] 15 U.S.C. 78f.

[20] 15 U.S.C. 78f(b)(4).

[21] 15 U.S.C. 78f.(b)(5).

[22] *See e.g.,* the Nasdaq Stock Market LLC Rules, Equity 7, Sec. 118(a)(1); and the Nasdaq BX, Inc. Rules, Equity 7 Pricing Schedule, Sec. 118(a), both of which generally provide credits to members for adding and/or removing liquidity that reaches certain thresholds of Consolidated Volume; *see also* Cboe BYX U.S. Equities Exchange Fee Schedule, Footnote 1, Add/Remove Volume Tiers, which provides similar incentives for liquidity adding and removing orders.

[23] *See generally,* Cboe EDGA U.S. Equities Exchange Fee Schedule, Footnote 7, Add/Remove Volume Tiers.

[24] *See supra* note 18. *See also supra* note 20 [sic]. Nasdaq offers credits between $0.00005 and $0.00305 per share for liquidity adding orders depending on different criteria achieved and member-base, which similarly equate to the reduced rate which the Exchange proposes for liquidity adding orders. BX charges between $0.0024 and $0.0028 per share between for liquidity adding orders for certain Consolidated Volume-based criteria achieved, which is substantially similar to the reduced rate which the Exchange proposes for liquidity adding orders.

represent a significant departure from the fees currently offered, or criteria required, under the Exchange's existing tiers. For example, the discounted fees assessed under existing Add Volume Tier 1, for which a Member must have a daily volume add (ADAV) of 0.10% or greater than the TCV, is $0.0026 per share, and the discounted fee in restructured Tier 2 (current Tier 3), for which a Member must add or remove an ADV of greater than or equal to 0.65% of the TCV, is $0.0016. The Exchange believes that the step-up in difficulty in achieving an add volume threshold of 0.10% to achieving and add/remove volume threshold of 0.65% is commensurate with the difference in the reduced fees offered per the respective tiers. The Exchange notes too that the add/remove volume threshold between proposed Tier 2 and proposed Tier 3 is a smaller increase in difficulty and therefore is commensurate with the proposed smaller increase between the reduced fees offered.

The Exchange believes the proposed rule change to delete Remove Volume Tier 2 is reasonable as its Members have not been choosing to meet the criteria under current Tier 2 to receive the enhanced rebate of $0.0028, but instead continue to opt to meet the criteria in current Tier 3 for which they can receive the same enhanced rebate. Therefore, the Exchange believes it is reasonable to remove an unused tier, particularly where another existing tier offers other criteria to achieve the same rebate.

The Exchange further believes the proposed rule change to increase the fee amount for fee code MM is reasonable because, as stated above, in order to operate in the highly competitive equities markets, the Exchange and its competing exchanges seek to offer similar pricing structures, including assessing comparable fees for similar types of orders. Thus, the Exchange believes the proposed fee is reasonable as it is generally aligned with the amounts assessed for the same type of non-display orders using Mid-Point Peg that add liquidity on other equities exchanges,[25] as well as off-exchange venues.

The Exchange believes that the proposal represents an equitable allocation of fees and rebates and is not unfairly discriminatory because all Members are eligible for the proposed Add Volume Tier 3 and would have the opportunity to meet the tier's criteria and would receive the proposed fee if such criteria is met. Without having a view of activity on other markets and off-exchange venues, the Exchange has no way of knowing whether this proposed rule change would definitely result in any Members qualifying for the new Add Volume tier. While the Exchange has no way of predicting with certainty how the proposed tier will impact Member activity, the Exchange anticipates that at least four Members will be able to compete for and reach the proposed tier. The Exchange anticipates that the tiers will include various Member types, including liquidity providers (*e.g.* wholesale firms that mainly make markets for retail orders), broker-dealers (*e.g.* bulge bracket firms that conduct trading on behalf of customers), and proprietary firms, each providing distinct types of order flow to the Exchange to the benefit of all market participants. For example, broker-dealer customer order flow provides more trading opportunities, which attracts Market Makers. Increased Market Maker activity facilitates tighter spreads which potentially increases order flow from other market participants. The Exchange likewise believes that the proposed rule change to deleted Remove Volume Tier 2 is represents an equitable allocation of rebates and is not unfairly discriminatory because it will no longer be available to any Member to choose to meet the tier. The Exchange also notes that proposed Add Volume Tier 3 and deleted Remove Volume Tier 2 will not adversely impact any Member's pricing or their ability to qualify for other reduced fee or enhanced rebate tiers. Should a Member not meet the proposed criteria under the proposed tier, the Member will merely not receive that reduced fee/enhanced rebate. Further, Members already do not choose to meet the proposed deleted tier, therefore, will not be adversely impacted. Furthermore, the proposed reduced fee in Add Volume Tier 3 would uniformly apply to all Members that meet the required criteria under the respective proposed tiers.

Finally, the Exchange believes that increasing the fee amount for orders yielding fee code MM represents an equitable allocation of fees and is not unfairly discriminatory because, as stated, it is appropriately in line with the rates assessed by competing exchanges and it will continue to automatically apply to all Members' non-displayed liquidity adding orders using Mid-Point Peg.

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 intramarket or intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. Rather, as discussed above, the Exchange believes that the proposed change would encourage the submission of additional order flow to a public exchange, thereby promoting market depth, execution incentives and enhanced execution opportunities, as well as price discovery and transparency for all Members. As a result, the Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering competition among orders, which promotes ''more efficient pricing of individual stocks for all types of orders, large and small.'' [26]

The Exchange believes the proposed rule change does not impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. Particularly, the proposed change applies to all Members equally in that all Members are eligible for the proposed Add Volume tier, have a reasonable opportunity to meet the tier's criteria and will all receive the proposed fee if such criteria is met. Additionally, the proposed Add Volume tier changes are designed to attract additional order flow to the Exchange. The Exchange believes that the additional tier criteria would incentivize market participants to direct liquidity and executing order flow to the Exchange, bringing with it improved price transparency. Greater overall order flow and pricing transparency benefits all market participants on the Exchange by providing more trading opportunities, enhancing market quality, and continuing to encourage Members to send orders, thereby contributing towards a robust and well-balanced market ecosystem, which benefits all market participants. Further, the Exchange does not believe that the proposed removal of Remove Volume Tier 2 imposes any burden on intramarket competition because, as noted above, no Members have been opting to achieve this tier and instead have been striving to achieve another Remove Volume Tier which offers the exact same enhanced rebate. In addition to this, the Exchange believes that the proposed fee for orders yielding fee code MM will continue to apply automatically to all such Members' orders.

Next, the Exchange believes the proposed rule change does not impose any burden on intermarket competition

[25] *See supra* note 18.

[26] Securities Exchange Act Release No. 51808, 70 FR 37495, 37498–99 (June 29, 2005) (S7–10–04) (Final Rule).

that is not necessary or appropriate in furtherance of the purposes of the Act. As previously discussed, the Exchange operates in a highly competitive market. Members have numerous alternative venues that they may participate on and direct their order flow, including 12 other equities exchanges and off-exchange venues and alternative trading systems. Additionally, the Exchange represents a small percentage of the overall market. Based on publicly available information, no single equities exchange has more than 18% of the market share.[27] Therefore, no exchange possesses significant pricing power in the execution of order flow. Indeed, participants can readily choose to send their orders to other exchange and off-exchange venues if they deem fee levels at those other venues to be more favorable. Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [28] The fact that this market is competitive has also 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'. . . .''.[29] Accordingly, the Exchange does not believe its proposed fee change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from Members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A) [30] of the Act and subparagraph (f)(2) of Rule 19b–4 [31] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange. At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) [32] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CboeEDGA–2020–023 on the subject line.

Paper Comments

- Send paper comments in triplicate to: Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–CboeEDGA–2020–023. 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–CboeEDGA–2020–023 and should be submitted on or before September 9, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[33]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–18100 Filed 8–18–20; 8:45 am]

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[27] *See supra* note 4.

[28] See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

[29] 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)).

[30] 15 U.S.C. 78s(b)(3)(A).

[31] 17 CFR 240.19b–4(f)(2).

[32] 15 U.S.C. 78s(b)(2)(B).

[33] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–89550; File No. SR–CboeBZX–2020–060]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing of a Proposed Rule Change To Amend the Fifth Amended and Restated Bylaws of the Exchange's Parent Corporation, Cboe Global Markets, Inc.

August 13, 2020.

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 July 30, 2020, Cboe BZX Exchange, Inc. (the ''Exchange'' or ''BZX'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

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

Cboe BZX Exchange, Inc. (the ''Exchange'' or ''BZX'') proposes to amend the Fifth Amended and Restated Bylaws (the ''Parent Bylaws'') of its parent corporation, Cboe Global Markets, Inc. (''Cboe'' or the ''Parent''). The text of the proposed amendments to the Parent Bylaws is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/equities/regulation/rule_filings/bzx/*), 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The proposed rule change amends the Parent Bylaws to improve the governance processes of Cboe, which is organized under the laws of the State of Delaware, and to make certain provisions more consistent with the Delaware General Corporation Law (''DGCL''). The proposed rule change also makes clarifying and cleanup changes to the Parent Bylaws.

Proposed Changes to Article 2—Stockholders

The majority of the proposed changes are being made to amend Section 2.11 (Nomination of Directors) and Section 2.12 (Notice of Business at Annual Meetings) and are generally designed to provide the Board with the most information and advance notice possible in connection with business and nominations at annual and special meetings. Additionally, the Exchange notes the proposed changes reflect the most up-to-date disclosure requirement practices. The proposed changes also combine the existing separate provisions for director nominations and stockholder proposals into one provision. Particularly, the proposed rule change combines current Sections 2.11 and 2.12 into one provision: Proposed Section 2.11 titled ''Notice of Business and Nomination of Directors at Meetings of Stockholders.'' [3] Specifically, the proposed rule change delineates proposed Section 2.11 into paragraph (a) governing notice requirements for annual meetings, paragraph (b) governing notice requirements for special meetings,[4] and paragraph (c), which provides for other general procedures and practices in connection with notices. The proposed delineation does not alter the process or definition of either type of meeting, but instead provides for significantly more detailed written notice requirements as well as updates to the manner and timeliness of notices.

First, the proposed change to Section 2.11(a)(i) relocates the provisions regarding ''properly brought'' business from current Section 2.12, and streamlines such provisions to clearly state that the only business that will be conducted at an annual meeting of the stockholders is business that has properly been brought before the meeting and specifies to be ''properly brought'' such business must be included in the Corporation's notice of the meeting and brought pursuant to Rule 14a–8 under the Securities Exchange Act of 1934, (the ''Exchange Act'') (or any successor provision of law) and included in the Corporation's properly brought business. It also proposes to specify the a precise time that the notices must be made by (*i.e.,* delivered to or mailed and received by the Secretary of the Corporation), which is not later than 5:00 p.m. Eastern Time on the 90th day nor earlier than the 120th day (which are the time frames currently in place) prior to such annual meeting.

Next, the proposed rule change adds greater detail regarding the requirements for proper written notice. Particularly, for notice for stockholder proposals for business other than nominations, (proposed Section 2.11(a)(iii)(A)), the proposed rule change provides that such notice must essentially set forth the same information that would be disclosed in a proxy statement, including:

- A reasonably brief description of the business desired to be brought before the meeting; the text of the proposal or business (including the text of any resolutions proposed for consideration and, in the event that such business includes a proposal to amend the Certificate of Incorporation or the Bylaws of the Corporation, the language of the proposed amendment);
- the reasons for conducting such business at the meeting; a complete and accurate description of any material interest in such business of such stockholder and any Stockholder Associated Person, individually or in the aggregate, including any anticipated benefit to the stockholder and any Stockholder Associated Person therefrom; and
- all other information relating to such proposed business that would be required to be disclosed in a proxy statement or other filing required to be made by the stockholder or any Stockholder Associated Person in connection with the solicitation of proxies in support of such proposed business pursuant to Regulation 14A under the Exchange Act.

Regarding proposed proper written notice for director nominations (proposed Section 2.11(a)(iii)(B)), the notice must include:

- The name, age, business address and residence address of such nominee, (''Proposed Nominee'') (which, the Exchange notes is currently the case);
- the principal occupation or employment of such nominee (which, the Exchange notes is currently the case);
- a completed written questionnaire with respect to the background and qualifications of such Proposed Nominee, which must be completed in a form required by the Corporation and provided to such stockholder within ten days of receiving such request;
- the Proposed Nominee's executed written consent to being named in the proxy statement for the meeting as a director nominee;
- the Proposed Nominee's completed written representation and agreement, which must be completed in a form required by the Corporation and provided to such stockholder within ten days of receiving such request. Importantly, the Proposed Nominee must represent and agree (1) to a ''Voting Commitment'' that the Proposed Nominee is not and will not become party to any agreement,

[3] The proposed rule change also updates the subsequent section numbering (current 2.13 through 2.16) to reflect this change (proposed 2.12 through 2.15).

[4] *See* Section 2.3 of the Parent Bylaws for a description of Special Meetings.

arrangement or understanding with, and has not given any commitment or assurance to, any person or entity as to how such Proposed Nominee, if elected as a director, will act or vote on any issue or question (that has not been disclosed to the Corporation). or any Voting Commitment that could limit or interfere with the Proposed Nominee's ability to comply with fiduciary duties under applicable law, (2) that the Proposed Nominee is not and will not become a party to any agreement, arrangement, or understanding with any person or entity other than the Corporation with respect to any direct or indirect compensation, reimbursement, or indemnification in connection with service or action as a director that has not been disclosed to the Corporation, (3) would comply with all applicable rules of the exchange and Corporation and fiduciary duties under state law, (4) would comply with certain Articles of Incorporation with respect to activities related to any of the Exchanges, (5) intends to serve a full term if elected, and (6) will provide true and correct information in communications to the Corporation and its stockholders and will not omit material information or provide misleading information;

• a description of all direct and indirect compensation and other material monetary agreements, arrangements and understandings during the past three years, and any other material relationships; and

• any other information that would be required to be disclosed statement or other filing required to be made in connection with solicitations of proxies for election of directors in a contested election pursuant to Section 14 of the Exchange Act (which, the Exchange notes is currently the case).

As to the stockholder providing notice, any Stockholder Associated Person and any Proposed Nominee, (proposed Section 2.11(a)(iii)(C)) the proposed proper written notice must provide:

• Name and address of such person (as they appear on the Corporation's books, if applicable) (which, the Exchange notes is currently the case);

• class (which is currently the case) or series and number of shares of capital stock of the Corporation (''Shares'') which are, directly or indirectly, owned beneficially and/or of record by such person, the dates such shares were acquired and the investment intent of such acquisition;

• the name of each nominee holder for, and any pledge by such person or any number of, securities of the Corporation owned beneficially, but not of record;

• short interest, including a definition of what constitutes short interest, wherein a person shall be deemed to have a short interest in a security if such person, directly or indirectly, through any contract, arrangement, understanding, or relationship or otherwise has an opportunity to profit or share in profit derived from decreased value of the subject security;

• a description of any agreement, arrangement or understanding, whether written or oral, (including any derivative or short positions, profit interests, options, warrants, convertible securities, stock appreciation or similar rights, hedging transactions, and borrowed or loaned shares (which, the Exchange notes, is currently the case) or similar rights with an exercise or conversion privilege or a settlement payment or mechanism at a price related to any class or series of capital stock of the Corporation or with a value derived in whole or in part from the value of any class or series of capital stock of the Corporation (a ''Derivative Instrument'')), in order to mitigate loss to, manage risk or benefit of share price changes for, or increase or decrease voting power with respect to Shares;

• any rights to dividends on the Shares owned beneficially by such person;

• any proportionate interest [5] in Shares or Derivative Instruments by a general or limited partnership or similar entity in which such person (1) is a general partner or beneficially owns an interest in a general partner, or (2) is the manager, managing member, or beneficially owns an interest in such management, of a limited liability company or similar entity;

• any substantial interest (including, without limitation, any existing or prospective commercial, business or contractual relationship with the Corporation), by security holdings or otherwise, in the Corporation or any of its affiliates;

• a complete and accurate description of all agreements, arrangements or understandings, written or oral, and formal or informal, between or among the stockholder providing notice and any of the Stockholder Associated Persons (collectively, the ''Stockholders''), or the Stockholders with any Proposed Nominee and any other person in connection with (1) any proxy, contract, arrangement, understanding or relationship where either of the Stockholders have the right to vote any Shares, (2) that such individuals may have reached with any stockholder of the Corporation regarding how such stockholder will vote its shares, take other action in support of any Proposed Nominee, or other action by either of the Stockholders, and (3) any other agreements that would be required to be disclosed by either of the Stockholders or any other person or entity pursuant to a Schedule 13D filed pursuant to the Exchange Act

• a complete and accurate description of any performance-related fees to which such person may be entitled as a result of any increase or decrease in the value of Shares or any Derivative Instruments;

• any investment strategy or objective of those who are not an individual and a copy of the prospectus (and other like documents);

• a complete and accurate description of any pending or threatened legal proceeding in which such person is a party or participant involving the Corporation;

• if any agreement, arrangement or understanding has been made to increase or decrease the voting power of such person with respect to any Shares; and

• any other information relating to such person that would be required to be disclosed in a proxy statement or other filing required to be made in connection with solicitations of proxies for such business or the election of any Proposed Nominee, or is otherwise required, pursuant to Section 14 of the Exchange Act.

Further, regarding proposed proper written notice, proposed Section 2.11(a)(iii)(D) simplifies the language in connection with the current requirement that the Stockholders must represent if they intend to deliver a proxy statement and/or form of proxy to holders to approve or adopt the proposed business, elect the Proposed Nominee, and/or otherwise solicit proxies or votes from stockholders in support of such proposed business or Proposed Nominee, making it easier to understand.

Proposed Section 2.11(a)(iii)(E) provides for the current requirement that the stockholder providing notice must represent that it is a holder of record of stock of the Corporation entitled to vote at such meeting and intends to appear in person, and adds that ''in person'' may be virtually, in the case of a meeting held solely by means of remote communication) or by proxy at the meeting to bring such proposed business and/or nominate one or more Proposed Nominee.

[5] Interest referred to throughout the proposed stockholder proper written notice may be direct or indirect.

Proposed Section 2.11(a)(iii)(F) requires that proper written notice include an acknowledgment that the Corporation does not have to present the business or nomination being brought at the meeting by the stockholder proposing such, if such stockholder does not appear. The proposed rule change also adds that, in addition to the proper written notice information, the Corporation may require any Proposed Nominee to furnish certain other information as the Corporation may reasonably require to determine the eligibility or independence of a Proposed Nominee.

Proposed Section 2.11(b), which, as stated, delineates the provisions governing special meetings of stockholders, amends the procedures governing advance notice of director nominations at a special meeting called by the Board for the election of directors. Currently, notices of a special meeting must be made not less than ninety (90) days nor more than one hundred twenty (120) days prior to the anniversary date of the immediately preceding annual meeting of stockholders; provided, however, that if the annual meeting is not held within thirty (30) days before or more than seventy (70) days after such anniversary date, then such nomination shall have been delivered to or mailed and received by the Secretary not later than the close of business on the 10th day following the date on which public announcement of the annual meeting date was made. The proposed rule change updates this notice procedure to mirror the same procedural language in proposed Section 2.11(a)(ii) (maintaining the same 90- to 120-day notice requirement), but updates the timing requirements to remove the language regarding the 30-day and 70-day time frames around the anniversary date and provides that, if public announcement of the special meeting and the nominees proposed by the Board of Directors to be elected at such meeting is first made less than ninety (90) days prior to the date of the special meeting, notice must be made the tenth (10th) day following the day on which such public announcement is first made. The Exchange believes this proposed timing provision simplifies the timing requirement, making it easier to understand and follow, and also provides ample time to provide notice in advance to stockholders of any scheduled special meeting. Proposed Section 2.11(b) also provides that proper written notice of a special meeting must comply with the requirements, as proposed, laid out in Section 2.11(a)(iii).

Proposed Section 2.11(c) provides, generally, for other procedures and practices in connection with notices, as well as certain defined terms. Proposed Section 2.11(c)(i) provides that a stockholder providing notice must update any notice, if necessary, so that the information provided or required to be provided in a notice is be true and correct (A) as of the record date for determining the stockholders entitled to receive notice of the meeting and (B) as of the date that is ten business days prior to the meeting (or any postponement, adjournment or recess thereof). If an update is required to be made as of the record date for determining the stockholders entitled to receive notice of the meeting then the notice of update must be made not later than five business days after the record date for determining the stockholders entitled to receive notice of such meeting. If an update is required to be made as of the date that is ten business days prior to the meeting (or any postponement, adjournment or recess thereof), then the notice of update must be made no later than seven business days prior to the date for the meeting, if practicable, or, if not practicable, on the first practicable date prior to the meeting or any adjournment, recess or postponement thereof Proposed Section 2.11(c)(ii) provides that if any information submitted pursuant to Section 2.11 is inaccurate in any respect, such information may be deemed not to have been provided in accordance with the Parent Bylaws. As proposed, the stockholder providing the notice has an obligation to notify the Secretary in writing at the principal executive offices of the Corporation of any inaccuracy or change in any such information within two business days of becoming aware of such inaccuracy or change. Additionally, within seven days upon delivery of a written request by the Secretary, the Board of Directors (or a duly authorized committee thereof), any such stockholder is obliged to provide: (A) Written verification, reasonably satisfactory to the Board of Directors, any committee thereof or any authorized officer of the Corporation, to demonstrate the accuracy of any information submitted by the stockholder pursuant to Section 2.11, and (B) a written update of any information pursuant to Section 2.11 as of an earlier date. If the stockholder fails to provide such written verification within such period, the information as to which written verification was requested may be deemed not to have been provided in accordance with Section 2.11. Proposed Section 2.11(c)(iii) provides that a stockholder providing notice must also comply with all applicable requirements of State law and all applicable requirements of the Exchange Act and the rules and regulations thereunder, however, references to the Exchange Act and its rules and regulations will not limit the requirements applicable to stockholder proposals or director nominations pursuant to Section 2.11. Proposed Section 2.11(c)(iv) updates current language governing failure for the proposing stockholder to appear by adding that virtual appearances are acceptable when such meeting is being held remotely, as well as the flexibility for the Corporation to waive the appearance requirement. The rule change updates this provision and adds this flexibility in light of the ongoing Covid–19 pandemic and the consequential remote working status for many companies, including Cboe. Proposed Section 2.11(c)(v) adds the definition of key terms, along with current definitions, for clarity. Specifically, the proposed rule change defines an ''affiliate'' and ''associate'' as having the respective meanings set forth in Rule 12b–2 under the Exchange Act and ''Stockholder Associated Person'' to mean: Any person who is a member of a ''group'' (used in Rule 13d–5 under the Exchange Act) with or otherwise acting in concert with such stockholder providing notice; any beneficial owner of shares of stock of the Corporation owned of record or beneficially by such stockholder (other than a stockholder that is a depositary); any person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such stockholder or such Stockholder Associated Person and beneficially owns, directly or indirectly, shares of stock of the Corporation; any person that directly, or indirectly through one or more intermediaries, controls such stockholder or any Stockholder Associated Person; and any participant (as defined in paragraphs (a)(ii)–(vi) of Instruction 3 to Item 4 of Schedule 14A, or any successor instructions) with such stockholder or other Stockholder Associated Person in respect of any proposals or nominations, as applicable.

The Exchange notes that many of the proposed rule changes to proposed Section 2.11 are consistent with the bylaws of Cboe's peer financial market/services corporations, Nasdaq, Inc (''Nasdaq''),[6] Intercontinental Exchange

[6] *See* By-laws of Nasdaq, Inc., available at *https://listingcenter.nasdaq.com/assets/RuleBook/*

(''ICE''),[7] and/or the CME Group, Inc. (''CME''),[8] including:

- The proposed disclosures required under Regulation 14A for proposed business other than director nominations; director questionnaires;
- consent to be named in the proxy statement as a director nominee;
- a Voting Commitment;
- disclosure of compensation arrangements in connection with service as a director;
- agreement to comply with applicable regulations, organizational documents and policies;
- representation of intent to serve a full term; commitment to provide true and correct facts and to not omit material facts;
- nominee disclosures for contested elections under Section 14;
- required disclosure by a proposing stockholder's 13D group members and related parties;
- disclosure of rights to dividends, short interest, interests held through controlled partnerships or LLCs, and in the Company other than Company common stock;
- disclosure of agreements/arrangements in connection with conferring proxy authority, with any other stockholder regarding voting or supporting the proposal/nominee, with increasing or decreasing voting power, and agreements required to be disclosed on Schedule 13D;
- disclosure of performance-related fees related to the Company's performance;
- disclosure of investment strategy and inclusion of prospectus/offering memorandum;
- disclosure of pending or threatened litigation;
- Special meeting provisions;
- Obligation to update and correct disclosures; and
- Express obligation to appear to present the proposal/nominee.

Additionally, the proposed rule change moves language currently in Section 2.10 providing that the number of nominees for director may not exceed the number of directors to be elected at any meeting to proposed Section 2.11(a) (annual meetings) and Section 2.11(b) (special meetings), therefore adding clarity to the updated Section 2.11 format that this provision continues to apply for both annual and special meetings. The proposed rule change to Section 2.10 also simplifies current language that provides an election may proceed if proper notice is made and received and adds language that nominations may be withdrawn on or prior to the tenth day before the date the Corporation first mails its notice of meeting for such election.

The proposed rule change also amends Section 2.1 (Place of Meetings) by removing language that requires stockholder meetings to be held at the principal place of business of the Company if no location is designated. The Exchange believes that it is appropriate for the Board to retain both control and flexibility over the location and timing of stockholder meetings. The proposed rule change amends Section 2.2 (Annual Meeting) and Section 2.3 (Special Meeting) to provide that the Board may postpone, reschedule or cancel any previously-scheduled annual meeting or special meeting, respectively. The proposed rule change also updates Section 2.7 (Adjournments) to provide that only the presiding person of a stockholder meeting can adjourn the meeting in the absence of a quorum. The proposed changes are intended to provide the Board the flexibility to postpone, recess, reschedule or cancel a stockholder meeting. The Exchange also notes that the proposed rule changes to Sections 2.2, 2.3, and 2.7 are consistent with the bylaws of Cboe's peer corporation, Nasdaq.[9]

The proposed rule change also makes updates to reflect the current best corporate governance practices to certain Sections under Article 2. In particular, it updates the language in Section 2.5 (Voting List) regarding who is required to prepare the voting list. Section 2.5 currently provides that officer who has charge of the stock ledger prepares the voting list and the proposed rule change updates this to provide that the Corporation prepares the voting list. The proposed rule change is consistent with the DGCL and reflects current best practice. The proposed rule change also amends current Section 2.13 (Organization) (proposed Section 2.12), which currently states that that the Board of Directors may appoint any stockholder to act as chairman of any meeting in the absence of the Chairman of the Board, to instead provide that that the Board of Directors may appoint any director of the Corporation to act as chairman of any meeting in the absence of the Chairman of the Board. Also, current Section 2.16 (Conduct of Meetings) (proposed Section 2.15) makes certain changes to expand the procedural authority of the presiding officer of any stockholder meeting, including the right to recess and/or adjourn meetings for any or no reason, and the determination of when the polls will open and close for any given matter to be voted on at the meeting, the removal of any stockholder or individual who refuses to comply with meeting procedures, rules, or guidelines, the restrictions on the use of audio and/or video recording devices and cell phones. This is consistent with best practice and ensures that the presiding officer has the flexibility to take measures, as needed, that ensure meetings are conducted in the most appropriate manner.

Proposed Changes to Article 3—Directors

The proposed rule change amends Section 3.5 (Vacancies) to provide that that vacancies on the Board may be filled exclusively by a majority of the directors. The Exchange notes that stockholders have a common law right under Delaware law to fill director vacancies, unless the Company's Charter or Bylaws explicitly give the Board exclusive authority, therefore, the proposed change is designed to make this right exclusive to the Board. The proposed rule change is consistent with the bylaws of Cboe's peer corporations, Nasdaq and ICE.[10] The proposed rule change to Section 3.10 (Special Meetings) would allow special meetings of the Board to be called with less than 24 hours' notice. Currently, Section 3.10 requires at least 24 hours' notice to directors of special Board meetings. However, there may be circumstances that necessitate an emergency meeting of the Board with less than 24 hours' notice (*e.g.,* in relation to a pending transaction), and therefore, the proposed changes would allow notice on a shorter time frame if necessary and appropriate under the circumstances. The proposed changes to Section 3.13 (Action by Consent) updates language regarding routine filing of consents following an action by the Board. Specifically, the proposed change updates the consents to reflect the same electronic form as minutes are maintained, which is consistent with recent amendments to the DGCL, reflects current best practice.

The proposed change also adds Section 3.15 (Emergency Bylaws). Specifically, the proposed Section 3.15 provides that, notwithstanding anything to the contrary in the Certificate of

NASDAQ/rules/Nasdaq_Inc_Corporate_Organization_Nasdaq_Inc.pdf.

[7] *See* Eighth Amended and Restated Bylaws of Intercontinental Exchange, Inc., available at *https://s2.q4cdn.com/154085107/files/doc_downloads/intercontinental_exchange/bylaws-eighth-amended.pdf.*

[8] *See* Fifteenth Amended and Restated Bylaws of CME Group Inc., available at *https://www.cmegroup.com/rulebook/files/CME-Bylaws.pdf.*

[9] *See supra* note 6.

[10] *See supra* notes 6 and 7.

Incorporation or these Bylaws, in the event there is any emergency, disaster or catastrophe, as referred to in Section 110 of the DGCL, or other similar emergency condition (each, an ''emergency''), and a quorum of the Board of Directors cannot readily be convened for action, this Section 3.15 shall apply, including:

- Any director or Chief Executive Officer, President, Chief Operating Officer, Chief Financial Officer, Treasurer or Secretary of the Corporation may call a meeting of the Board of Directors by any feasible means and with such advance notice as circumstances permit in the judgment of the person calling the meeting. Neither the business to be transacted nor the purpose of any such meeting need be specified in the notice thereof.
- One-third (⅓) of the directors shall constitute a quorum, which may in all cases act by majority vote.
- Directors may take action to appoint one or more of the director or directors to membership on any standing or temporary committees of the Board of Directors as they deem advisable. Directors may also take action to designate one or more of the officers of the Corporation to serve as directors of the Corporation while this Section 3.15 applies.
- To the extent that it considers it practical to do so, the Board of Directors shall manage the business of the Corporation during an emergency in a manner that is consistent with the Certificate of Incorporation and Bylaws. It is recognized, however, that in an emergency it may not always be practical to act in this manner and this Section 3.15 is intended to and does hereby empower the Board of Directors with the maximum authority possible under the DGCL, and all other applicable law, to conduct the interim management of the affairs of the Corporation in an emergency in what it considers to be in the best interests of the Corporation.
- No director, officer or employee acting in good faith in accordance with this Section 3.15 or otherwise pursuant to Section 110 of the DGCL shall be liable except for willful misconduct.
- This Section 3.15 shall continue to apply until such time following the emergency when it is feasible for at least a majority of the directors of the Corporation immediately prior to the emergency to resume management of the business of the Corporation.
- The Board of Directors may modify, amend or add to the provisions of this Section 3.15 in order to make any provision that may be practical or necessary given the circumstances of the emergency.
- The provisions of this Section 3.15 shall be subject to repeal or change by further action of the Board of Directors or by action of the stockholders, but no such repeal or change shall modify the provisions of paragraph (e) of this Section 3.15 with regard to action taken prior to the time of such repeal or change.

The Exchange notes that these proposed changes are largely consistent with the DGCL and are designed to allow the Board and the Corporation to continue to function in the case of an emergency, such as a pandemic or an act of terrorism. The Exchange believes the ongoing COVID–19 pandemic, as well as similar potential events, demonstrate the need for Emergency Bylaws and notes that a number of companies are adopting (or at least considering) emergency bylaws to relax Board requirements when directors may be unavailable due to emergency conditions, such as the pandemic.

Proposed Changes to Article 4—Committees

The proposed rule change to Section 4.1 (Designation of Committees) adds language that provides the Board with additional rights in their ability to designate committees and committee alternates and specifies that such committees may exercise all powers and authority of the Board in the management of the business. Specifically, the proposed language provides that the Board of Directors may designate one or more committees, each committee to consist of one or more of the directors of the Corporation. The Board of Directors may designate one or more directors as alternate members of any committee, who may replace any absent or disqualified member at any meeting of the committee. In the absence or disqualification of a member of the committee, the member or members thereof present at any meeting and not disqualified from voting, whether or not he, she or they constitute a quorum, may unanimously appoint another member of the Board of Directors to act at the meeting in place of any such absent or disqualified member. Any such committee, to the extent permitted by law and to the extent provided in the resolution of the Board of Directors, shall have and may exercise all the powers and authority of the Board of Directors in the management of the business and affairs of the Corporation, and may authorize the seal of the Corporation, if any, to be affixed to all papers which may require it. The proposed rule change provides additional detail regarding the specific authority of the Board to designate members of the committees and their general powers and authority to manage the Corporation, as well as the power invested in the voting members regarding the appointment of a member of the Board to act in a circumstance of disqualification. The proposed language is consistent with the DGCL and reflects current best practice.

The proposed rule changes to Section 4.2 (The Executive Committee) removes language that lists out specific actions or matters that are not to be handled by the Executive Committee under Delaware law, including amending the Certificate of Incorporation, adopting an agreement of merger or consolidation, approving a sale, lease or exchange of all or substantially all of the Corporation's property and assets, or approval of a dissolution of the Corporation or revocation of a dissolution. The proposed change, instead, replaces this list with reference to matters under the DGCL to be submitted to stockholders for approval. The Exchange believes that the proposed change, while being consistent with the DGCL, removes ambiguous and potentially unnecessarily limiting language that lists the circumstances that could not be handled by the Executive Committee that required stockholder approval and replaces it with broader reference to the DGCL.

The proposed change to Section 4.5 (The Nominating and Governance Committee) reduces the minimum size requirement of the Nominating and Governance Committee (''N&G Committee'') from a minimum of five members to three members. This proposed rule change is intended to provide the Board additional flexibility when populating the N&G Committee and is consistent with the minimum number of members required on other Board committees.[11]

Proposed Changes to Article 8—Notices

The proposed rule change in Section 8.1 (Notices) replaces language in paragraph (e) that requires that stockholders opt-in to email notice with language that instead allows stockholders to opt-out of email notice or not receive email notice if such notice is prohibited by the DGCL. The proposed rule change also updates Section 8.2 (Electronic Notice) to reflect this change. The proposed rule change also removes the provision in Section 8.1 paragraph (c) which provides that notice may be given by messenger or

[11] *See e.g.,* Sections 4.3 and 4.4 of the Parent Bylaws.

overnight courier service if the delivery method does not require payment of the messenger or courier service fee to deliver the notice by the person to whom the notice is addressed. The proposed rule change then adds to paragraph (c) that notice is deemed to have been given via this method at the earlier of when the notice is received or left at the stockholder's or director's address. The proposed change is consistent with the DGCL.

Proposed Rule Changes to Article 11 (Forum for Adjudication of Disputes)

The proposed rule changes to Article 11 add clarifying provisions and additional detail regarding the exclusive forum. The proposed changes are designed to update the exclusive forum bylaw to reflect current best practices. Specifically, the proposed rule change adds that, among the existing actions listed, the Court of Chancery of the State of Delaware will be the sole and exclusive forum for any action asserting an ''internal corporate claim'' (defined in the DGCL). The proposed rule change also provides that, in the event that the Delaware Court of Chancery lacks subject matter jurisdiction over any such action or proceeding, the sole and exclusive forum for such action or proceeding shall be another State or Federal court located within the State of Delaware. The proposed rule change provides that any person or entity purchasing or otherwise acquiring any interest in shares of capital stock of the Corporation is deemed to have notice of and consented to the provisions of Article 1, including exclusive personal jurisdiction in the Delaware Court or Chancery and having service of process made, even if an action (within the scope of Article 11) is filed in a court other than a court located within the State of Delaware. Additionally, the proposed rule change makes clear that the existence of any prior consent to, or selection of, an alternative forum by the Corporation shall not act as a waiver of the Corporation's ongoing consent right in Article 11 and that failure to enforce the foregoing provisions would cause the Corporation irreparable harm and the Corporation is entitled to equitable relief, including injunctive relief and specific performance, to enforce Article 11. It also clarifies that a claim may be made against the Corporation or any current or former director, officer, other employee, agent or stockholder of the Corporation, and may arise pursuant to the Certificate of Incorporation or these Bylaws, in addition to the DCGL. The proposed rule change is in line with current best practice, and, additionally, the bylaws of Cboe's peer, CME,[12] currently provide for similar language related to foreign actions and specific performance.

Finally, the proposed rule change makes non-substantive edits throughout the above listed Articles of the Parent Bylaws, including updating paragraph lettering and numbering, simplifying language in order to better align it with plain English, update the terms Board of Directors and Exchange Act to be uniform throughout the bylaws (*e.g.,* as opposed to just ''Board'', or ''Securities and Exchange Act'', and the other versions of the Act's name).

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[13] Specifically, the Exchange believes the proposed rule change is consistent with Section 6(b)(1) of the Act,[14] which provides that the Exchange be organized and have the capacity to be able to carry out the purposes of the Act and to enforce compliance by the Exchange's Trading Permit Holders and persons associated with its Trading Permit Holders with the Act, the rules and regulations thereunder, and the rules of the Exchange.

In particular, the Exchange believes the proposed changes overall are designed to improve the governance process of Cboe, as well as update the Parent Bylaws, where applicable, to reflect and track the DCGL and current best practices. Moreover, the Exchange does not believe the proposed rule changes are controversial and indeed are common among public companies, including its peers, Nasdaq, ICE and CME.

Particularly, the proposed rule changes to proposed Section 2.11 in connection with providing notice regarding business and director nominations at annual and special meetings, will enable the Exchange to continue to be organized and have the capacity to be able to carry out the purposes of the Act, because such proposed changes are generally designed to strengthen these provisions by requiring notices (including updates to notices) to disclose to the Board more detailed information than currently required. In this manner, the proposed detailed disclosure requirements would provide the Board with substantially more information by which they may make complete and informed decisions and most appropriately address business before the Board. The Exchange also believes that the proposed rule changes in connection with timely notice, including the 10 days' advanced notice of director nominations (via the required director questionnaire), procedures governing advance notice of director nominations at a special meeting, an obligation to update and correct the notice up to 7 days prior to a meeting, and updated timing regarding the 10-day notice of a special meeting less than 90 days from the scheduled meeting, will allow the Board the appropriate time needed to consider and prepare to address all business, nominations, and other issues to be presented before it. As such, the proposed rule changes will ensure that the Board is able to continue to oversee the orderly operation of the corporation, including the Exchange, in a manner the it deems most appropriate. Additionally, and as listed in detail above, the vast majority of the proposed notice requirements are consistent with the bylaws of Cboe's peer corporations, CME, ICE, and/or Nasdaq, as well as in line with current best practices. The proposed changes are also all consistent with the DCGL.

Moreover, the proposed changes are intended to provide the Board with additional flexibility and more appropriate governance procedures in addressing various circumstances, which will enable the Exchange to continue to be organized and have the capacity to be able to carry out the purposes of the Act. In particular, the proposed rule changes would allow the Board to retain both control and flexibility over the location and timing of stockholder meetings, would allow the Board to postpone, recess, reschedule or cancel a stockholder meeting, would allow only the presiding person of a stockholder meeting to adjourn and reset a stockholder meeting date in the absence of quorum, would allow for shorter notice in order for the Board to call a special meeting, would allow the Board and the Corporation to continue to function (including remotely) in the case of an emergency, such as the ongoing COVID–19 pandemic, and would provide the Board with increased flexibility in populating the Nomination and Governance Committee. Each of these proposed changes is designed to assist the Exchange in most effectively and efficiently managing evolving corporate matters as they arise, many of which are highly complex and may be time

[12] *See supra* note 8.

[13] 15 U.S.C. 78f(b).

[14] 15 U.S.C. 78f(b)(1).

sensitive. Additionally, as indicated above, a majority of the proposed changes align certain Sections in the Parent Bylaws with current best practices and with the DCGL (as well as a change in accordance with Delaware common law) and are also consistent with bylaw provisions of Cboe's peer corporations. Accordingly, the Exchange believes the proposed changes are widely accepted as appropriate governance measures.

Lastly, the proposed nonsubstantive changes to the Parent Bylaws provide additional clarity within the Parent Bylaws and make them easier to understand. By making certain provisions read more in plain English, updating paragraph lettering and numbering, making certain terms uniform and simplifying language throughout, the proposed nonsubstantive changes benefit investors by providing more clarity and reduced complexity within the Parent Bylaws and making the Parent Bylaw [sic] better organized and easier to follow thus reducing potential investor confusion.

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 proposed rule change is not intended to address competitive issues but rather is concerned solely with updating the Parent Bylaws to reflect the changes described above.

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

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

A. By order approve or disapprove such proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CboeBZX–2020–060 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–2020–060. 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–2020–060 and should be submitted on or before September 9, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–18099 Filed 8–18–20; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–89545; File No. SR–CboeBZX–2020–053]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change, as Modified by Amendment No. 1, To List and Trade Shares of the 2x Long VIX Futures ETF, a Series of VS Trust, Under Rule 14.11(f)(4) (''Trust Issued Receipts'')

August 13, 2020.

On June 23, 2020, Cboe BZX Exchange, Inc. (''BZX'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade shares of the 2x Long VIX Futures ETF, a series of VS Trust, under Rule 14.11(f)(4) (''Trust Issued Receipts''). On June 26, 2020, the Exchange filed Amendment No. 1 to the proposed rule change. The proposed rule change, as modified by Amendment No. 1, was published for comment in the **Federal Register** on July 10, 2020.[3] Section 19(b)(2) of the Act[4] provides that, within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is August 24,

[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. 89234 (July 6, 2020), 85 FR 41644. Comments on the proposed rule change can be found at: *https://www.sec.gov/comments/sr-cboebzx-2020-053/srcboebzx2020053.htm.*

[4] 15 U.S.C. 78s(b)(2).

2020. The Commission is extending this 45-day time period.

The Commission finds that it is appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[5] designates October 8, 2020, as the date by which the Commission shall either approve or disapprove or institute proceedings to determine whether to disapprove the proposed rule change (File Number SR–CboeBZX–2020–053), as modified by Amendment No. 1.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

J. Matthew DeLesDernier,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–89541; File No. SR–CboeEDGA–2020–021]

Self-Regulatory Organizations; Cboe EDGA Exchange, Inc.; Notice of Filing of a Proposed Rule Change To Amend the Fifth Amended and Restated Bylaws of the Exchange's Parent Corporation, Cboe Global Markets, Inc.

August 13, 2020.

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 July 30, 2020, Cboe EDGA Exchange, Inc. (the ''Exchange'' or ''EDGA'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe EDGA Exchange, Inc. (the ''Exchange'' or ''EDGA'') proposes to amend the Fifth Amended and Restated Bylaws (the ''Parent Bylaws'') of its parent corporation, Cboe Global Markets, Inc. (''Cboe'' or the ''Parent''). The text of the proposed amendments to the Parent Bylaws is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/equities/regulation/rule_filings/edga/*), 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The proposed rule change amends the Parent Bylaws to improve the governance processes of Cboe, which is organized under the laws of the State of Delaware, and to make certain provisions more consistent with the Delaware General Corporation Law (''DGCL''). The proposed rule change also makes clarifying and cleanup changes to the Parent Bylaws.

Proposed Changes to Article 2—Stockholders

The majority of the proposed changes are being made to amend Section 2.11 (Nomination of Directors) and Section 2.12 (Notice of Business at Annual Meetings) and are generally designed to provide the Board with the most information and advance notice possible in connection with business and nominations at annual and special meetings. Additionally, the Exchange notes the proposed changes reflect the most up-to-date disclosure requirement practices. The proposed changes also combine the existing separate provisions for director nominations and stockholder proposals into one provision. Particularly, the proposed rule change combines current Sections 2.11 and 2.12 into one provision: proposed Section 2.11 titled ''Notice of Business and Nomination of Directors at Meetings of Stockholders.''[3] Specifically, the proposed rule change delineates proposed Section 2.11 into paragraph (a) governing notice requirements for annual meetings, paragraph (b) governing notice requirements for special meetings[4], and paragraph (c), which provides for other general procedures and practices in connection with notices. The proposed delineation does not alter the process or definition of either type of meeting, but instead provides for significantly more detailed written notice requirements as well as updates to the manner and timeliness of notices.

First, the proposed change to Section 2.11(a)(i) relocates the provisions regarding ''properly brought'' business from current Section 2.12, and streamlines such provisions to clearly state that the only business that will be conducted at an annual meeting of the stockholders is business that has properly been brought before the meeting and specifies to be ''properly brought'' such business must be included in the Corporation's notice of the meeting and brought pursuant to Rule 14a–8 under the Securities Exchange Act of 1934, (the ''Exchange Act'') (or any successor provision of law) and included in the Corporation's properly brought business. It also proposes to specify the a precise time that the notices must be made by (*i.e.,* delivered to or mailed and received by the Secretary of the Corporation), which is not later than 5:00 p.m. Eastern Time on the 90th day nor earlier than the 120th day (which are the time frames currently in place) prior to such annual meeting.

Next, the proposed rule change adds greater detail regarding the requirements for proper written notice. Particularly, for notice for stockholder proposals for business other than nominations, (proposed Section 2.11(a)(iii)(A)), the proposed rule change provides that such notice must essentially set forth the same information that would be disclosed in a proxy statement, including:

- A reasonably brief description of the business desired to be brought before the meeting; the text of the proposal or business (including the text of any resolutions proposed for consideration and, in the event that such business includes a proposal to amend the Certificate of Incorporation

[5] *Id.*

[6] 17 CFR 200.30–3(a)(31).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The proposed rule change also updates the subsequent section numbering (current 2.13 through 2.16) to reflect this change (proposed 2.12 through 2.15).

[4] *See* Section 2.3 of the Parent Bylaws for a description of Special Meetings.

or the Bylaws of the Corporation, the language of the proposed amendment);

• the reasons for conducting such business at the meeting; a complete and accurate description of any material interest in such business of such stockholder and any Stockholder Associated Person, individually or in the aggregate, including any anticipated benefit to the stockholder and any Stockholder Associated Person therefrom; and

• all other information relating to such proposed business that would be required to be disclosed in a proxy statement or other filing required to be made by the stockholder or any Stockholder Associated Person in connection with the solicitation of proxies in support of such proposed business pursuant to Regulation 14A under the Exchange Act.

Regarding proposed proper written notice for director nominations (proposed Section 2.11(a)(iii)(B)), the notice must include:

• The name, age, business address and residence address of such nominee, (''Proposed Nominee'') (which, the Exchange notes is currently the case);

• the principal occupation or employment of such nominee (which, the Exchange notes is currently the case)

• a completed written questionnaire with respect to the background and qualifications of such Proposed Nominee, which must be completed in a form required by the Corporation and provided to such stockholder within ten days of receiving such request;

• the Proposed Nominee's executed written consent to being named in the proxy statement for the meeting as a director nominee;

• the Proposed Nominee's completed written representation and agreement, which must be completed in a form required by the Corporation and provided to such stockholder within ten days of receiving such request. Importantly, the Proposed Nominee must represent and agree (1) to a ''Voting Commitment'' that the Proposed Nominee is not and will not become party to any agreement, arrangement or understanding with, and has not given any commitment or assurance to, any person or entity as to how such Proposed Nominee, if elected as a director, will act or vote on any issue or question (that has not been disclosed to the Corporation). or any Voting Commitment that could limit or interfere with the Proposed Nominee's ability to comply with fiduciary duties under applicable law, (2) that the Proposed Nominee is not and will not become a party to any agreement, arrangement, or understanding with any person or entity other than the Corporation with respect to any direct or indirect compensation, reimbursement, or indemnification in connection with service or action as a director that has not been disclosed to the Corporation, (3) would comply with all applicable rules of the exchange and Corporation and fiduciary duties under state law, (4) would comply with certain Articles of Incorporation with respect to activities related to any of the Exchanges, (5) intends to serve a full term if elected, and (6) will provide true and correct information in communications to the Corporation and its stockholders and will not omit material information or provide misleading information;

• a description of all direct and indirect compensation and other material monetary agreements, arrangements and understandings during the past three years, and any other material relationships; and

• any other information that would be required to be disclosed statement or other filing required to be made in connection with solicitations of proxies for election of directors in a contested election pursuant to Section 14 of the Exchange Act (which, the Exchange notes is currently the case).

As to the stockholder providing notice, any Stockholder Associated Person and any Proposed Nominee, (proposed Section 2.11(a)(iii)(C)) the proposed proper written notice must provide:

• Name and address of such person (as they appear on the Corporation's books, if applicable) (which, the Exchange notes is currently the case);

• class (which is currently the case) or series and number of shares of capital stock of the Corporation (''Shares'') which are, directly or indirectly, owned beneficially and/or of record by such person, the dates such shares were acquired and the investment intent of such acquisition;

• the name of each nominee holder for, and any pledge by such person or any number of, securities of the Corporation owned beneficially, but not of record;

• short interest, including a definition of what constitutes short interest, wherein a person shall be deemed to have a short interest in a security if such person, directly or indirectly, through any contract, arrangement, understanding, or relationship or otherwise has an opportunity to profit or share in profit derived from decreased value of the subject security;

• a description of any agreement, arrangement or understanding, whether written or oral, (including any derivative or short positions, profit interests, options, warrants, convertible securities, stock appreciation or similar rights, hedging transactions, and borrowed or loaned shares (which, the Exchange notes, is currently the case) or similar rights with an exercise or conversion privilege or a settlement payment or mechanism at a price related to any class or series of capital stock of the Corporation or with a value derived in whole or in part from the value of any class or series of capital stock of the Corporation (a ''Derivative Instrument'')), in order to mitigate loss to, manage risk or benefit of share price changes for, or increase or decrease voting power with respect to Shares;

• any rights to dividends on the Shares owned beneficially by such person;

• any proportionate interest [5] in Shares or Derivative Instruments by a general or limited partnership or similar entity in which such person (1) is a general partner or beneficially owns an interest in a general partner, or (2) is the manager, managing member, or beneficially owns an interest in such management, of a limited liability company or similar entity;

• any substantial interest (including, without limitation, any existing or prospective commercial, business or contractual relationship with the Corporation), by security holdings or otherwise, in the Corporation or any of its affiliates;

• a complete and accurate description of all agreements, arrangements or understandings, written or oral, and formal or informal, between or among the stockholder providing notice and any of the Stockholder Associated Persons (collectively, the ''Stockholders''), or the Stockholders with any Proposed Nominee and any other person in connection with (1) any proxy, contract, arrangement, understanding or relationship where either of the Stockholders have the right to vote any Shares, (2) that such individuals may have reached with any stockholder of the Corporation regarding how such stockholder will vote its shares, take other action in support of any Proposed Nominee, or other action by either of the Stockholders, and (3) any other agreements that would be required to be disclosed by either of the Stockholders or any other person or entity pursuant to a Schedule 13D filed pursuant to the Exchange Act;

• a complete and accurate description of any performance-related fees to

[5] Interest referred to throughout the proposed stockholder proper written notice may be direct or indirect.

which such person may be entitled as a result of any increase or decrease in the value of Shares or any Derivative Instruments;

• any investment strategy or objective of those who are not an individual and a copy of the prospectus (and other like documents);

• a complete and accurate description of any pending or threatened legal proceeding in which such person is a party or participant involving the Corporation;

• if any agreement, arrangement or understanding has been made to increase or decrease the voting power of such person with respect to any Shares; and

• any other information relating to such person that would be required to be disclosed in a proxy statement or other filing required to be made in connection with solicitations of proxies for such business or the election of any Proposed Nominee, or is otherwise required, pursuant to Section 14 of the Exchange Act.

Further, regarding proposed proper written notice, proposed Section 2.11(a)(iii)(D) simplifies the language in connection with the current requirement that the Stockholders must represent if they intend to deliver a proxy statement and/or form of proxy to holders to approve or adopt the proposed business, elect the Proposed Nominee, and/or otherwise solicit proxies or votes from stockholders in support of such proposed business or Proposed Nominee, making it easier to understand.

Proposed Section 2.11(a)(iii)(E) provides for the current requirement that the stockholder providing notice must represent that it is a holder of record of stock of the Corporation entitled to vote at such meeting and intends to appear in person, and adds that ''in person'' may be virtually, in the case of a meeting held solely by means of remote communication) or by proxy at the meeting to bring such proposed business and/or nominate one or more Proposed Nominee.

Proposed Section 2.11(a)(iii)(F) requires that proper written notice include an acknowledgment that the Corporation does not have to present the business or nomination being brought at the meeting by the stockholder proposing such, if such stockholder does not appear. The proposed rule change also adds that, in addition to the proper written notice information, the Corporation may require any Proposed Nominee to furnish certain other information as the Corporation may reasonably require to determine the eligibility or independence of a Proposed Nominee.

Proposed Section 2.11(b), which, as stated, delineates the provisions governing special meetings of stockholders, amends the procedures governing advance notice of director nominations at a special meeting called by the Board for the election of directors. Currently, notices of a special meeting must be made not less than ninety (90) days nor more than one hundred twenty (120) days prior to the anniversary date of the immediately preceding annual meeting of stockholders; provided, however, that if the annual meeting is not held within thirty (30) days before or more than seventy (70) days after such anniversary date, then such nomination shall have been delivered to or mailed and received by the Secretary not later than the close of business on the 10th day following the date on which public announcement of the annual meeting date was made. The proposed rule change updates this notice procedure to mirror the same procedural language in proposed Section 2.11(a)(ii) (maintaining the same 90- to 120-day notice requirement), but updates the timing requirements to remove the language regarding the 30-day and 70-day time frames around the anniversary date and provides that, if public announcement of the special meeting and the nominees proposed by the Board of Directors to be elected at such meeting is first made less than ninety (90) days prior to the date of the special meeting, notice must be made the tenth (10th) day following the day on which such public announcement is first made. The Exchange believes this proposed timing provision simplifies the timing requirement, making it easier to understand and follow, and also provides ample time to provide notice in advance to stockholders of any scheduled special meeting. Proposed Section 2.11(b) also provides that proper written notice of a special meeting must comply with the requirements, as proposed, laid out in Section 2.11(a)(iii).

Proposed Section 2.11(c) provides, generally, for other procedures and practices in connection with notices, as well as certain defined terms. Proposed Section 2.11(c)(i) provides that a stockholder providing notice must update any notice, if necessary, so that the information provided or required to be provided in a notice is be true and correct (A) as of the record date for determining the stockholders entitled to receive notice of the meeting and (B) as of the date that is ten business days prior to the meeting (or any postponement, adjournment or recess thereof). If an update is required to be made as of the record date for determining the stockholders entitled to receive notice of the meeting then the notice of update must be made not later than five business days after the record date for determining the stockholders entitled to receive notice of such meeting. If an update is required to be made as of the date that is ten business days prior to the meeting (or any postponement, adjournment or recess thereof), then the notice of update must be made no later than seven business days prior to the date for the meeting, if practicable, or, if not practicable, on the first practicable date prior to the meeting or any adjournment, recess or postponement thereof Proposed Section 2.11(c)(ii) provides that if any information submitted pursuant to Section 2.11 is inaccurate in any respect, such information may be deemed not to have been provided in accordance with the Parent Bylaws. As proposed, the stockholder providing the notice has an obligation to notify the Secretary in writing at the principal executive offices of the Corporation of any inaccuracy or change in any such information within two business days of becoming aware of such inaccuracy or change. Additionally, within seven days upon delivery of a written request by the Secretary, the Board of Directors (or a duly authorized committee thereof), any such stockholder is obliged to provide: (A) Written verification, reasonably satisfactory to the Board of Directors, any committee thereof or any authorized officer of the Corporation, to demonstrate the accuracy of any information submitted by the stockholder pursuant to Section 2.11, and (B) a written update of any information pursuant to Section 2.11 as of an earlier date. If the stockholder fails to provide such written verification within such period, the information as to which written verification was requested may be deemed not to have been provided in accordance with Section 2.11. Proposed Section 2.11(c)(iii) provides that a stockholder providing notice must also comply with all applicable requirements of state law and all applicable requirements of the Exchange Act and the rules and regulations thereunder, however, references to the Exchange Act and its rules and regulations will not limit the requirements applicable to stockholder proposals or director nominations pursuant to Section 2.11. Proposed Section 2.11(c)(iv) updates current language governing failure for the proposing stockholder to appear by adding that virtual appearances are

acceptable when such meeting is being held remotely, as well as the flexibility for the Corporation to waive the appearance requirement. The rule change updates this provision and adds this flexibility in light of the ongoing Covid–19 pandemic and the consequential remote working status for many companies, including Cboe. Proposed Section 2.11(c)(v) adds the definition of key terms, along with current definitions, for clarity. Specifically, the proposed rule change defines an ''affiliate'' and ''associate'' as having the respective meanings set forth in Rule 12b–2 under the Exchange Act and ''Stockholder Associated Person'' to mean: any person who is a member of a ''group'' (used in Rule 13d–5 under the Exchange Act) with or otherwise acting in concert with such stockholder providing notice; any beneficial owner of shares of stock of the Corporation owned of record or beneficially by such stockholder (other than a stockholder that is a depositary); any person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such stockholder or such Stockholder Associated Person and beneficially owns, directly or indirectly, shares of stock of the Corporation; any person that directly, or indirectly through one or more intermediaries, controls such stockholder or any Stockholder Associated Person; and any participant (as defined in paragraphs (a)(ii)–(vi) of Instruction 3 to Item 4 of Schedule 14A, or any successor instructions) with such stockholder or other Stockholder Associated Person in respect of any proposals or nominations, as applicable.

The Exchange notes that many of the proposed rule changes to proposed Section 2.11 are consistent with the bylaws of Cboe's peer financial market/services corporations, Nasdaq, Inc (''Nasdaq''),[6] Intercontinental Exchange (''ICE''),[7] and/or the CME Group, Inc. (''CME''),[8] including:

- The proposed disclosures required under Regulation 14A for proposed business other than director nominations; director questionnaires;
- consent to be named in the proxy statement as a director nominee;
- a Voting Commitment;
- disclosure of compensation arrangements in connection with service as a director;
- agreement to comply with applicable regulations, organizational documents and policies;
- representation of intent to serve a full term; commitment to provide true and correct facts and to not omit material facts;
- nominee disclosures for contested elections under Section 14;
- required disclosure by a proposing stockholder's 13D group members and related parties;
- disclosure of rights to dividends, short interest, interests held through controlled partnerships or LLCs, and in the Company other than Company common stock;
- disclosure of agreements/arrangements in connection with conferring proxy authority, with any other stockholder regarding voting or supporting the proposal/nominee, with increasing or decreasing voting power, and agreements required to be disclosed on Schedule 13D;
- disclosure of performance-related fees related to the Company's performance;
- disclosure of investment strategy and inclusion of prospectus/offering memorandum;
- disclosure of pending or threatened litigation;
- Special meeting provisions;
- Obligation to update and correct disclosures; and
- Express obligation to appear to present the proposal/nominee.

Additionally, the proposed rule change moves language currently in Section 2.10 providing that the number of nominees for director may not exceed the number of directors to be elected at any meeting to proposed Section 2.11(a) (annual meetings) and Section 2.11(b) (special meetings), therefore adding clarity to the updated Section 2.11 format that this provision continues to apply for both annual and special meetings. The proposed rule change to Section 2.10 also simplifies current language that provides an election may proceed if proper notice is made and received and adds language that nominations may be withdrawn on or prior to the tenth day before the date the Corporation first mails its notice of meeting for such election.

The proposed rule change also amends Section 2.1 (Place of Meetings) by removing language that requires stockholder meetings to be held at the principal place of business of the Company if no location is designated. The Exchange believes that it is appropriate for the Board to retain both control and flexibility over the location and timing of stockholder meetings. The proposed rule change amends Section 2.2 (Annual Meeting) and Section 2.3 (Special Meeting) to provide that the Board may postpone, reschedule or cancel any previously-scheduled annual meeting or special meeting, respectively. The proposed rule change also updates Section 2.7 (Adjournments) to provide that only the presiding person of a stockholder meeting can adjourn the meeting in the absence of a quorum. The proposed changes are intended to provide the Board the flexibility to postpone, recess, reschedule or cancel a stockholder meeting. The Exchange also notes that the proposed rule changes to Sections 2.2, 2.3, and 2.7 are consistent with the bylaws of Cboe's peer corporation, Nasdaq.[9]

The proposed rule change also makes updates to reflect the current best corporate governance practices to certain Sections under Article 2. In particular, it updates the language in Section 2.5 (Voting List) regarding who is required to prepare the voting list. Section 2.5 currently provides that officer who has charge of the stock ledger prepares the voting list and the proposed rule change updates this to provide that the Corporation prepares the voting list. The proposed rule change is consistent with the DGCL and reflects current best practice. The proposed rule change also amends current Section 2.13 (Organization) (proposed Section 2.12), which currently states that that the Board of Directors may appoint any stockholder to act as chairman of any meeting in the absence of the Chairman of the Board, to instead provide that that the Board of Directors may appoint any director of the Corporation to act as chairman of any meeting in the absence of the Chairman of the Board. Also, current Section 2.16 (Conduct of Meetings) (proposed Section 2.15) makes certain changes to expand the procedural authority of the presiding officer of any stockholder meeting, including the right to recess and/or adjourn meetings for any or no reason, and the determination of when the polls will open and close for any given matter to be voted on at the meeting, the removal of any stockholder or individual who refuses to comply with meeting procedures, rules, or guidelines, the restrictions on the use of audio and/or video recording devices and cell phones. This is consistent with

[6] *See* By-laws of Nasdaq, Inc., available at *https://listingcenter.nasdaq.com/assets/RuleBook/NASDAQ/rules/Nasdaq_Inc_Corporate_Organization_Nasdaq_Inc.pdf.*

[7] *See* Eighth Amended and Restated Bylaws of Intercontinental Exchange, Inc., available at *https://s2.q4cdn.com/154085107/files/doc_downloads/intercontinental_exchange/bylaws-eighth-amended.pdf.*

[8] *See* Fifteenth Amended and Restated Bylaws of CME Group Inc., available at *https://www.cmegroup.com/rulebook/files/CME-Bylaws.pdf.*

[9] *See supra* note 6.

best practice and ensures that the presiding officer has the flexibility to take measures, as needed, that ensure meetings are conducted in the most appropriate manner.

Proposed Changes to Article 3—Directors

The proposed rule change amends Section 3.5 (Vacancies) to provide that that vacancies on the Board may be filled exclusively by a majority of the directors. The Exchange notes that stockholders have a common law right under Delaware law to fill director vacancies, unless the Company's Charter or Bylaws explicitly give the Board exclusive authority, therefore, the proposed change is designed to make this right exclusive to the Board. The proposed rule change is consistent with the bylaws of Cboe's peer corporations, Nasdaq and ICE.[10] The proposed rule change to Section 3.10 (Special Meetings) would allow special meetings of the Board to be called with less than 24 hours' notice. Currently, Section 3.10 requires at least 24 hours' notice to directors of special Board meetings. However, there may be circumstances that necessitate an emergency meeting of the Board with less than 24 hours' notice (*e.g.,* in relation to a pending transaction), and therefore, the proposed changes would allow notice on a shorter time frame if necessary and appropriate under the circumstances. The proposed changes to Section 3.13 (Action by Consent) updates language regarding routine filing of consents following an action by the Board. Specifically, the proposed change updates the consents to reflect the same electronic form as minutes are maintained, which is consistent with recent amendments to the DGCL, reflects current best practice.

The proposed change also adds Section 3.15 (Emergency Bylaws). Specifically, the proposed Section 3.15 provides that, notwithstanding anything to the contrary in the Certificate of Incorporation or these Bylaws, in the event there is any emergency, disaster or catastrophe, as referred to in Section 110 of the DGCL, or other similar emergency condition (each, an ''emergency''), and a quorum of the Board of Directors cannot readily be convened for action, this Section 3.15 shall apply., including:

- Any director or Chief Executive Officer, President, Chief Operating Officer, Chief Financial Officer, Treasurer or Secretary of the Corporation may call a meeting of the Board of Directors by any feasible means and with such advance notice as circumstances permit in the judgment of the person calling the meeting. Neither the business to be transacted nor the purpose of any such meeting need be specified in the notice thereof.
- One-third (⅓) of the directors shall constitute a quorum, which may in all cases act by majority vote.
- Directors may take action to appoint one or more of the director or directors to membership on any standing or temporary committees of the Board of Directors as they deem advisable. Directors may also take action to designate one or more of the officers of the Corporation to serve as directors of the Corporation while this Section 3.15 applies.
- To the extent that it considers it practical to do so, the Board of Directors shall manage the business of the Corporation during an emergency in a manner that is consistent with the Certificate of Incorporation and Bylaws. It is recognized, however, that in an emergency it may not always be practical to act in this manner and this Section 3.15 is intended to and does hereby empower the Board of Directors with the maximum authority possible under the DGCL, and all other applicable law, to conduct the interim management of the affairs of the Corporation in an emergency in what it considers to be in the best interests of the Corporation.
- No director, officer or employee acting in good faith in accordance with this Section 3.15 or otherwise pursuant to Section 110 of the DGCL shall be liable except for willful misconduct.
- This Section 3.15 shall continue to apply until such time following the emergency when it is feasible for at least a majority of the directors of the Corporation immediately prior to the emergency to resume management of the business of the Corporation.
- The Board of Directors may modify, amend or add to the provisions of this Section 3.15 in order to make any provision that may be practical or necessary given the circumstances of the emergency.
- The provisions of this Section 3.15 shall be subject to repeal or change by further action of the Board of Directors or by action of the stockholders, but no such repeal or change shall modify the provisions of paragraph (e) of this Section 3.15 with regard to action taken prior to the time of such repeal or change.

The Exchange notes that these proposed changes are largely consistent with the DGCL and are designed to allow the Board and the Corporation to continue to function in the case of an emergency, such as a pandemic or an act of terrorism. The Exchange believes the ongoing COVID–19 pandemic, as well as similar potential events, demonstrate the need for Emergency Bylaws and notes that a number of companies are adopting (or at least considering) emergency bylaws to relax Board requirements when directors may be unavailable due to emergency conditions, such as the pandemic.

Proposed Changes to Article 4—Committees

The proposed rule change to Section 4.1 (Designation of Committees) adds language that provides the Board with additional rights in their ability to designate committees and committee alternates and specifies that such committees may exercise all powers and authority of the Board in the management of the business. Specifically, the proposed language provides that the Board of Directors may designate one or more committees, each committee to consist of one or more of the directors of the Corporation. The Board of Directors may designate one or more directors as alternate members of any committee, who may replace any absent or disqualified member at any meeting of the committee. In the absence or disqualification of a member of the committee, the member or members thereof present at any meeting and not disqualified from voting, whether or not he, she or they constitute a quorum, may unanimously appoint another member of the Board of Directors to act at the meeting in place of any such absent or disqualified member. Any such committee, to the extent permitted by law and to the extent provided in the resolution of the Board of Directors, shall have and may exercise all the powers and authority of the Board of Directors in the management of the business and affairs of the Corporation, and may authorize the seal of the Corporation, if any, to be affixed to all papers which may require it. The proposed rule change provides additional detail regarding the specific authority of the Board to designate members of the committees and their general powers and authority to manage the Corporation, as well as the power invested in the voting members regarding the appointment of a member of the Board to act in a circumstance of disqualification. The proposed language is consistent with the DGCL and reflects current best practice.

The proposed rule changes to Section 4.2 (The Executive Committee) removes language that lists out specific actions or matters that are not to be handled by the Executive Committee under Delaware law, including amending the Certificate

[10] *See supra* notes 6 and 7.

of Incorporation, adopting an agreement of merger or consolidation, approving a sale, lease or exchange of all or substantially all of the Corporation's property and assets, or approval of a dissolution of the Corporation or revocation of a dissolution. The proposed change, instead, replaces this list with reference to matters under the DGCL to be submitted to stockholders for approval. The Exchange believes that the proposed change, while being consistent with the DGCL, removes ambiguous and potentially unnecessarily limiting language that lists the circumstances that could not be handled by the Executive Committee that required stockholder approval and replaces it with broader reference to the DGCL.

The proposed change to Section 4.5 (The Nominating and Governance Committee) reduces the minimum size requirement of the Nominating and Governance Committee (''N&G Committee'') from a minimum of five members to three members. This proposed rule change is intended to provide the Board additional flexibility when populating the N&G Committee and is consistent with the minimum number of members required on other Board committees.[11]

Proposed Changes to Article 8—Notices

The proposed rule change in Section 8.1 (Notices) replaces language in paragraph (e) that requires that stockholders opt-in to email notice with language that instead allows stockholders to opt-out of email notice or not receive email notice if such notice is prohibited by the DGCL. The proposed rule change also updates Section 8.2 (Electronic Notice) to reflect this change. The proposed rule change also removes the provision in Section 8.1 paragraph (c) which provides that notice may be given by messenger or overnight courier service if the delivery method does not require payment of the messenger or courier service fee to deliver the notice by the person to whom the notice is addressed. The proposed rule change then adds to paragraph (c) that notice is deemed to have been given via this method at the earlier of when the notice is received or left at the stockholder's or director's address. The proposed change is consistent with the DGCL.

Proposed Rule Changes to Article 11 (Forum for Adjudication of Disputes)

The proposed rule changes to Article 11 add clarifying provisions and additional detail regarding the exclusive forum. The proposed changes are designed to update the exclusive forum bylaw to reflect current best practices. Specifically, the proposed rule change adds that, among the existing actions listed, the Court of Chancery of the State of Delaware will be the sole and exclusive forum for any action asserting an ''internal corporate claim'' (defined in the DGCL). The proposed rule change also provides that, in the event that the Delaware Court of Chancery lacks subject matter jurisdiction over any such action or proceeding, the sole and exclusive forum for such action or proceeding shall be another state or federal court located within the State of Delaware. The proposed rule change provides that any person or entity purchasing or otherwise acquiring any interest in shares of capital stock of the Corporation is deemed to have notice of and consented to the provisions of Article 1, including exclusive personal jurisdiction in the Delaware Court or Chancery and having service of process made, even if an action (within the scope of Article 11) is filed in a court other than a court located within the State of Delaware. Additionally, the proposed rule change makes clear that the existence of any prior consent to, or selection of, an alternative forum by the Corporation shall not act as a waiver of the Corporation's ongoing consent right in Article 11 and that failure to enforce the foregoing provisions would cause the Corporation irreparable harm and the Corporation is entitled to equitable relief, including injunctive relief and specific performance, to enforce Article 11. It also clarifies that a claim may be made against the Corporation or any current or former director, officer, other employee, agent or stockholder of the Corporation, and may arise pursuant to the Certificate of Incorporation or these Bylaws, in addition to the DCGL. The proposed rule change is in line with current best practice, and, additionally, the bylaws of Cboe's peer, CME,[12] currently provide for similar language related to foreign actions and specific performance.

Finally, the proposed rule change makes non-substantive edits throughout the above listed Articles of the Parent Bylaws, including updating paragraph lettering and numbering, simplifying language in order to better align it with plain English, update the terms Board of Directors and Exchange Act to be uniform throughout the bylaws (*e.g.,* as opposed to just ''Board'', or ''Securities and Exchange Act'', and the other versions of the Act's name).

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[13] Specifically, the Exchange believes the proposed rule change is consistent with Section 6(b)(1) of the Act,[14] which provides that the Exchange be organized and have the capacity to be able to carry out the purposes of the Act and to enforce compliance by the Exchange's Trading Permit Holders and persons associated with its Trading Permit Holders with the Act, the rules and regulations thereunder, and the rules of the Exchange.

In particular, the Exchange believes the proposed changes overall are designed to improve the governance process of Cboe, as well as update the Parent Bylaws, where applicable, to reflect and track the DCGL and current best practices. Moreover, the Exchange does not believe the proposed rule changes are controversial and indeed are common among public companies, including its peers, Nasdaq, ICE and CME.

Particularly, the proposed rule changes to proposed Section 2.11 in connection with providing notice regarding business and director nominations at annual and special meetings, will enable the Exchange to continue to be organized and have the capacity to be able to carry out the purposes of the Act, because such proposed changes are generally designed to strengthen these provisions by requiring notices (including updates to notices) to disclose to the Board more detailed information than currently required. In this manner, the proposed detailed disclosure requirements would provide the Board with substantially more information by which they may make complete and informed decisions and most appropriately address business before the Board. The Exchange also believes that the proposed rule changes in connection with timely notice, including the 10 days' advanced notice of director nominations (via the required director questionnaire), procedures governing advance notice of director nominations at a special meeting, an obligation to update and correct the notice up to 7 days prior to a meeting, and updated timing regarding the 10-day notice of a special meeting less than 90 days from the scheduled meeting, will allow the

[11] *See e.g.,* Sections 4.3 and 4.4 of the Parent Bylaws.

[12] *See supra* note 8.

[13] 15 U.S.C. 78f(b).

[14] 15 U.S.C. 78f(b)(1).

Board the appropriate time needed to consider and prepare to address all business, nominations, and other issues to be presented before it. As such, the proposed rule changes will ensure that the Board is able to continue to oversee the orderly operation of the corporation, including the Exchange, in a manner the it deems most appropriate. Additionally, and as listed in detail above, the vast majority of the proposed notice requirements are consistent with the bylaws of Cboe's peer corporations, CME, ICE, and/or Nasdaq, as well as in line with current best practices. The proposed changes are also all consistent with the DCGL.

Moreover, the proposed changes are intended to provide the Board with additional flexibility and more appropriate governance procedures in addressing various circumstances, which will enable the Exchange to continue to be organized and have the capacity to be able to carry out the purposes of the Act. In particular, the proposed rule changes would allow the Board to retain both control and flexibility over the location and timing of stockholder meetings, would allow the Board to postpone, recess, reschedule or cancel a stockholder meeting, would allow only the presiding person of a stockholder meeting to adjourn and reset a stockholder meeting date in the absence of quorum, would allow for shorter notice in order for the Board to call a special meeting, would allow the Board and the Corporation to continue to function (including remotely) in the case of an emergency, such as the ongoing COVID–19 pandemic, and would provide the Board with increased flexibility in populating the Nomination and Governance Committee. Each of these proposed changes is designed to assist the Exchange in most effectively and efficiently managing evolving corporate matters as they arise, many of which are highly complex and may be time sensitive. Additionally, as indicated above, a majority of the proposed changes align certain Sections in the Parent Bylaws with current best practices and with the DCGL (as well as a change in accordance with Delaware common law) and are also consistent with bylaw provisions of Cboe's peer corporations. Accordingly, the Exchange believes the proposed changes are widely accepted as appropriate governance measures.

Lastly, the proposed nonsubstantive changes to the Parent Bylaws provide additional clarity within the Parent Bylaws and make them easier to understand. By making certain provisions read more in plain English, updating paragraph lettering and numbering, making certain terms uniform and simplifying language throughout, the proposed nonsubstantive changes benefit investors by providing more clarity and reduced complexity within the Parent Bylaws and making the Parent Bylaw [sic] better organized and easier to follow thus reducing potential investor confusion.

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 proposed rule change is not intended to address competitive issues but rather is concerned solely with updating the Parent Bylaws to reflect the changes described above.

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

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

A. by order approve or disapprove such proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CboeEDGA–2020–021 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–CboeEDGA–2020–021. 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–CboeEDGA–2020–021 and should be submitted on or before September 9, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–18090 Filed 8–18–20; 8:45 am]

BILLING CODE 8011–01–P

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–89542; File No. SR–CboeEDGX–2020–037]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing of a Proposed Rule Change To Amend the Fifth Amended and Restated Bylaws of the Exchange's Parent Corporation, Cboe Global Markets, Inc.

August 13, 2020.

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 July 30, 2020, Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') proposes to amend the Fifth Amended and Restated Bylaws (the ''Parent Bylaws'') of its parent corporation, Cboe Global Markets, Inc. (''Cboe'' or the ''Parent''). The text of the proposed amendments to the Parent Bylaws is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/options/regulation/rule_filings/edgx/*), 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.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The proposed rule change amends the Parent Bylaws to improve the governance processes of Cboe, which is organized under the laws of the State of Delaware, and to make certain provisions more consistent with the Delaware General Corporation Law (''DGCL''). The proposed rule change also makes clarifying and cleanup changes to the Parent Bylaws.

Proposed Changes to Article 2—Stockholders

The majority of the proposed changes are being made to amend Section 2.11 (Nomination of Directors) and Section 2.12 (Notice of Business at Annual Meetings) and are generally designed to provide the Board with the most information and advance notice possible in connection with business and nominations at annual and special meetings. Additionally, the Exchange notes the proposed changes reflect the most up-to-date disclosure requirement practices. The proposed changes also combine the existing separate provisions for director nominations and stockholder proposals into one provision. Particularly, the proposed rule change combines current Sections 2.11 and 2.12 into one provision: Proposed Section 2.11 titled ''Notice of Business and Nomination of Directors at Meetings of Stockholders.''[3] Specifically, the proposed rule change delineates proposed Section 2.11 into paragraph (a) governing notice requirements for annual meetings, paragraph (b) governing notice requirements for special meetings,[4] and paragraph (c), which provides for other general procedures and practices in connection with notices. The proposed delineation does not alter the process or definition of either type of meeting, but instead provides for significantly more detailed written notice requirements as well as updates to the manner and timeliness of notices.

First, the proposed change to Section 2.11(a)(i) relocates the provisions regarding ''properly brought'' business from current Section 2.12, and streamlines such provisions to clearly state that the only business that will be conducted at an annual meeting of the stockholders is business that has properly been brought before the meeting and specifies to be ''properly brought'' such business must be included in the Corporation's notice of the meeting and brought pursuant to Rule 14a–8 under the Securities Exchange Act of 1934, (the ''Exchange Act'') (or any successor provision of law) and included in the Corporation's properly brought business. It also proposes to specify the a precise time that the notices must be made by (*i.e.,* delivered to or mailed and received by the Secretary of the Corporation), which is not later than 5:00 p.m. Eastern Time on the 90th day nor earlier than the 120th day (which are the time frames currently in place) prior to such annual meeting.

Next, the proposed rule change adds greater detail regarding the requirements for proper written notice. Particularly, for notice for stockholder proposals for business other than nominations, (proposed Section 2.11(a)(iii)(A)), the proposed rule change provides that such notice must essentially set forth the same information that would be disclosed in a proxy statement, including:

- A reasonably brief description of the business desired to be brought before the meeting; the text of the proposal or business (including the text of any resolutions proposed for consideration and, in the event that such business includes a proposal to amend the Certificate of Incorporation or the Bylaws of the Corporation, the language of the proposed amendment);
- the reasons for conducting such business at the meeting; a complete and accurate description of any material interest in such business of such stockholder and any Stockholder Associated Person, individually or in the aggregate, including any anticipated benefit to the stockholder and any Stockholder Associated Person therefrom; and
- all other information relating to such proposed business that would be required to be disclosed in a proxy statement or other filing required to be made by the stockholder or any Stockholder Associated Person in connection with the solicitation of proxies in support of such proposed business pursuant to Regulation 14A under the Exchange Act.

Regarding proposed proper written notice for director nominations (proposed Section 2.11(a)(iii)(B)), the notice must include:

- The name, age, business address and residence address of such nominee, (''Proposed Nominee'') (which, the Exchange notes is currently the case);

[3] The proposed rule change also updates the subsequent section numbering (current 2.13 through 2.16) to reflect this change (proposed 2.12 through 2.15).

[4] *See* Section 2.3 of the Parent Bylaws for a description of Special Meetings.

• the principal occupation or employment of such nominee (which, the Exchange notes is currently the case)

• a completed written questionnaire with respect to the background and qualifications of such Proposed Nominee, which must be completed in a form required by the Corporation and provided to such stockholder within ten days of receiving such request;

• the Proposed Nominee's executed written consent to being named in the proxy statement for the meeting as a director nominee;

• the Proposed Nominee's completed written representation and agreement, which must be completed in a form required by the Corporation and provided to such stockholder within ten days of receiving such request. Importantly, the Proposed Nominee must represent and agree (1) to a ''Voting Commitment'' that the Proposed Nominee is not and will not become party to any agreement, arrangement or understanding with, and has not given any commitment or assurance to, any person or entity as to how such Proposed Nominee, if elected as a director, will act or vote on any issue or question (that has not been disclosed to the Corporation). or any Voting Commitment that could limit or interfere with the Proposed Nominee's ability to comply with fiduciary duties under applicable law, (2) that the Proposed Nominee is not and will not become a party to any agreement, arrangement, or understanding with any person or entity other than the Corporation with respect to any direct or indirect compensation, reimbursement, or indemnification in connection with service or action as a director that has not been disclosed to the Corporation, (3) would comply with all applicable rules of the exchange and Corporation and fiduciary duties under state law, (4) would comply with certain Articles of Incorporation with respect to activities related to any of the Exchanges, (5) intends to serve a full term if elected, and (6) will provide true and correct information in communications to the Corporation and its stockholders and will not omit material information or provide misleading information;

• a description of all direct and indirect compensation and other material monetary agreements, arrangements and understandings during the past three years, and any other material relationships; and

• any other information that would be required to be disclosed statement or other filing required to be made in connection with solicitations of proxies for election of directors in a contested election pursuant to Section 14 of the Exchange Act (which, the Exchange notes is currently the case).

As to the stockholder providing notice, any Stockholder Associated Person and any Proposed Nominee, (proposed Section 2.11(a)(iii)(C)) the proposed proper written notice must provide:

• Name and address of such person (as they appear on the Corporation's books, if applicable) (which, the Exchange notes is currently the case);

• class (which is currently the case) or series and number of shares of capital stock of the Corporation (''Shares'') which are, directly or indirectly, owned beneficially and/or of record by such person, the dates such shares were acquired and the investment intent of such acquisition;

• the name of each nominee holder for, and any pledge by such person or any number of, securities of the Corporation owned beneficially, but not of record;

• short interest, including a definition of what constitutes short interest, wherein a person shall be deemed to have a short interest in a security if such person, directly or indirectly, through any contract, arrangement, understanding, or relationship or otherwise has an opportunity to profit or share in profit derived from decreased value of the subject security;

• a description of any agreement, arrangement or understanding, whether written or oral, (including any derivative or short positions, profit interests, options, warrants, convertible securities, stock appreciation or similar rights, hedging transactions, and borrowed or loaned shares (which, the Exchange notes, is currently the case) or similar rights with an exercise or conversion privilege or a settlement payment or mechanism at a price related to any class or series of capital stock of the Corporation or with a value derived in whole or in part from the value of any class or series of capital stock of the Corporation (a ''Derivative Instrument'')), in order to mitigate loss to, manage risk or benefit of share price changes for, or increase or decrease voting power with respect to Shares;

• any rights to dividends on the Shares owned beneficially by such person;

• any proportionate interest [5] in Shares or Derivative Instruments by a general or limited partnership or similar entity in which such person (1) is a general partner or beneficially owns an interest in a general partner, or (2) is the manager, managing member, or beneficially owns an interest in such management, of a limited liability company or similar entity;

• any substantial interest (including, without limitation, any existing or prospective commercial, business or contractual relationship with the Corporation), by security holdings or otherwise, in the Corporation or any of its affiliates;

• a complete and accurate description of all agreements, arrangements or understandings, written or oral, and formal or informal, between or among the stockholder providing notice and any of the Stockholder Associated Persons (collectively, the ''Stockholders''), or the Stockholders with any Proposed Nominee and any other person in connection with (1) any proxy, contract, arrangement, understanding or relationship where either of the Stockholders have the right to vote any Shares, (2) that such individuals may have reached with any stockholder of the Corporation regarding how such stockholder will vote its shares, take other action in support of any Proposed Nominee, or other action by either of the Stockholders, and (3) any other agreements that would be required to be disclosed by either of the Stockholders or any other person or entity pursuant to a Schedule 13D filed pursuant to the Exchange Act

• a complete and accurate description of any performance-related fees to which such person may be entitled as a result of any increase or decrease in the value of Shares or any Derivative Instruments;

• any investment strategy or objective of those who are not an individual and a copy of the prospectus (and other like documents);

• a complete and accurate description of any pending or threatened legal proceeding in which such person is a party or participant involving the Corporation;

• if any agreement, arrangement or understanding has been made to increase or decrease the voting power of such person with respect to any Shares; and

• any other information relating to such person that would be required to be disclosed in a proxy statement or other filing required to be made in connection with solicitations of proxies for such business or the election of any Proposed Nominee, or is otherwise required, pursuant to Section 14 of the Exchange Act.

Further, regarding proposed proper written notice, proposed Section 2.11(a)(iii)(D) simplifies the language in

[5] Interest referred to throughout the proposed stockholder proper written notice may be direct or indirect.

connection with the current requirement that the Stockholders must represent if they intend to deliver a proxy statement and/or form of proxy to holders to approve or adopt the proposed business, elect the Proposed Nominee, and/or otherwise solicit proxies or votes from stockholders in support of such proposed business or Proposed Nominee, making it easier to understand.

Proposed Section 2.11(a)(iii)(E) provides for the current requirement that the stockholder providing notice must represent that it is a holder of record of stock of the Corporation entitled to vote at such meeting and intends to appear in person, and adds that ''in person'' may be virtually, in the case of a meeting held solely by means of remote communication) or by proxy at the meeting to bring such proposed business and/or nominate one or more Proposed Nominee.

Proposed Section 2.11(a)(iii)(F) requires that proper written notice include an acknowledgment that the Corporation does not have to present the business or nomination being brought at the meeting by the stockholder proposing such, if such stockholder does not appear. The proposed rule change also adds that, in addition to the proper written notice information, the Corporation may require any Proposed Nominee to furnish certain other information as the Corporation may reasonably require to determine the eligibility or independence of a Proposed Nominee.

Proposed Section 2.11(b), which, as stated, delineates the provisions governing special meetings of stockholders, amends the procedures governing advance notice of director nominations at a special meeting called by the Board for the election of directors. Currently, notices of a special meeting must be made not less than ninety (90) days nor more than one hundred twenty (120) days prior to the anniversary date of the immediately preceding annual meeting of stockholders; provided, however, that if the annual meeting is not held within thirty (30) days before or more than seventy (70) days after such anniversary date, then such nomination shall have been delivered to or mailed and received by the Secretary not later than the close of business on the 10th day following the date on which public announcement of the annual meeting date was made. The proposed rule change updates this notice procedure to mirror the same procedural language in proposed Section 2.11(a)(ii) (maintaining the same 90- to 120-day notice requirement), but updates the timing requirements to remove the language regarding the 30-day and 70-day time frames around the anniversary date and provides that, if public announcement of the special meeting and the nominees proposed by the Board of Directors to be elected at such meeting is first made less than ninety (90) days prior to the date of the special meeting, notice must be made the tenth (10th) day following the day on which such public announcement is first made. The Exchange believes this proposed timing provision simplifies the timing requirement, making it easier to understand and follow, and also provides ample time to provide notice in advance to stockholders of any scheduled special meeting. Proposed Section 2.11(b) also provides that proper written notice of a special meeting must comply with the requirements, as proposed, laid out in Section 2.11(a)(iii).

Proposed Section 2.11(c) provides, generally, for other procedures and practices in connection with notices, as well as certain defined terms. Proposed Section 2.11(c)(i) provides that a stockholder providing notice must update any notice, if necessary, so that the information provided or required to be provided in a notice is be true and correct (A) as of the record date for determining the stockholders entitled to receive notice of the meeting and (B) as of the date that is ten business days prior to the meeting (or any postponement, adjournment or recess thereof). If an update is required to be made as of the record date for determining the stockholders entitled to receive notice of the meeting then the notice of update must be made not later than five business days after the record date for determining the stockholders entitled to receive notice of such meeting. If an update is required to be made as of the date that is ten business days prior to the meeting (or any postponement, adjournment or recess thereof), then the notice of update must be made no later than seven business days prior to the date for the meeting, if practicable, or, if not practicable, on the first practicable date prior to the meeting or any adjournment, recess or postponement thereof Proposed Section 2.11(c)(ii) provides that if any information submitted pursuant to Section 2.11 is inaccurate in any respect, such information may be deemed not to have been provided in accordance with the Parent Bylaws. As proposed, the stockholder providing the notice has an obligation to notify the Secretary in writing at the principal executive offices of the Corporation of any inaccuracy or change in any such information within two business days of becoming aware of such inaccuracy or change. Additionally, within seven days upon delivery of a written request by the Secretary, the Board of Directors (or a duly authorized committee thereof), any such stockholder is obliged to provide: (A) Written verification, reasonably satisfactory to the Board of Directors, any committee thereof or any authorized officer of the Corporation, to demonstrate the accuracy of any information submitted by the stockholder pursuant to Section 2.11, and (B) a written update of any information pursuant to Section 2.11 as of an earlier date. If the stockholder fails to provide such written verification within such period, the information as to which written verification was requested may be deemed not to have been provided in accordance with Section 2.11. Proposed Section 2.11(c)(iii) provides that a stockholder providing notice must also comply with all applicable requirements of state law and all applicable requirements of the Exchange Act and the rules and regulations thereunder, however, references to the Exchange Act and its rules and regulations will not limit the requirements applicable to stockholder proposals or director nominations pursuant to Section 2.11. Proposed Section 2.11(c)(iv) updates current language governing failure for the proposing stockholder to appear by adding that virtual appearances are acceptable when such meeting is being held remotely, as well as the flexibility for the Corporation to waive the appearance requirement. The rule change updates this provision and adds this flexibility in light of the ongoing Covid–19 pandemic and the consequential remote working status for many companies, including Cboe. Proposed Section 2.11(c)(v) adds the definition of key terms, along with current definitions, for clarity. Specifically, the proposed rule change defines an ''affiliate'' and ''associate'' as having the respective meanings set forth in Rule 12b–2 under the Exchange Act and ''Stockholder Associated Person'' to mean: any person who is a member of a ''group'' (used in Rule 13d–5 under the Exchange Act) with or otherwise acting in concert with such stockholder providing notice; any beneficial owner of shares of stock of the Corporation owned of record or beneficially by such stockholder (other than a stockholder that is a depositary); any person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such stockholder or such

Stockholder Associated Person and beneficially owns, directly or indirectly, shares of stock of the Corporation; any person that directly, or indirectly through one or more intermediaries, controls such stockholder or any Stockholder Associated Person; and any participant (as defined in paragraphs (a)(ii)–(vi) of Instruction 3 to Item 4 of Schedule 14A, or any successor instructions) with such stockholder or other Stockholder Associated Person in respect of any proposals or nominations, as applicable.

The Exchange notes that many of the proposed rule changes to proposed Section 2.11 are consistent with the bylaws of Cboe's peer financial market/services corporations, Nasdaq, Inc (''Nasdaq''),[6] Intercontinental Exchange (''ICE''),[7] and/or the CME Group, Inc. (''CME''),[8] including:

- The proposed disclosures required under Regulation 14A for proposed business other than director nominations; director questionnaires;
- consent to be named in the proxy statement as a director nominee;
- a Voting Commitment;
- disclosure of compensation arrangements in connection with service as a director;
- agreement to comply with applicable regulations, organizational documents and policies;
- representation of intent to serve a full term; commitment to provide true and correct facts and to not omit material facts;
- nominee disclosures for contested elections under Section 14;
- required disclosure by a proposing stockholder's 13D group members and related parties;
- disclosure of rights to dividends, short interest, interests held through controlled partnerships or LLCs, and in the Company other than Company common stock;
- disclosure of agreements/arrangements in connection with conferring proxy authority, with any other stockholder regarding voting or supporting the proposal/nominee, with increasing or decreasing voting power, and agreements required to be disclosed on Schedule 13D;
- disclosure of performance-related fees related to the Company's performance;
- disclosure of investment strategy and inclusion of prospectus/offering memorandum;
- disclosure of pending or threatened litigation;
- Special meeting provisions;
- Obligation to update and correct disclosures; and
- Express obligation to appear to present the proposal/nominee.

Additionally, the proposed rule change moves language currently in Section 2.10 providing that the number of nominees for director may not exceed the number of directors to be elected at any meeting to proposed Section 2.11(a) (annual meetings) and Section 2.11(b) (special meetings), therefore adding clarity to the updated Section 2.11 format that this provision continues to apply for both annual and special meetings. The proposed rule change to Section 2.10 also simplifies current language that provides an election may proceed if proper notice is made and received and adds language that nominations may be withdrawn on or prior to the tenth day before the date the Corporation first mails its notice of meeting for such election.

The proposed rule change also amends Section 2.1 (Place of Meetings) by removing language that requires stockholder meetings to be held at the principal place of business of the Company if no location is designated. The Exchange believes that it is appropriate for the Board to retain both control and flexibility over the location and timing of stockholder meetings. The proposed rule change amends Section 2.2 (Annual Meeting) and Section 2.3 (Special Meeting) to provide that the Board may postpone, reschedule or cancel any previously-scheduled annual meeting or special meeting, respectively. The proposed rule change also updates Section 2.7 (Adjournments) to provide that only the presiding person of a stockholder meeting can adjourn the meeting in the absence of a quorum. The proposed changes are intended to provide the Board the flexibility to postpone, recess, reschedule or cancel a stockholder meeting. The Exchange also notes that the proposed rule changes to Sections 2.2, 2.3, and 2.7 are consistent with the bylaws of Cboe's peer corporation, Nasdaq.[9]

The proposed rule change also makes updates to reflect the current best corporate governance practices to certain Sections under Article 2. In particular, it updates the language in Section 2.5 (Voting List) regarding who is required to prepare the voting list. Section 2.5 currently provides that officer who has charge of the stock ledger prepares the voting list and the proposed rule change updates this to provide that the Corporation prepares the voting list. The proposed rule change is consistent with the DGCL and reflects current best practice. The proposed rule change also amends current Section 2.13 (Organization) (proposed Section 2.12), which currently states that that the Board of Directors may appoint any stockholder to act as chairman of any meeting in the absence of the Chairman of the Board, to instead provide that that the Board of Directors may appoint any director of the Corporation to act as chairman of any meeting in the absence of the Chairman of the Board. Also, current Section 2.16 (Conduct of Meetings) (proposed Section 2.15) makes certain changes to expand the procedural authority of the presiding officer of any stockholder meeting, including the right to recess and/or adjourn meetings for any or no reason, and the determination of when the polls will open and close for any given matter to be voted on at the meeting, the removal of any stockholder or individual who refuses to comply with meeting procedures, rules, or guidelines, the restrictions on the use of audio and/or video recording devices and cell phones. This is consistent with best practice and ensures that the presiding officer has the flexibility to take measures, as needed, that ensure meetings are conducted in the most appropriate manner.

Proposed Changes to Article 3—Directors

The proposed rule change amends Section 3.5 (Vacancies) to provide that that vacancies on the Board may be filled exclusively by a majority of the directors. The Exchange notes that stockholders have a common law right under Delaware law to fill director vacancies, unless the Company's Charter or Bylaws explicitly give the Board exclusive authority, therefore, the proposed change is designed to make this right exclusive to the Board. The proposed rule change is consistent with the bylaws of Cboe's peer corporations, Nasdaq and ICE.[10] The proposed rule change to Section 3.10 (Special Meetings) would allow special meetings of the Board to be called with less than 24 hours' notice. Currently, Section 3.10 requires at least 24 hours' notice to directors of special Board meetings.

[6] *See* By-laws of Nasdaq, Inc., available at *https://listingcenter.nasdaq.com/assets/RuleBook/NASDAQ/rules/Nasdaq_Inc_Corporate_Organization_Nasdaq_Inc.pdf.*

[7] *See* Eighth Amended and Restated Bylaws of Intercontinental Exchange, Inc., available at *https://s2.q4cdn.com/154085107/files/doc_downloads/intercontinental_exchange/bylaws-eighth-amended.pdf.*

[8] *See* Fifteenth Amended and Restated Bylaws of CME Group Inc., available at *https://www.cmegroup.com/rulebook/files/CME-Bylaws.pdf.*

[9] *See supra* note 6.

[10] *See supra* notes 6 and 7.

However, there may be circumstances that necessitate an emergency meeting of the Board with less than 24 hours' notice (*e.g.,* in relation to a pending transaction), and therefore, the proposed changes would allow notice on a shorter time frame if necessary and appropriate under the circumstances. The proposed changes to Section 3.13 (Action by Consent) updates language regarding routine filing of consents following an action by the Board. Specifically, the proposed change updates the consents to reflect the same electronic form as minutes are maintained, which is consistent with recent amendments to the DGCL, reflects current best practice.

The proposed change also adds Section 3.15 (Emergency Bylaws). Specifically, the proposed Section 3.15 provides that, notwithstanding anything to the contrary in the Certificate of Incorporation or these Bylaws, in the event there is any emergency, disaster or catastrophe, as referred to in Section 110 of the DGCL, or other similar emergency condition (each, an ''emergency''), and a quorum of the Board of Directors cannot readily be convened for action, this Section 3.15 shall apply., including:

- Any director or Chief Executive Officer, President, Chief Operating Officer, Chief Financial Officer, Treasurer or Secretary of the Corporation may call a meeting of the Board of Directors by any feasible means and with such advance notice as circumstances permit in the judgment of the person calling the meeting. Neither the business to be transacted nor the purpose of any such meeting need be specified in the notice thereof.
- One-third (⅓) of the directors shall constitute a quorum, which may in all cases act by majority vote.
- Directors may take action to appoint one or more of the director or directors to membership on any standing or temporary committees of the Board of Directors as they deem advisable. Directors may also take action to designate one or more of the officers of the Corporation to serve as directors of the Corporation while this Section 3.15 applies.
- To the extent that it considers it practical to do so, the Board of Directors shall manage the business of the Corporation during an emergency in a manner that is consistent with the Certificate of Incorporation and Bylaws. It is recognized, however, that in an emergency it may not always be practical to act in this manner and this Section 3.15 is intended to and does hereby empower the Board of Directors with the maximum authority possible under the DGCL, and all other applicable law, to conduct the interim management of the affairs of the Corporation in an emergency in what it considers to be in the best interests of the Corporation.
- No director, officer or employee acting in good faith in accordance with this Section 3.15 or otherwise pursuant to Section 110 of the DGCL shall be liable except for willful misconduct.
- This Section 3.15 shall continue to apply until such time following the emergency when it is feasible for at least a majority of the directors of the Corporation immediately prior to the emergency to resume management of the business of the Corporation.
- The Board of Directors may modify, amend or add to the provisions of this Section 3.15 in order to make any provision that may be practical or necessary given the circumstances of the emergency.
- The provisions of this Section 3.15 shall be subject to repeal or change by further action of the Board of Directors or by action of the stockholders, but no such repeal or change shall modify the provisions of paragraph (e) of this Section 3.15 with regard to action taken prior to the time of such repeal or change.

The Exchange notes that these proposed changes are largely consistent with the DGCL and are designed to allow the Board and the Corporation to continue to function in the case of an emergency, such as a pandemic or an act of terrorism. The Exchange believes the ongoing COVID–19 pandemic, as well as similar potential events, demonstrate the need for Emergency Bylaws and notes that a number of companies are adopting (or at least considering) emergency bylaws to relax Board requirements when directors may be unavailable due to emergency conditions, such as the pandemic.

Proposed Changes to Article 4—Committees

The proposed rule change to Section 4.1 (Designation of Committees) adds language that provides the Board with additional rights in their ability to designate committees and committee alternates and specifies that such committees may exercise all powers and authority of the Board in the management of the business. Specifically, the proposed language provides that the Board of Directors may designate one or more committees, each committee to consist of one or more of the directors of the Corporation. The Board of Directors may designate one or more directors as alternate members of any committee, who may replace any absent or disqualified member at any meeting of the committee. In the absence or disqualification of a member of the committee, the member or members thereof present at any meeting and not disqualified from voting, whether or not he, she or they constitute a quorum, may unanimously appoint another member of the Board of Directors to act at the meeting in place of any such absent or disqualified member. Any such committee, to the extent permitted by law and to the extent provided in the resolution of the Board of Directors, shall have and may exercise all the powers and authority of the Board of Directors in the management of the business and affairs of the Corporation, and may authorize the seal of the Corporation, if any, to be affixed to all papers which may require it. The proposed rule change provides additional detail regarding the specific authority of the Board to designate members of the committees and their general powers and authority to manage the Corporation, as well as the power invested in the voting members regarding the appointment of a member of the Board to act in a circumstance of disqualification. The proposed language is consistent with the DGCL and reflects current best practice.

The proposed rule changes to Section 4.2 (The Executive Committee) removes language that lists out specific actions or matters that are not to be handled by the Executive Committee under Delaware law, including amending the Certificate of Incorporation, adopting an agreement of merger or consolidation, approving a sale, lease or exchange of all or substantially all of the Corporation's property and assets, or approval of a dissolution of the Corporation or revocation of a dissolution. The proposed change, instead, replaces this list with reference to matters under the DGCL to be submitted to stockholders for approval. The Exchange believes that the proposed change, while being consistent with the DGCL, removes ambiguous and potentially unnecessarily limiting language that lists the circumstances that could not be handled by the Executive Committee that required stockholder approval and replaces it with broader reference to the DGCL.

The proposed change to Section 4.5 (The Nominating and Governance Committee) reduces the minimum size requirement of the Nominating and Governance Committee (''N&G Committee'') from a minimum of five members to three members. This proposed rule change is intended to provide the Board additional flexibility when populating the N&G Committee and is consistent with the minimum

number of members required on other Board committees.[11]

Proposed Changes to Article 8—Notices

The proposed rule change in Section 8.1 (Notices) replaces language in paragraph (e) that requires that stockholders opt-in to email notice with language that instead allows stockholders to opt-out of email notice or not receive email notice if such notice is prohibited by the DGCL. The proposed rule change also updates Section 8.2 (Electronic Notice) to reflect this change. The proposed rule change also removes the provision in Section 8.1 paragraph (c) which provides that notice may be given by messenger or overnight courier service if the delivery method does not require payment of the messenger or courier service fee to deliver the notice by the person to whom the notice is addressed. The proposed rule change then adds to paragraph (c) that notice is deemed to have been given via this method at the earlier of when the notice is received or left at the stockholder's or director's address. The proposed change is consistent with the DGCL.

Proposed Rule Changes to Article 11 (Forum for Adjudication of Disputes)

The proposed rule changes to Article 11 add clarifying provisions and additional detail regarding the exclusive forum. The proposed changes are designed to update the exclusive forum bylaw to reflect current best practices. Specifically, the proposed rule change adds that, among the existing actions listed, the Court of Chancery of the State of Delaware will be the sole and exclusive forum for any action asserting an ''internal corporate claim'' (defined in the DGCL). The proposed rule change also provides that, in the event that the Delaware Court of Chancery lacks subject matter jurisdiction over any such action or proceeding, the sole and exclusive forum for such action or proceeding shall be another state or federal court located within the State of Delaware. The proposed rule change provides that any person or entity purchasing or otherwise acquiring any interest in shares of capital stock of the Corporation is deemed to have notice of and consented to the provisions of Article 1, including exclusive personal jurisdiction in the Delaware Court or Chancery and having service of process made, even if an action (within the scope of Article 11) is filed in a court other than a court located within the State of Delaware. Additionally, the proposed rule change makes clear that the existence of any prior consent to, or selection of, an alternative forum by the Corporation shall not act as a waiver of the Corporation's ongoing consent right in Article 11 and that failure to enforce the foregoing provisions would cause the Corporation irreparable harm and the Corporation is entitled to equitable relief, including injunctive relief and specific performance, to enforce Article 11. It also clarifies that a claim may be made against the Corporation or any current or former director, officer, other employee, agent or stockholder of the Corporation, and may arise pursuant to the Certificate of Incorporation or these Bylaws, in addition to the DCGL. The proposed rule change is in line with current best practice, and, additionally, the bylaws of Cboe's peer, CME,[12] currently provide for similar language related to foreign actions and specific performance.

Finally, the proposed rule change makes non-substantive edits throughout the above listed Articles of the Parent Bylaws, including updating paragraph lettering and numbering, simplifying language in order to better align it with plain English, update the terms Board of Directors and Exchange Act to be uniform throughout the bylaws (*e.g.,* as opposed to just ''Board'', or ''Securities and Exchange Act'', and the other versions of the Act's name).

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[13] Specifically, the Exchange believes the proposed rule change is consistent with Section 6(b)(1) of the Act,[14] which provides that the Exchange be organized and have the capacity to be able to carry out the purposes of the Act and to enforce compliance by the Exchange's Trading Permit Holders and persons associated with its Trading Permit Holders with the Act, the rules and regulations thereunder, and the rules of the Exchange.

In particular, the Exchange believes the proposed changes overall are designed to improve the governance process of Cboe, as well as update the Parent Bylaws, where applicable, to reflect and track the DCGL and current best practices. Moreover, the Exchange does not believe the proposed rule changes are controversial and indeed are common among public companies, including its peers, Nasdaq, ICE and CME.

Particularly, the proposed rule changes to proposed Section 2.11 in connection with providing notice regarding business and director nominations at annual and special meetings, will enable the Exchange to continue to be organized and have the capacity to be able to carry out the purposes of the Act, because such proposed changes are generally designed to strengthen these provisions by requiring notices (including updates to notices) to disclose to the Board more detailed information than currently required. In this manner, the proposed detailed disclosure requirements would provide the Board with substantially more information by which they may make complete and informed decisions and most appropriately address business before the Board. The Exchange also believes that the proposed rule changes in connection with timely notice, including the 10 days' advanced notice of director nominations (via the required director questionnaire), procedures governing advance notice of director nominations at a special meeting, an obligation to update and correct the notice up to 7 days prior to a meeting, and updated timing regarding the 10-day notice of a special meeting less than 90 days from the scheduled meeting, will allow the Board the appropriate time needed to consider and prepare to address all business, nominations, and other issues to be presented before it. As such, the proposed rule changes will ensure that the Board is able to continue to oversee the orderly operation of the corporation, including the Exchange, in a manner the it deems most appropriate. Additionally, and as listed in detail above, the vast majority of the proposed notice requirements are consistent with the bylaws of Cboe's peer corporations, CME, ICE, and/or Nasdaq, as well as in line with current best practices. The proposed changes are also all consistent with the DCGL.

Moreover, the proposed changes are intended to provide the Board with additional flexibility and more appropriate governance procedures in addressing various circumstances, which will enable the Exchange to continue to be organized and have the capacity to be able to carry out the purposes of the Act. In particular, the proposed rule changes would allow the Board to retain both control and flexibility over the location and timing of stockholder meetings, would allow the Board to postpone, recess, reschedule or cancel a stockholder

[11] *See e.g.,* Sections 4.3 and 4.4 of the Parent Bylaws.

[12] *See supra* note 8.

[13] 15 U.S.C. 78f(b).

[14] 15 U.S.C. 78f(b)(1).

meeting, would allow only the presiding person of a stockholder meeting to adjourn and reset a stockholder meeting date in the absence of quorum, would allow for shorter notice in order for the Board to call a special meeting, would allow the Board and the Corporation to continue to function (including remotely) in the case of an emergency, such as the ongoing COVID–19 pandemic, and would provide the Board with increased flexibility in populating the Nomination and Governance Committee. Each of these proposed changes is designed to assist the Exchange in most effectively and efficiently managing evolving corporate matters as they arise, many of which are highly complex and may be time sensitive. Additionally, as indicated above, a majority of the proposed changes align certain Sections in the Parent Bylaws with current best practices and with the DCGL (as well as a change in accordance with Delaware common law) and are also consistent with bylaw provisions of Cboe's peer corporations. Accordingly, the Exchange believes the proposed changes are widely accepted as appropriate governance measures.

Lastly, the proposed nonsubstantive changes to the Parent Bylaws provide additional clarity within the Parent Bylaws and make them easier to understand. By making certain provisions read more in plain English, updating paragraph lettering and numbering, making certain terms uniform and simplifying language throughout, the proposed nonsubstantive changes benefit investors by providing more clarity and reduced complexity within the Parent Bylaws and making the Parent Bylaw [sic] better organized and easier to follow thus reducing potential investor confusion.

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 proposed rule change is not intended to address competitive issues but rather is concerned solely with updating the Parent Bylaws to reflect the changes described above.

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

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

A. By order approve or disapprove such proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CboeEDGX–2020–037 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–CboeEDGX–2020–037. 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–CboeEDGX–2020–037 and should be submitted on or before September 9, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–18096 Filed 8–18–20; 8:45 am]

BILLING CODE 8011–01–P

[15] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

Military Reservist Economic Injury Disaster Loans; Interest Rate for Fourth Quarter FY 2020

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of the Military Reservist Economic Injury Disaster Loans interest rate for loans approved on or after July 31, 2020.

DATES: Issued on 07/31/2020.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: The Small Business Administration publishes an interest rate for Military Reservist Economic Injury Disaster Loans (13 CFR 123.512) on a quarterly basis. The interest rate will be 3.000 for loans approved on or after July 31, 2020.

Cynthia Pitts,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 2020–18171 Filed 8–18–20; 8:45 am]

BILLING CODE 8026–03–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #16575 and #16576; Indiana Disaster Number IN–00074]

Administrative Declaration of a Disaster for the State of Indiana

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Administrative declaration of a disaster for the State of Indiana dated 08/11/2020.

Incident: Heavy Rainfall and Flooding.

Incident Period: 06/27/2020.

DATES: Issued on 08/11/2020.

Physical Loan Application Deadline Date: 10/13/2020.

Economic Injury (EIDL) Loan Application Deadline Date: 05/11/2021.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's disaster declaration, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Newton

Contiguous Counties:

Indiana: Benton, Jasper, Lake.

Illinois: Iroquois, Kankakee.

The Interest Rates are:

	Percent
For Physical Damage:	
Homeowners With Credit Available Elsewhere	2.500
Homeowners Without Credit Available Elsewhere	1.250
Businesses With Credit Available Elsewhere	6.000
Businesses Without Credit Available Elsewhere	3.000
Non-Profit Organizations With Credit Available Elsewhere	2.750
Non-Profit Organizations Without Credit Available Elsewhere	2.750
For Economic Injury:	
Businesses & Small Agricultural Cooperatives Without Credit Available Elsewhere	3.000
Non-Profit Organizations Without Credit Available Elsewhere	2.750

The number assigned to this disaster for physical damage is 16575 6 and for economic injury is 16576 0.

The States which received an EIDL Declaration # are Indiana, Illinois.

(Catalog of Federal Domestic Assistance Number 59008)

Jovita Carranza,

Administrator.

[FR Doc. 2020–18058 Filed 8–18–20; 8:45 am]

BILLING CODE 8026–03–P

SMALL BUSINESS ADMINISTRATION

Meeting of the Advisory Committee on Veterans Business Affairs

AGENCY: U.S. Small Business Administration (SBA)

ACTION: Notice of open Federal Advisory Committee meeting.

SUMMARY: The SBA is issuing this notice to announce the date, time, and agenda for a meeting of the Advisory Committee on Veterans Business Affairs (ACVBA). The meeting is open to the public; however, advance notice of attendance is strongly requested.

DATES: Thursday, September 3, 2020, from 9:00 a.m. to 3:30 p.m. EDT.

ADDRESSES: Due to the coronavirus pandemic, the meeting will be held via Microsoft Teams.

FOR FURTHER INFORMATION CONTACT: The meeting is open to the public; however advance notice of attendance is strongly encouraged. To RSVP and confirm attendance, the general public should email *veteransbusiness@sba.gov* with subject line—''RSVP for 9/3/20 ACVBA Public Meeting.'' To submit a written comment, individuals should email *veteransbusiness@sba.gov* with subject line—''Response for 9/3/20 ACVBA Public Meeting'' no later than August 27, or contact Timothy Green, Deputy Associate Administrator, Office of Veterans Business Development (OVBD) at (202) 205–6773. Comments received in advanced will be addressed as time allows during the public comment period. All other submitted comments will be included in the meeting record. During the live meeting, those who wish to comment will be able to do so only via the online platform chat function and will be included in the meeting record. The live meeting will be accessible in two parts—a morning session and afternoon session. Participants attending can join via Microsoft Teams from 9:00 a.m. to 12:15 p.m. here: *https://bit.ly/3almKEh* and from 1:00 p.m. to 3:30 p.m. here: *https://bit.ly/31KCE7t.* Special accommodation requests should be directed to OVBD at (202) 205–6773 or *veteransbusiness@sba.gov.* All applicable documents will be posted on the ACVBA website prior to the meeting: *https://www.sba.gov/page/advisory-committee-veterans-business-affairs.* For more information on veteran owned small business programs, please visit *www.sba.gov/ovbd.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C., Appendix 2), SBA announces the meeting of the Advisory Committee on Veterans Business Affairs. The ACVBA is established pursuant to 15 U.S.C. 657(b) note and serves as an independent source of advice and policy. The purpose of this meeting is to discuss efforts that support veteran-owned small businesses, updates on past and current events, and the ACVBA's objectives for fiscal year 2020.

Dated: August 14, 2020.

Nicole Nelson,

Committee Management Officer (Acting).

[FR Doc. 2020–18170 Filed 8–18–20; 8:45 am]

BILLING CODE 8026–03–P

SMALL BUSINESS ADMINISTRATION

Meeting of the Interagency Task Force on Veterans Small Business Development

AGENCY: U.S. Small Business Administration (SBA).

ACTION: Notice of open Federal Advisory Committee meeting.

SUMMARY: The SBA is issuing this notice to announce the date, time and agenda for the next meeting of the Interagency Task Force on Veterans Small Business Development (IATF). The meeting is open to the public; however, advance notice of attendance is strongly requested.

DATES: Wednesday, September 2, 2020, from 1:00 p.m. to 3:30 p.m. EST.

ADDRESSES: Due to the coronavirus pandemic, the meeting will be held via Microsoft Teams.

FOR FURTHER INFORMATION CONTACT: The meeting is open to the public; however advance notice of attendance is strongly encouraged. To RSVP and confirm attendance, the general public should email *veteransbusiness@sba.gov* with subject line—''RSVP for 9/2/20 IATF Public Meeting.'' To submit a written comment, individuals should email *veteransbusiness@sba.gov* with subject line—''Response for 9/2/20 IATF Public Meeting'' no later than August 26, or contact Timothy Green, Deputy Associate Administrator, Office of Veterans Business Development (OVBD) at (202) 205–6773. Comments received in advanced will be addressed as time allows during the public comment period. All other submitted comments

will be included in the meeting record. During the live meeting, those who wish to comment will be able to do so only via the online platform chat function and will be included in the meeting record. Participants attending can join via Microsoft Teams from 1:00 p.m. to 3:30 p.m. here: *https://bit.ly/2PIurLw.* Special accommodation requests should be directed to OVBD at (202) 205–6773 or *veteransbusiness@sba.gov.* All applicable documents will be posted on the IATF website prior to the meeting: *https://www.sba.gov/page/interagency-task-force-veterans-small-business-development.* For more information on veteran owned small business programs, please visit *www.sba.gov/ovbd.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C., Appendix 2), SBA announces the meeting of the Interagency Task Force on Veterans Small Business Development (IAFT). The IATF is established pursuant to Executive Order 13540 to coordinate the efforts of Federal agencies to improve capital, business development opportunities, and pre-established federal contracting goals for small business concerns owned and controlled by veterans and service-disabled veterans.

The purpose of this meeting is to discuss efforts that support service-disabled veteran-owned small businesses, updates on past and current events, and the IATF's objectives for fiscal year 2020.

Dated: August 14, 2020.

Nicole Nelson,

Committee Management Officer (Acting).

[FR Doc. 2020–18168 Filed 8–18–20; 8:45 am]

BILLING CODE P

SMALL BUSINESS ADMINISTRATION

Class Waiver of the Nonmanufacturer Rule

AGENCY: U.S. Small Business Administration.

ACTION: Notice To rescind Notice of Intent To waive the Nonmanufacturer Rule for diabetic test strips published on July 14, 2020.

SUMMARY: The U.S. Small Business Administration (SBA) is issuing this notice to advise the public it is rescinding a duplicate Notice of Intent, published in the **Federal Register** on July 14, 2020, regarding a class waiver of the Nonmanufacturer Rule (NMR) for diabetic test strips under North American Industry Classification (NAICS) code 325413 and Product Service Code (PSC) 6515.

FOR FURTHER INFORMATION CONTACT: Carol Hulme, Attorney Advisor, by telephone at 202–205–6347; or by email at *Carol-Ann.Hulme@sba.gov.*

SUPPLEMENTARY INFORMATION: An initial Notice of Intent to Waive the Nonmanufacturer Rule for diabetic test strips was published in the **Federal Register** on April 20, 2020, and remains in effect. The comment period pertaining to that notice closed on May 20, 2020. The duplicate notice of intent was published in error on July 14, 2020, identified as Document Number 2020–15149, and located in the **Federal Register** at 85 FR 42480. SBA took action on the initial Notice on July 17, 2020 by issuing a class waiver of the NMR for diabetic test strips. 85 FR 43634. The class waiver becomes effective on August 17, 2020.

David Loines,

Director, Office of Government Contracting.

[FR Doc. 2020–18173 Filed 8–18–20; 8:45 am]

BILLING CODE P

SUSQUEHANNA RIVER BASIN COMMISSION

Projects Approved for Consumptive Uses of Water

AGENCY: Susquehanna River Basin Commission.

ACTION: Notice.

SUMMARY: This notice lists the projects approved by rule by the Susquehanna River Basin Commission during the period set forth in ''DATES.''

DATES: July 1–31, 2020.

ADDRESSES: Susquehanna River Basin Commission, 4423 North Front Street, Harrisburg, PA 17110–1788.

FOR FURTHER INFORMATION CONTACT: Jason E. Oyler, General Counsel and Secretary to the Commission, telephone: (717) 238–0423, ext. 1312; fax: (717) 238–2436; email: *joyler@srbc.net.* Regular mail inquiries May be sent to the above address.

SUPPLEMENTARY INFORMATION: This notice lists the projects, described below, receiving approval for the consumptive use of water pursuant to the Commission's approval by rule process set forth in 18 CFR 806.22 (f)(13) and 18 CFR 806.22 (f) for the time period specified above:

Water Source Approval—Issued Under 18 CFR 806.22(f):

1. Seneca Resources Company, LLC; Pad ID: Warren Pad B; ABR–20100621.R2; Covington and Richmond Townships, Tioga County, Pa.; Consumptive Use of Up to 4.0000 mgd; Approval Date: July 8, 2020.

2. Chesapeake Appalachia, L.L.C.; Pad ID: Shaw; ABR–20100634.R2; Windham Township, Wyoming County, Pa.; Consumptive Use of Up to 7.5000 mgd; Approval Date: July 8, 2020.

3. Chesapeake Appalachia, L.L.C.; Pad ID: Stalford; ABR–20100617.R2; Wyalusing Township, Bradford County, Pa.; Consumptive Use of Up to 7.50000 mgd; Approval Date: July 8, 2020.

4. Chesapeake Appalachia, L.L.C.; Pad ID: Towner; ABR–20100638.R2; Rome Township, Bradford County, Pa.; Consumptive Use of Up to 7.5000 mgd; Approval Date: July 8, 2020.

5. SWEPI LP; Pad ID: Vandergrift 290; ABR–20100442.R1; Charleston Township, Tioga County, Pa.; Consumptive Use of Up to 4.0000 mgd; Approval Date: July 8, 2020.

6. Chief Oil & Gas, LLC.; Pad ID: SGL–12 P UNIT PAD; ABR–202007001; Franklin, Bradford County, Pa.; Consumptive Use of Up to 2.5000 mgd; Approval Date: July 27, 2020.

7. Chesapeake Appalachia, L.L.C.; Pad ID: Hickory Row; ABR–202007002; Wyalusing Township, Bradford County, Pa.; Consumptive Use of Up to 7.5000 mgd; Approval Date: July 27, 2020.

8. Chesapeake Appalachia, L.L.C.; Pad ID: Tanner & Hana; ABR–202007003; Wyalusing Township, Bradford County, Pa.; Consumptive Use of Up to 7.5000 mgd; Approval Date: July 27, 2020.

9. Chesapeake Appalachia, L.L.C.; Pad ID: Shingle Ridge; ABR–202007004; North Branch Township, Wyoming County, Pa.; Consumptive Use of Up to 7.5000 mgd; Approval Date: July 27, 2020.

10. Chesapeake Appalachia, L.L.C.; Pad ID: Black Creek; ABR–20100686.R2; Forks Township, Sullivan County, Pa.; Consumptive Use of Up to 7.5000 mgd; Approval Date: July 27, 2020.

11. Repsol Oil & Gas USA, LLC; Pad ID: GARDINER (01 071) D; ABR–20100522.R2; Troy Township, Bradford County, Pa.; Consumptive Use of Up to 6.0000 mgd; Approval Date: July 27, 2020.

12. ARD Operating, LLC.; Pad ID: COP Tr 685 A; ABR–20100541.R2; Cummings Township, Lycoming County, Pa.; Consumptive Use of Up to 3.0000 mgd; Approval Date: July 27, 2020.

13. ARD Operating, LLC.; Pad ID: COP Tr 231 D; ABR–20100530.R2; Snow Shoe Township, Centre County, Pa.; Consumptive Use of Up to 3.0000 mgd; Approval Date: July 27, 2020.

14. XTO Energy, Inc.; Pad ID: Everbe Farms 8518H; ABR–20100533.R2; Franklin Township, Lycoming County,

Pa.; Consumptive Use of Up to 4.0000 mgd; Approval Date: July 27, 2020.

15. Chesapeake Appalachia, L.L.C.; Pad ID: Covington; ABR–201007123.R2; Sheshequin Township, Bradford County, Pa.; Consumptive Use of Up to 7.5000 mgd; Approval Date: July 28, 2020.

16. Chief Oil & Gas, LLC.; Pad ID: McCarty Drilling Pad #1; ABR–20100676.R2; Elkland Township, Sullivan County, Pa.; Consumptive Use of Up to 2.0000 mgd; Approval Date: July 30, 2020.

17. Chief Oil & Gas, LLC.; Pad ID: Signore Drilling Pad #1; ABR–20100697.R2; Elkland Township, Sullivan County, Pa.; Consumptive Use of Up to 2.0000 mgd; Approval Date: July 30, 2020.

18. Chief Oil & Gas, LLC.; Pad ID: Waldeisen-Ladd Drilling Pad; ABR–20100699.R2; Fox Township, Sullivan County, Pa.; Consumptive Use of Up to 2.0000 mgd; Approval Date: July 30, 2020.

19. Chesapeake Appalachia, L.L.C.; Pad ID: Delima; ABR–201007078.R2; Albany Township, Bradford County, Pa.; Consumptive Use of Up to 7.5000 mgd; Approval Date: July 30, 2020.

20. Chesapeake Appalachia, L.L.C.; Pad ID: Moose; ABR–201007019.R2; Wysox Township, Bradford County, Pa.; Consumptive Use of Up to 7.5000 mgd; Approval Date: July 30, 2020.

21. Chesapeake Appalachia, L.L.C.; Pad ID: Redmond; ABR–201007005.R2; Meshoppen Township, Wyoming County, Pa.; Consumptive Use of Up to 7.5000 mgd; Approval Date: July 30, 2020.

22. Chesapeake Appalachia, L.L.C.; Pad ID: Robinson NEW; ABR–201007036.R2; Orwell Township, Bradford County, Pa.; Consumptive Use of Up to 7.5000 mgd; Approval Date: July 30, 2020.

23. Chesapeake Appalachia, L.L.C.; Pad ID: Rowe; ABR–201007101.R2; Rome Township, Bradford County, Pa.; Consumptive Use of Up to 7.5000 mgd; Approval Date: July 30, 2020.

24. Chesapeake Appalachia, L.L.C.; Pad ID: Simpson; ABR–201007030.R2; West Burlington Township, Bradford County, Pa.; Consumptive Use of Up to 7.5000 mgd; Approval Date: July 30, 2020.

25. Repsol Oil & Gas, LLC; Pad ID: WILBUR (03 065); ABR–20100552.R2; Wells and Columbia Townships, Bradford County, Pa.; Consumptive Use of Up to 6.0000 mgd; Approval Date: July 30, 2020.

26. Repsol Oil & Gas, LLC; Pad ID: Wilcox #1; ABR–20090803.R2; Covington Township, Tioga County, Pa.; Consumptive Use of Up to 6.0000 mgd; Approval Date: July 30, 2020.

27. Pennsylvania General Energy Company, L.L.C.; Pad ID: COP TRACT 724—PAD A; ABR–20091118.R1; Gamble Township, Lycoming County, Pa.; Consumptive Use of Up to 4.9000 mgd; Approval Date: July 30, 2020.

Authority: Pub. L. 91–575, 84 Stat. 1509 *et seq.,* 18 CFR parts 806, 807, and 808.

Dated: August 13, 2020.

Jason E. Oyler,

General Counsel and Secretary to the Commission.

[FR Doc. 2020–18088 Filed 8–18–20; 8:45 am]

BILLING CODE 7040–01–P

SUSQUEHANNA RIVER BASIN COMMISSION

Grandfathering (GF) Registration Notice

AGENCY: Susquehanna River Basin Commission.

ACTION: Notice.

SUMMARY: This notice lists Grandfathering Registration for projects by the Susquehanna River Basin Commission during the period set forth in **DATES**.

DATES: July 1–31, 2020.

ADDRESSES: Susquehanna River Basin Commission, 4423 North Front Street, Harrisburg, PA 17110–1788.

FOR FURTHER INFORMATION CONTACT: Jason E. Oyler, General Counsel and Secretary to the Commission, telephone: (717) 238–0423, ext. 1312; fax: (717) 238–2436; email: *joyler@srbc.net.* Regular mail inquiries May be sent to the above address.

SUPPLEMENTARY INFORMATION: This notice lists GF Registration for projects, described below, pursuant to 18 CFR 806, Subpart E for the time period specified above:

Grandfathering Registration Under 18 CFR part 806, subpart E:

1. Pennsylvania Department of Corrections—State Correctional Institute at Huntingdon, GF Certification No. GF–202007101, Smithfield Township, Huntingdon County, Pa.; Price Spring, Mason Spring, and consumptive use; Issue Date: July 1, 2020.

2. Village of Bath—Bath Electric, Gas and Water Systems, GF Certificate No. GF–202007102, Village and Town of Bath, Steuben County, N.Y.; Wells 4, 6, and 7; Issue Date: July 1, 2020.

3. Village of Canisteo—Public Water Supply System, GF Certificate No. GF–202007103, Village of Canisteo, Steuben County, N.Y.; Well 1; Issue Date: July 30, 2020.

4. Pennsylvania Fish & Boat Commission—Reynoldsdale State Fish Hatchery, GF Certificate No. GF–202007104, East St. Clair Township, Bedford County, Pa.; the Sump and Spring; Issue Date: July 30, 2020.

5. Sugarloaf Golf Club, Inc., GF Certificate No. GF–202007105, Black Creek Township, Luzerne County, Pa.; Lower Pond, Unnamed Tributary to Black Creek, and consumptive use; Issue Date: July 30, 2020.

6. Pennsylvania—American Water Company—Susquehanna District, GF Certificate No. GF–202007106, Harmony and Great Bend Townships, Susquehanna County, Pa.; East Branch Canawacta Creek; Issue Date: July 30, 2020.

Authority: Pub. L. 91–575, 84 Stat. 1509 *et seq.,* 18 CFR parts 806 and 808.

Dated: August 13, 2020.

Jason E. Oyler,

General Counsel and Secretary to the Commission.

[FR Doc. 2020–18093 Filed 8–18–20; 8:45 am]

BILLING CODE 7040–01–P

SUSQUEHANNA RIVER BASIN COMMISSION

Commission Meeting

AGENCY: Susquehanna River Basin Commission.

ACTION: Notice.

SUMMARY: The Susquehanna River Basin Commission will conduct its regular business meeting on September 18, 2020, from Harrisburg, Pennsylvania. Details concerning the matters to be addressed at the business meeting are contained in the Supplementary Information section of this notice. Also the Commission published a document in the **Federal Register** on July 17, 2020, concerning its public hearing on August 13, 2020, in Harrisburg, Pennsylvania.

DATES: The meeting will be held on Friday, September 18, 2020, at 9 a.m.

ADDRESSES: The meeting will be conducted telephonically from the Susquehanna River Basin Commission, 4423 N. Front Street, Harrisburg, PA 17110.

FOR FURTHER INFORMATION CONTACT: Jason E. Oyler, General Counsel and Secretary to the Commission, telephone: 717–238–0423; fax: 717–238–2436.

SUPPLEMENTARY INFORMATION: The business meeting will include actions or presentations on the following items: (1) Adoption of a general permit; (2) rescission of two policies; (3) Resolution 2020–06 considering modifications to the Commission's Fiscal Year 2021

Budget; (4) adoption of the Commission's Fiscal Year 2022 Budget; (5) Resolution 2020–08 adopting the proposed water resources program for FY2019–2021; (6) ratification/approval of contracts/grants; (7) Resolution 2020–09 adopting amendments to *Comprehensive Plan for the Water Resources of the Susquehanna River Basin;* (8) two resolutions providing for emergency certificate extensions; (9) a report on delegated settlements; and (10) Regulatory Program projects.

This agenda is complete at the time of issuance, but other items may be added, and some stricken without further notice. The listing of an item on the agenda does not necessarily mean that the Commission will take final action on it at this meeting. When the Commission does take final action, notice of these actions will be published in the **Federal Register** after the meeting. Any actions specific to projects will also be provided in writing directly to project sponsors.

Due to the COVID–19 orders, the meeting will be conducted telephonically and there will be no physical public attendance. The public is invited to attend the Commission's business meeting by telephone conference and may do so by dialing Conference Call # 1–888–387–8686, the Conference Room Code # 9179686050. Written comments pertaining to items on the agenda at the business meeting may be mailed to the Susquehanna River Basin Commission, 4423 North Front Street, Harrisburg, Pennsylvania 17110–1788, or submitted electronically through *www.srbc.net/about/meetings-events/business-meeting.html.* Such comments are due to the Commission on or before September 16, 2020. Comments will not be accepted at the business meeting noticed herein.

Authority: Pub. L. 91–575, 84 Stat. 1509 *et seq.,* 18 CFR parts 806, 807, and 808.

Dated: August 13, 2020.

Jason E. Oyler,

General Counsel and Secretary to the Commission.

[FR Doc. 2020–18092 Filed 8–18–20; 8:45 am]

BILLING CODE 7040–01–P

SUSQUEHANNA RIVER BASIN COMMISSION

Projects Approved for Minor Modifications

AGENCY: Susquehanna River Basin Commission.

ACTION: Notice.

SUMMARY: This notice lists the minor modifications approved for a previously approved project by the Susquehanna River Basin Commission during the period set forth in **DATES**.

DATES: July 1–31, 2020.

ADDRESSES: Susquehanna River Basin Commission, 4423 North Front Street, Harrisburg, PA 17110–1788.

FOR FURTHER INFORMATION CONTACT: Jason E. Oyler, General Counsel, telephone: (717) 238–0423, ext. 1312; fax: (717) 238–2436; email: *joyler@srbc.net.* Regular mail inquiries may be sent to the above address.

SUPPLEMENTARY INFORMATION: This notice lists previously approved projects, receiving approval of minor modifications, described below, pursuant to 18 CFR 806.18 or to Commission Resolution Nos. 2013–11 and 2015–06 for the time period specified above:

Minor Modifications Issued Under 18 CFR 806.18

1. Moxie Freedom LLC, Docket No. 20200314, Salem Township, Luzerne County, Pa.; approval to add Hazleton Area Water Company as an additional source of water for consumptive use; Approval Date: July 24, 2020.

Authority: Pub. L. 91–575, 84 Stat. 1509 *et seq.,* 18 CFR parts 806, 807, and 808.

Dated: August 13, 2020.

Jason E. Oyler,

General Counsel and Secretary to the Commission.

[FR Doc. 2020–18097 Filed 8–18–20; 8:45 am]

BILLING CODE 7040–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Availability of a Draft Environmental Impact Statement (EIS) and Notice of Public Workshops and Hearings for the Proposed LaGuardia Access Improvement Project at LaGuardia Airport (LGA), New York City, Queens County, New York

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

ACTION: Notice of Availability of a Draft Environmental Impact Statement and Notice of Public Workshops and Hearings.

SUMMARY: The FAA is issuing this notice under the provisions of the National Environmental Policy Act (NEPA) of 1969, as amended, to announce the availability of the Draft Environmental Impact Statement (EIS) for the proposed LaGuardia Airport (LGA) Access Improvement Project and its connected actions (the Proposed Action). The Proposed Action would provide direct access between LGA and the Metropolitan Transportation Authority (MTA) Long Island Rail Road (LIRR) Mets-Willets Point Station and the New York City Transit (NYCT) 7 Line Mets-Willets Point Station. FAA is the lead federal agency in the preparation of the EIS, with cooperating agencies including U.S. Army Corps of Engineers, U.S. Environmental Protection Agency, New York State Department of Environmental Conservation, New York State Department of Transportation, and New York State Office of Parks, Recreation and Historic Preservation. The Draft EIS was prepared to disclose the potential environmental impacts resulting from the Proposed Action, including real property transactions under the New York State Eminent Domain Procedures Law. This notice announces the beginning of public comment period to solicit public comments on the Draft EIS. FAA plans to hold two public meetings and three public hearings concerning the Proposed Action and information contained in the Draft EIS.

DATES: The public comment period on the Draft EIS starts on August 21, 2020 and ends on October 5, 2020. All comments must be received by no later than 5:00 p.m. Eastern Daylight Time, Monday, October 5, 2020.

As part of the EIS public participation process, FAA will hold two public workshops via Zoom where information will be presented and interested members of the public can participate in a moderated question and answer session on the Proposed Action and information contained in the Draft EIS with the FAA and the EIS Team:

- September 22, 2020 from 4:30 p.m. to 6:30 p.m.
- September 23, 2020 from 11:00 a.m. to 1:00 p.m.

FAA will also hold three public hearings via Zoom where interested members of the public can provide and listen to oral comments concerning the Proposed Action and information contained in the Draft EIS:

- September 22, 2020 from 7:00 p.m. to 9:00 p.m.
- September 23, 2020 from 2:00 p.m. to 4:00 p.m.
- September 24, 2020 from 5:00 p.m. to 7:00 p.m.

All speakers who register to give oral comments will be given up to 3 minutes to allow everyone the opportunity to provide oral comments, if they choose to do so. Written comments will also be accepted, as specified below.

Due to the ongoing public health emergency associated with COVID–19

and FAA's responsibility to protect the health and safety of the community, all workshops and hearings will be virtual. Registration and instructions for the public workshops and hearings is available on the project website at *https://www.lgaaccesseis.com/.* Translation services, including sign language interpretation, can be made available during the public workshops and hearings, if requested 10 calendar days before the sessions, via the online registration process.

ADDRESSES: Oral comments on the Draft EIS may be presented at the public hearings or by leaving a voicemail at (855) LGA–EIS9 or (855) 542–3479. Written comments on the Draft EIS may be submitted via the following methods:

- Online on the project website at *https://www.lgaaccesseis.com/formal-comment*
- Email to *comments@lgaaccesseis.com*
- U.S. Mail to Mr. Andrew Brooks, Environmental Program Manager, Eastern Regional Office, AEA–610, Federal Aviation Administration, 1 Aviation Plaza, Jamaica, NY 11434

Comments on the Draft EIS will help FAA arrive at the best possible informed decision about the proposal. If you choose to include your name, address and telephone number, email, or other personal identifying information in your comment, be advised 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, FAA cannot guarantee that we will be able to do so.

FOR FURTHER INFORMATION CONTACT: Mr. Andrew Brooks, Environmental Program Manager, Eastern Regional Office, AEA–610, Federal Aviation Administration, 1 Aviation Plaza, Jamaica, NY 11434. Telephone: 718–553–2511.

SUPPLEMENTARY INFORMATION: This notice continues the EIS process announced in the Notice of Intent To Prepare an Environmental Impact Statement (EIS) and Initiate Section 106 Consultation for the Proposed LaGuardia Access Improvement Project at LaGuardia Airport (LGA), New York City, Queens County, New York, 84 FR 19151, May 3, 2019, and follows meetings associated with the EIS announced in the Notice of Public Information Sessions on Alternatives Analysis for the Proposed LaGuardia Airport Access Improvement Project at LaGuardia Airport (LGA), New York City, Queens County, New York, 84 FR 66438, December 4, 2019.

This document was prepared in response to a proposal presented by the Port Authority of New York and New Jersey (Port Authority). The Port Authority operates LGA under a lease agreement with the City of New York. FAA must decide whether to approve, pursuant to 49 U.S.C. 47106 and 47107 relating to the eligibility of the Proposed Action for federal funding under the Airport Improvement Program (AIP) and/or under 49 U.S.C. 40117, as implemented by 14 CFR 158.25, to impose and use passenger facility charge (PFC) revenue collected for the Proposed Action to assist with construction of potentially eligible development items shown on the Airport Layout Plan (ALP). FAA approval of the eligibility for federal funding under AIP or to impose and use PFCs is a Federal action that must comply with NEPA requirements. FAA, as lead federal agency, invited the U.S. Army Corps of Engineers, U.S. Environmental Protection Agency, New York State Department of Environmental Conservation, New York State Department of Transportation, and New York State Office of Parks, Recreation and Historic Preservation to participate as cooperating agencies, which they have accepted, as described under 40 CFR 1501.6(a)(1).

The Draft EIS presents the purpose and need for the Proposed Action, analysis of reasonable alternatives, discussion of impacts for each reasonable alternative, and support appendices. Pursuant to 40 CFR 1502.14(d), the No Action Alternative is also assessed in the Draft EIS as the baseline for comparison purposes. The Proposed Action includes:

- construction of an above ground fixed guideway automated people mover (APM) system approximately 2.3 miles in length that extends from the future LGA Central Hall Building to the Metropolitan Transportation Authority (MTA) Long Island Rail Road (LIRR) Mets-Willets Point Station and the New York City Transit (NYCT) 7 Line Mets-Willets Point Station;
- construction of two on-Airport APM stations (Central Hall APM Station and East APM Station) and one off-Airport APM station at Willets Point (Willets Point APM Station) that provides connections to the Mets-Willets Point LIRR and NYCT 7 Line stations;
- construction of passenger walkway systems to connect the APM stations to the passenger terminals, parking garages, and ground transportation facilities;
- construction of a multi-level APM operations, maintenance, and storage facility (OMSF) that includes up to 1,000 parking spaces (500 for airport employees, 250 for MTA employees, 50 for APM employees, and 200 for replacement Citi Field parking);
- construction of three traction power substations: One located at the on-Airport East Station, another at-grade west of the proposed Willets Point Station just south of Roosevelt Avenue, and the third at the OMSF to provide power to the APM guideway;
- construction of a 27kV main substation located adjacent to the OMSF structure on MTA property;
- construction of utilities infrastructure, both new and modified, as needed, to support the Proposed Action, including a permanent stormwater outfall into Flushing Creek and a temporary stormwater outfall into Flushing Creek; and
- acquisition of temporary and permanent easements.

The Proposed Action also includes various connected actions, including: Utility relocation and demolition of certain existing facilities; a temporary MTA bus storage/parking facility; relocation of up to 200 Citi Field parking spaces; demolition and replacement of the Passerelle Bridge; temporary walkway to maintain access between the transit stations and Flushing Meadows-Corona Park; modifications to the MTA LIRR Mets-Willets Point Station, including service changes to the LIRR Port Washington Line; and the relocation of a boat lift, finger piers and connected timber floating dock, Marina office and boatyard facility, boat storage and parking, and operations shed, part of the World's Fair Marina.

FAA provides the following notices:

- Pursuant to 36 CFR 800.8(c) that it is using the NEPA process to notify the public of FAA's finding that the proposed undertaking would adversely affect properties listed or eligible for listing on the National Register of Historic Places and is seeking public comment on the measures proposed to avoid, minimize, or mitigate such effects disclosed in the Draft EIS. A Draft Memorandum of Agreement to resolve adverse effects to historic properties is included in Appendix K.11 of the Draft EIS.
- Pursuant to Section 4(f) of the DOT Act, FAA has prepared a Draft Section 4(f) Evaluation (see Appendix I of the Draft EIS). The Proposed Action would have a significant impact on Section 4(f) resources and is seeking public comments on impacts and proposed mitigation disclosed in Chapter 3.8 of the Draft EIS.
- Pursuant to DOT Order 5610.2(a), DOT Actions to Address Environmental Justice in Minority Populations and

Low-Income Populations, the Proposed Action would have a significant impact on minority environmental justice populations and is seeking public comments on impacts and proposed mitigation disclosed in Chapter 3.14 of the Draft EIS.

- Pursuant to Executive Order 11990, Protection of Wetlands, that the Proposed Action would temporarily affect less than 1 acre of jurisdictional wetlands in Flushing Creek and less than 1 acre of temporary and permanent impact in Flushing Bay. Impacts to these aquatic resources are disclosed in Chapter 3.16 of the Draft EIS.
- Pursuant to Executive Order 11988, Floodplain Management that the Proposed Action would not result in a significant encroachment on floodplains. Impacts to floodplains are disclosed in Chapter 3.16 of the Draft EIS.

FAA encourages all interested parties to provide comments concerning the scope and content of the Draft EIS. Comments should be as specific as possible and address the analysis of potential environmental impacts and the adequacy of the assessment of the Proposed Action or merits of its alternatives and the mitigation being considered. Reviewers should organize their participation so that it is meaningful and makes the agency aware of the viewers' interests and concerns using quotations and other specific references to the Draft EIS and related documents. This commenting procedure is intended to ensure that substantive comments and concerns are available to FAA in a timely manner so that FAA has an opportunity to address them. Matters that could have been raised with specificity during the comment period on the Draft EIS may not be considered if they are raised for the first time later in the decision process.

Following the public comment period, FAA will prepare a Final EIS and Record of Decision pursuant to 40 CFR 1503.4(c) [Council of Environmental Quality regulations] and FAA Orders 1050.1F and 5050.4B. FAA and the US Army Corps of Engineers will prepare a joint Record of Decision pursuant to Executive Order 13807.

Issued in Jamaica, New York, August 14, 2020.

Evelyn Martinez,

Manager, New York Airport District Office, Airports Division, Eastern Region.

[FR Doc. 2020–18163 Filed 8–18–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2020–0799]

Agency Information Collection Activities: Requests for Comments; Clearance of a Renewed Approval of Information Collection: Certification: Mechanics, Repairman, Parachute Riggers

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew an information collection. The collection involves requirements for mechanics, repairmen, parachute riggers, and inspection authorization. The information to be collected will be used to determine applicant eligibility for certification or authorization.

DATES: Written comments should be submitted by October 19, 2020.

ADDRESSES: Please send written comments:

By Electronic Docket: https://www.regulations.gov (Enter docket number into search field).

By email: Tanya Glines, *tanya.glines@faa.gov.*

FOR FURTHER INFORMATION CONTACT: Tanya Glines by email at: *Tanya.glines@faa.gov;* phone: 801–257–5085

SUPPLEMENTARY INFORMATION:

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

OMB Control Number: 2120–0022.

Title: Certification: Mechanics, Repairman, Parachute Riggers FAR–65.

Form Numbers: FAA Form 8610–1, FAA Form 8610–2, FAA Form 8610–3.

Type of Review: Renewal of an information collection.

Background: 14 CFR part 65 prescribes, among other things, rules governing the issuance of certificates and associated ratings for mechanics, repairmen, parachute riggers, and the issuance and renewal of inspection authorizations. The information is collected on forms submitted by applicants for mechanic, repairman, or parachute rigger certificates, or applicants for an inspection authorization. The information is used for evaluation by the FAA, and is necessary for determining eligibility for issuance of a certificate, rating, or authorization.

Applicants for a light-sport repairman certificate must complete a prescribed number of training hours, based on the repairman rating and class of aircraft being applied for. Parachute riggers must maintain records of the packing, maintenance, and alteration of parachutes performed or supervised by the parachute rigger. Applicants who fail a required certification test, and who test within 30 days of that test failure, must present a signed statement certifying that the applicant has received additional instruction in each of the subjects failed.

A new FAA form is being proposed for repairman applications. In lieu of repairman applicant information being collected on FAA Form 8610–2 as currently required, it will be collected on a new FAA Form 8610–3.

Respondents: 37,350 mechanic, parachute rigger, and repairmen applicants.

Frequency: On occasion.

Estimated Average Burden per Response: 20 Minutes.

Estimated Total Annual Burden: 40,000 Hours.

Issued in Washington, DC, on August 13, 2020.

Tanya A. Glines,

Aviation Safety Inspector, Safety Standards, General Aviation Maintenance Branch (AFS–350).

[FR Doc. 2020–18119 Filed 8–18–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. 2020–65]

Petition for Exemption; Summary of Petition Received; Vintage Aviation LLC

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

ACTION: Notice.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of Federal

Aviation Regulations. The purpose of this notice is to improve the public's awareness of, and participation in, the FAA's exemption process. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number and must be received on or before August 27, 2020. Due to the unique circumstances and plans for this event, the FAA requests commenters provide their feedback no later than the due date.

ADDRESSES: Send comments identified by docket number FAA–2020–0698 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30; U.S. Department of Transportation, 1200 New Jersey Avenue SE, Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- **FAX:** Fax comments to Docket Operations at (202) 493–2251.

Privacy: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *http://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *http://www.dot.gov/privacy.*

Docket: Background documents or comments received may be read at *http://www.regulations.gov* at any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Brittany Newton, 202–267–6691, Office of Rulemaking, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on August 13, 2020.

Brandon Roberts,

Executive Director, Office of Rulemaking.

Petition for Exemption

Docket No.: FAA–2020–0698.

Petitioner: Vintage Aviation LLC.

Section(s) of 14 CFR Affected: §§ 91.319(c) and 91.9 (a).

Description of Relief Sought: Vintage Aviation LLC requests relief to operate experimental aircraft over densely populated areas. This request is in support of the flyovers of the Legacy of Peace Aerial Parade, commemorating the 75th anniversary of the end of World War II (WWII). These flyovers will occur over Pearl Harbor, Hawaii from August 28 through September 2, 2020. Twenty-one vintage aircraft from the WWII era will participate in the flyover.

[FR Doc. 2020–18104 Filed 8–18–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2020–0150]

Owner-Operator Independent Drivers Association, Small Business in Transportation Coalition Petitions for Rulemaking; Transparency in Property Broker Transactions

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

ACTION: Notice; request for public comments.

SUMMARY: FMCSA requests public comments on petitions for rulemaking to amend certain requirements for property brokers submitted by the Owner-Operator Independent Drivers Association (OOIDA) and the Small Business in Transportation Coalition (SBTC). OOIDA requests that FMCSA require property brokers to provide an electronic copy of each transaction record automatically within 48 hours after the contractual service has been completed, and prohibit explicitly brokers from including any provision in their contracts that requires a motor carrier to waive its rights to access the transaction records. SBTC requests that FMCSA prohibit brokers from coercing or otherwise requiring parties to brokers' transactions to waive their right to review the record of the transaction as a condition for doing business. SBTC also requests that FMCSA adopt regulatory language indicating that brokers' contracts may not include a stipulation or clause exempting the broker from having to comply with the transparency requirement.

DATES: Comments must be submitted by October 19, 2020.

ADDRESSES: You may submit comments identified by Docket Number FMCSA–2020–0150 using any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Docket Operations, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* Docket Operations, West Building, Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE, Washington, DC 20590, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Docket Operations.
- *Fax:* (202) 493–2251.

To avoid duplication, please use only one of these four methods. See the ''Submitting Comments'' portion of the **SUPPLEMENTARY INFORMATION** section for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: Ms. La Tonya Mimms, Chief, Driver and Carrier Operations, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590–0001, by telephone at (202) 366–4001, or by email at *MCPSD@dot.gov.* If you have questions on viewing or submitting material to the docket, contact Docket Services, (202) 366–9826.

SUPPLEMENTARY INFORMATION:

A. Submitting Comments

If you submit a comment, please include the docket number for this notice (Docket No. FMCSA–2020–0150), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* put the docket number, FMCSA–2020–0150, in

the keyword box, and click ''Search.'' When the new screen appears, click on the ''Comment Now!'' button and type your comment into the text box on the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit.

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

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

Confidential Business Information

Confidential Business Information (CBI) is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA, 5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to the notice contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to the notice, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission that constitutes CBI as ''PROPIN'' to indicate it contains proprietary information. FMCSA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket for this notice. Submissions containing CBI should be sent to Mr. Brian Dahlin, Chief, Regulatory Analysis Division, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE, Washington DC 20590. Any comments FMCSA receives which are not specifically designated as CBI will be placed in the public docket for this notice.

B. Viewing Comments and Documents

To view comments, as well as any documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov.* Insert the docket number, FMCSA–2020–0150 in the keyword box, and click ''Search.'' Next, click the ''Open Docket Folder'' button and choose the document to review. If you do not have access to the internet, you may view the docket online by visiting Docket Operations in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Docket Operations.

C. Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.transportation.gov/privacy.*

I. Background

A. Brokers' Records of Transactions; History of Current Requirements

Section 371.3(c) of title 49 of the CFR states that ''[e]ach party to a brokered transaction has the right to review the record of the transaction required to be kept by these rules.'' The current requirements under 49 CFR 371.3(c) were adopted by the Interstate Commerce Commission (ICC) on October 17, 1980 (45 FR 68941), at 49 CFR 1045.3(c). Prior to 1980, the broker records requirements under 49 CFR 1045.3 did not include a specific provision concerning the rights of parties to a brokered transaction to review the record of the transaction. In its May 12, 1980 (45 FR 31140) notice of proposed rulemaking concerning multiple broker regulations, the ICC explained that the proposed change to section 1045(c) would allow the agency to ''. . . eliminate more complex rules found at sections 1045.5, 1045.6, and 1045.10.'' Those requirements related to charges for brokerage services, charges for non-brokerage services, and duties and obligations of brokers, respectively.

With the termination of the ICC in 1995, the regulatory oversight of brokers was transferred to the Federal Highway Administration (FHWA) and the requirements under 49 CFR 1045.3 were redesignated, without change, under 49 CFR 371.3 (61 FR 54707; October 21, 1996). Subsequently, with the establishment of FMCSA in 2000, all motor carrier oversight responsibilities and regulations were transferred from FHWA to FMCSA.

B. OOIDA Petition for Rulemaking

OOIDA requested that FMCSA amend 49 CFR 371.3 to require brokers to provide an electronic copy of each transaction record automatically within 48 hours after the contractual service has been completed. OOIDA also requested that the Agency explicitly prohibit brokers from including any provision in their contracts that requires a carrier to waive their rights to access the transaction records required by section 371.3.

OOIDA explained that with freight rates reaching historic lows, small motor carriers of property are struggling financially. Motor carriers have expressed frustration about the lack of transparency between brokers and motor carriers. OOIDA believes the problem is that the regulations designed to provide transparency are routinely evaded by brokers or simply not enforced by FMCSA. While the current rules require brokers to keep transaction records and permit each party to a brokered transaction to review the records, many brokers implement hurdles they know will prevent a carrier from ever seeing this information. For example, some brokers allow a motor carrier to access records only at the broker's office during normal business hours, and OOIDA argues this makes it virtually impossible for motor carriers to access the records. Given that many business transactions now take place electronically, OOIDA believes that the rules need to be updated to improve transparency and prevent brokers from keeping their transaction records from motor carriers that are not located near the broker. The updated rules would also prevent brokers from retaliating against carriers that request the transaction information. A copy of the OOIDA petition is included in the docket for this notice.

C. SBTC Petition for Rulemaking

The SBTC requested that FMCSA amend 49 CFR 371.3 to prohibit brokers from coercing or otherwise requiring parties to a transaction to waive their right to review the record of the transaction as a condition of doing business. The requested language would also state that ''No stipulation or clause in any contract shall exempt any broker from having to comply with this rule, upon demand, by a party to the transaction.''

SBTC explained that freight rates have dropped drastically and that motor carriers have reported instances of brokers engaging in ''profiteering, price gouging and low-balling tactics.'' SBTC claims that in some instances, brokers are receiving commissions of up to 65 percent on loads due to a sudden shortage of freight and over-capacity in the transportation market. SBTC stated that, to evade regulations, some brokers have resorted to requiring carriers, as parties to broker transactions, to waive their rights to obtain documents that

show the amount the shipper is paying the broker. SBTC further states that the provisions in 49 CFR 371.3 should be strengthened to stop this abuse, noting:

> While the SBTC does not seek to return to economic regulation to limit the amounts or percentages brokers earn and believe this should be left to the free market—much like we wouldn't want carriers' revenue to suddenly be limited, transparency is essential in making sure market forces operate ethically and fairly. We believe FMCSA should enforce its rule and act to terminate this abuse by big brokers in the marketplace.

A copy of SBTC's petition is included in the docket for this notice.

II. Request for Public Comments

Petitions for rulemaking are governed by DOT regulations codified at 49 CFR 5.13 and FMCSA regulations at 49 CFR 389.31 and 389.33. While these regulations do not require FMCSA to publish a notice in the **Federal Register** seeking public comments, FMCSA believes that taking this action would provide a means of engaging stakeholders in the process for assessing the need for a rulemaking. FMCSA therefore requests public comments on OOIDA's and SBTC's petitions for rulemaking. The Agency seeks public feedback concerning its statutory authority to require that brokers disclose certain financial details about transactions to motor carriers, and further seeks comments on whether a regulatory action would provide an effective solution to the problem described. Commenters are encouraged to provide responses to the following questions:

1. FMCSA has authority under 49 U.S.C. 14122(a) to require the form of records to be prepared or compiled by carriers and brokers, the Agency's right of inspection under 49 U.S.C. 14122(b), its authority to prescribe time periods for preservation of records under 49 U.S.C. 14122(c), and its authority to require annual financial reports from motor carriers, freight forwarders and brokers. FMCSA also has discretionary authority to prescribe regulations to carry out the provisions of 49 U.S.C. 13101–14916 that govern the commercial aspects of motor carrier and broker transportation. 49 U.S.C. 13301(a). Section 13301(a) is the statutory successor to former 49 U.S.C. 10321, which the ICC relied on in 1980 in prescribing the regulations later redesignated as part 371. In light of the significant statutory changes reducing the scope of regulatory authority over commercial transportation that have occurred since 1980, what statutory provisions, if any, would be carried out by the regulatory changes requested by the petitioners? In particular, how would a rule restricting the rights of private parties from including certain terms in their agreements align with the Agency's statutory authority?

2. How would a rulemaking expanding FMCSA's role in enforcement of the requirement mandating that brokers automatically disclose financial details about each transaction to the respective motor carrier transporting the load, as requested in the OOIDA and SBTC petitions, align with the statutes identified above? What measures could FMCSA take to ensure that regulatory action in this area is an appropriate exercise of the Agency's authority?

3. Are the transparency issues raised by OOIDA and SBTC limited to small brokers or large brokers (*e.g.,* brokers with revenues above a certain threshold, brokers with a certain number of transactions, etc.) or are they more widespread such that the rulemaking should cover all brokers, regardless of size?

4. If the transparency issues are primarily associated with large brokers, what revenue threshold should the FMCSA consider for the applicability of any new requirements, and how would the Agency obtain accurate information about brokers' revenues?

5. The OOIDA petition requested that brokers provide information to motor carriers automatically and electronically. The Agency requests commenters to provide their views on the most efficient and effective means of accomplishing this request. Should each broker have, for example, a stand-alone system with motor carriers receiving an email from the broker after the contractual service has been completed, or should brokers be allowed to satisfy the request with partnerships or networks through which registered brokers would upload transaction information which would then be automatically transmitted via the network to the registered carrier associated with the transaction?

6. The OOIDA petition request that FMCSA require brokers to provide transaction information automatically within 48 hours of the completion of the contractual services would likely require information technology (IT) resources that are currently not in use. FMCSA requests that commenters provide cost estimates for implementing an IT solution to accomplish OOIDA's request, either through stand-alone systems run by individual brokers, or systems operated by groups of brokers notifying the individual carriers utilizing any of the brokers within the group.

7. Please provide a quantitative estimate of the economic benefits that would likely be achieved by motor carriers if FMCSA adopted the rules OOIDA and SBTC requests. How much additional revenue might motor carriers receive on a per-transaction basis?

8. Please provide a quantitative estimate of the economic costs to brokers or others if FMCSA adopted the rules OOIDA and SBTC request. How much profit reduction on a per-transaction basis would brokers experience, and what percentage of the costs would be passed through to shippers or motor carriers?

Issued under authority delegated in 49 CFR 1.87.

Heather Eilers-Bowser,

Chief Counsel.

[FR Doc. 2020–18130 Filed 8–18–20; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2020–0112]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel TOURBILLION (Motor Vessel); Invitation for Public Comments

AGENCY: Maritime Administration, Transportation (DOT).

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirements of the coastwise trade laws to allow the carriage of no more than twelve passengers for hire on vessels, which are three years old or more. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before September 18, 2020.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2020–0112 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Search MARAD–2020–0112 and follow the instructions for submitting comments.
- *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is: U.S. Department of

Transportation, MARAD–2020–0112, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

Instructions: All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT: Bianca Carr, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–453, Washington, DC 20590. Telephone 202–366–9309, Email *Bianca.carr@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel TOURBILLION is:

—Intended Commercial Use of Vessel: ''Will be using this vessel for Charter, Sport Fishing and Sightseeing.''
—Geographic Region Including Base of Operations: ''California, Washington, Oregon, Alaska (excluding Southeast Alaska)'' (Base of Operations: Portland, OR)
—Vessel Length and Type: 75′ motor vessel

The complete application is available for review identified in the DOT docket as MARAD–2020–0112 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the vessel name, state the commenter's interest in the waiver application, and address the waiver criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at *http://www.regulations.gov,* keyword search MARAD–2020–0112 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Department of Transportation, Maritime Administration, Office of Legislation and Regulations, MAR–225, W24–220, 1200 New Jersey Avenue SE, Washington, DC 20590. Include a cover letter setting forth with specificity the basis for any such claim and, if possible, a summary of your submission that can be made available to the public.

Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, to *www.regulations.gov,* as described in the system of records notice, DOT/ALL–14 FDMS, accessible through *www.dot.gov/privacy.* To facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully considered. If you wish to provide comments containing proprietary or confidential information, please contact the agency for alternate submission instructions.

(Authority: 49 CFR 1.93(a), 46 U.S.C. § 55103, 46 U.S.C. § 12121)

* * *

Dated: August 13, 2020.

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2020–18072 Filed 8–18–20; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2020–0111]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel WINDSONG (Sailing Vessel); Invitation for Public Comments

AGENCY: Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirements of the coastwise trade laws to allow the carriage of no more than twelve passengers for hire on vessels, which are three years old or more. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before September 18, 2020.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2020–0111 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Search MARAD–2020–0111 and follow the instructions for submitting comments.
- *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is: U.S. Department of Transportation, MARAD–2020–0111, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

Instructions: All submissions received must include the agency name and specific docket number. All comments

received will be posted without change to the docket at *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT: Bianca Carr, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–453, Washington, DC 20590. Telephone 202–366–9309, Email *Bianca.carr@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel Windsong is:

—*Intended Commercial Use of Vessel:* ''passenger carrying''
—*Geographic Region Including Base of Operations:* ''Virginia, Maryland, North Carolina, Delaware '' (Base of Operations: Norfolk, VA)
—*Vessel Length and Type:* 47' sailing vessel

The complete application is available for review identified in the DOT docket as MARAD–2020–0111 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the vessel name, state the commenter's interest in the waiver application, and address the waiver criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at *http://www.regulations.gov.,* keyword search MARAD–1010–0111 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Department of Transportation, Maritime Administration, Office of Legislation and Regulations, MAR–225, W24–220, 1200 New Jersey Avenue SE, Washington, DC 20590. Include a cover letter setting forth with specificity the basis for any such claim and, if possible, a summary of your submission that can be made available to the public.

Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, to *www.regulations.gov,* as described in the system of records notice, DOT/ALL–14 FDMS, accessible through *www.dot.gov/privacy.* To facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully considered. If you wish to provide comments containing proprietary or confidential information, please contact the agency for alternate submission instructions.

Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121.

* * * * *

Dated: August 13, 2020.

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2020–18074 Filed 8–18–20; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2020–0114]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel BOOMERANG LOVE (Sailing Vessel); Invitation for Public Comments

AGENCY: Maritime Administration, Transportation (DOT).

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirements of the coastwise trade laws to allow the carriage of no more than twelve passengers for hire on vessels, which are three years old or more. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before September 18, 2020.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2020–0114 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Search MARAD–2020–0114 and follow the instructions for submitting comments.
- *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is: U.S. Department of Transportation, MARAD–2020–0114, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

Instructions: All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT: Bianca Carr, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey

Avenue SE, Room W23–453, Washington, DC 20590. Telephone 202–366–9309, Email *Bianca.carr@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel BOOMERANG LOVE is:

—Intended Commercial Use of Vessel: ''Passenger Vessel, tourist trade.''
—Geographic Region Including Base of Operations: ''Florida'' (Base of Operations: Treasure Island, FL)
—Vessel Length and Type: 42′ sailing vessel

The complete application is available for review identified in the DOT docket as MARAD–2020–0114 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the vessel name, state the commenter's interest in the waiver application, and address the waiver criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at *http://www.regulations.gov.,* keyword search MARAD–2020–0114 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Department of Transportation, Maritime Administration, Office of Legislation and Regulations, MAR–225, W24–220, 1200 New Jersey Avenue SE, Washington, DC 20590. Include a cover letter setting forth with specificity the basis for any such claim and, if possible, a summary of your submission that can be made available to the public.

Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, to *www.regulations.gov,* as described in the system of records notice, DOT/ALL–14 FDMS, accessible through *www.dot.gov/privacy.* To facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully considered. If you wish to provide comments containing proprietary or confidential information, please contact the agency for alternate submission instructions.

Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121.

* * *

Date: August 13, 2020.

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2020–18067 Filed 8–18–20; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2020–0113]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel VENTANAS (Catamaran); Invitation for Public Comments

AGENCY: Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirements of the coastwise trade laws to allow the carriage of no more than twelve passengers for hire on vessels, which are three years old or more. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before September 18, 2020.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2020–0113 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Search MARAD–2020–0113 and follow the instructions for submitting comments.
- *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is: U.S. Department of Transportation, MARAD–2020–0113, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

Instructions: All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT: Bianca Carr, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–453, Washington, DC 20590. Telephone 202–366–9309, Email *Bianca.carr@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel VENTANAS is:

—*Intended Commercial Use of Vessel:* ''Charter''
—*Geographic Region Including Base of Operations:* ''Florida'' (Base of Operations: St. Petersburg, FL)
—*Vessel Length and Type:* 39' catamaran

The complete application is available for review identified in the DOT docket as MARAD–2020–0113 at *http://*

www.regulations.gov. Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the vessel name, state the commenter's interest in the waiver application, and address the waiver criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at *http://www.regulations.gov.,* keyword search MARAD–2020–0113 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Department of Transportation, Maritime Administration, Office of Legislation and Regulations, MAR–225, W24–220, 1200 New Jersey Avenue SE, Washington, DC 20590. Include a cover letter setting forth with specificity the basis for any such claim and, if possible, a summary of your submission that can be made available to the public.

Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, to *www.regulations.gov,* as described in the system of records notice, DOT/ALL–14 FDMS, accessible through *www.dot.gov/privacy.* To facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully considered. If you wish to provide comments containing proprietary or confidential information, please contact the agency for alternate submission instructions.

Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121.

* * * * *

Dated: August 13, 2020.

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2020–18073 Filed 8–18–20; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2020–0109

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel CIARA MADELINE (Sailing Vessel); Invitation for Public Comments

AGENCY: Maritime Administration, Transportation (DOT).

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirements of the coastwise trade laws to allow the carriage of no more than twelve passengers for hire on vessels, which are three years old or more. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before September 18, 2020.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2020–0109 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Search MARAD–2020–0109 and follow the instructions for submitting comments.
- *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is: U.S. Department of Transportation, MARAD–2020–0109, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

Instructions: All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT: Bianca Carr, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–453, Washington, DC 20590. Telephone 202–366–9309, Email *Bianca.carr@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel CIARA MADELINE is:

—Intended Commercial Use of Vessel: ''My intended use for my vessel is to carry up to 6 paying customers for captained charter sails for durations between 2 hours to 1 week.''

—Geographic Region Including Base of Operations: ''Wisconsin, Michigan, Minnesota, Illinois, Indiana.'' (Base of Operations: McFarland, WI)

—Vessel Length and Type: 44.6′ sailing vessel

The complete application is available for review identified in the DOT docket as MARAD–2020–0109 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the vessel name, state the commenter's interest in the waiver application, and address the waiver

criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at *http://www.regulations.gov.,* keyword search MARAD–2020–0109 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Department of Transportation, Maritime Administration, Office of Legislation and Regulations, MAR–225, W24–220, 1200 New Jersey Avenue SE, Washington, DC 20590. Include a cover letter setting forth with specificity the basis for any such claim and, if possible, a summary of your submission that can be made available to the public.

Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, to *www.regulations.gov,* as described in the system of records notice, DOT/ALL–14 FDMS, accessible through *www.dot.gov/privacy.* To facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully considered. If you wish to provide comments containing proprietary or confidential information, please contact the agency for alternate submission instructions.

(Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121)

* * *

Dated: August 13, 2020.

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2020–18069 Filed 8–18–20; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2020–0108]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel ELLEON (Motor Vessel); Invitation for Public Comments

AGENCY: Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirements of the coastwise trade laws to allow the carriage of no more than twelve passengers for hire on vessels, which are three years old or more. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before September 18, 2020.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2020–0108 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Search MARAD–2020–0108 and follow the instructions for submitting comments.
- *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is: U.S. Department of Transportation, MARAD–2020–0108, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

Instructions: All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT: Bianca Carr, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–453, Washington, DC 20590. Telephone 202–366–9309, Email *Bianca.carr@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel ELLEON is:

—*Intended Commercial Use of Vessel:* ''Vessel is intended to be used for chartering according to the Vessel's East Coast cruising schedule. Activities would fall under coastwise time charter and bareboats charters as an uninspected vessel.''

—*Geographic Region Including Base of Operations:* ''Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, New Jersey, Maryland, Delaware, Virginia, North Carolina, South Carolina, Georgia, Florida'' (Base of Operations: Newport, RI)

—*Vessel Length and Type:* 64.3′ motor vessel

The complete application is available for review identified in the DOT docket as MARAD–2020–0108 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the vessel name, state the commenter's interest in the waiver application, and address the waiver criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised

that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at *http://www.regulations.gov,* keyword search MARAD–2020–0108 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Department of Transportation, Maritime Administration, Office of Legislation and Regulations, MAR–225, W24–220, 1200 New Jersey Avenue SE, Washington, DC 20590. Include a cover letter setting forth with specificity the basis for any such claim and, if possible, a summary of your submission that can be made available to the public.

Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, to *www.regulations.gov,* as described in the system of records notice, DOT/ALL–14 FDMS, accessible through *www.dot.gov/privacy.* To facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully considered. If you wish to provide comments containing proprietary or confidential information, please contact the agency for alternate submission instructions.

Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121

* * *

Dated: August 13, 2020.

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2020–18070 Filed 8–18–20; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2020–0110]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel YACHT SCARLET (Motor Vessel); Invitation for Public Comments

AGENCY: Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirements of the coastwise trade laws to allow the carriage of no more than twelve passengers for hire on vessels, which are three years old or more. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before September 18, 2020.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2020–0110 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Search MARAD–2020–0110 and follow the instructions for submitting comments.
- *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is: U.S. Department of Transportation, MARAD–2020–0110, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

Instructions: All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT: Bianca Carr, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–453, Washington, DC 20590. Telephone 202–366–9309, Email *Bianca.carr@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel YACHT SCARLET is:

—*Intended Commercial Use of Vessel:* ''Passenger yacht charters.''

—*Geographic Region Including Base of Operations:* ''Florida, Georgia, South Carolina, North Carolina, Virginia, Delaware, Massachusetts, New Hampshire, Maine, Alabama, Louisiana and Texas'' (Base of Operations: Miami, FL)

—*Vessel Length and Type:* 103' motor vessel

The complete application is available for review identified in the DOT docket as MARAD–2020–0110 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the vessel name, state the commenter's interest in the waiver application, and address the waiver criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at *http://www.regulations.gov.,* keyword search MARAD–2020–0110 or visit the Docket

Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Department of Transportation, Maritime Administration, Office of Legislation and Regulations, MAR–225, W24–220, 1200 New Jersey Avenue SE, Washington, DC 20590. Include a cover letter setting forth with specificity the basis for any such claim and, if possible, a summary of your submission that can be made available to the public.

Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, to *www.regulations.gov,* as described in the system of records notice, DOT/ALL–14 FDMS, accessible through *www.dot.gov/privacy.* To facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully considered. If you wish to provide comments containing proprietary or confidential information, please contact the agency for alternate submission instructions.

Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121.

* * * * *

Dated: August 13, 2020.

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2020–18075 Filed 8–18–20; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2020–0107]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel SEAS THE DAY (Catamaran); Invitation for Public Comments

AGENCY: Maritime Administration, Transportation (DOT).

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirements of the coastwise trade laws to allow the carriage of no more than twelve passengers for hire on vessels, which are three years old or more. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before September 18, 2020.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2020–0107 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Search MARAD–2020–0107 and follow the instructions for submitting comments.
- *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is: U.S. Department of Transportation, MARAD–2020–0107, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

Instructions: All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT: Bianca Carr, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–453, Washington, DC 20590. Telephone 202–366–9309, Email *Bianca.carr@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel SEAS THE DAY is:

—Intended Commercial Use of Vessel: ''Coastwise YACHT TIME Charter as an uninspected passenger vessel.''
—Geographic Region Including Base of Operations: ''Florida'' (Base of Operations: Ft. Lauderdale, FL)
—Vessel Length and Type: 45.8′ catamaran

The complete application is available for review identified in the DOT docket as MARAD–2020–0107 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the vessel name, state the commenter's interest in the waiver application, and address the waiver criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at *http://www.regulations.gov,* keyword search MARAD–2020–0107 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal

identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Department of Transportation, Maritime Administration, Office of Legislation and Regulations, MAR–225, W24–220, 1200 New Jersey Avenue SE, Washington, DC 20590. Include a cover letter setting forth with specificity the basis for any such claim and, if possible, a summary of your submission that can be made available to the public.

Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, to *www.regulations.gov,* as described in the system of records notice, DOT/ALL–14 FDMS, accessible through *www.dot.gov/privacy.* To facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully considered. If you wish to provide comments containing proprietary or confidential information, please contact the agency for alternate submission instructions.

(Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121)

* * *

Dated: August 13, 2020.

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2020–18071 Filed 8–18–20; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Agency Information Collection Activities: Information Collection Revision; Comment Request; Licensing Manual

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The OCC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on a revision to a continuing information collection as required by the Paperwork Reduction Act of 1995 (PRA). In accordance with the requirements of the PRA, the OCC may not conduct or sponsor, and respondents are not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The OCC is soliciting comment concerning a revision to its information collection titled ''Licensing Manual.''

DATES: Comments must be received on or before October 19, 2020.

ADDRESSES: Commenters are encouraged to submit comments by email, if possible. You may submit comments by any of the following methods:

- *Email: prainfo@occ.treas.gov.*
- *Mail:* Chief Counsel's Office, Attention: Comment Processing, 1557–0014, 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 ''1557–0014'' in your comment. In general, the OCC will publish comments on *www.reginfo.gov* 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 information collection beginning on the date of publication of the second notice for this collection [1] by any of the following methods:

- *Viewing Comments Electronically:* Go to *www.reginfo.gov.* Click on the ''Information Collection Review'' tab. Underneath the ''Currently under Review'' section heading, from the drop-down menu select ''Department of Treasury'' and then click ''submit.'' This information collection can be located by searching by OMB control number ''1557–0014'' or ''Licensing Manual.'' Upon finding the appropriate information collection, click on the related ''ICR Reference Number.'' On the next screen, select ''View Supporting Statement and Other Documents'' and then click on the link to any comment listed at the bottom of the screen.
- For assistance in navigating *www.reginfo.gov,* please contact the Regulatory Information Service Center at (202) 482–7340.

FOR FURTHER INFORMATION CONTACT: Shaquita Merritt, Clearance Officer, (202) 649–5490 or, for persons who are deaf or hearing impaired, TTY, (202) 649–5597, Chief Counsel's Office, Office of the Comptroller of the Currency, 400 7th Street SW, Suite 3E–218, Washington, DC 20219.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the OMB for each collection of information that they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) to include agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of title 44 requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or revision of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, the OCC is publishing notice of the revision of the collection of information set forth in this document.

Title: Licensing Manual.

OMB Control No.: 1557–0014.

Description: The Licensing Manual sets forth the OCC's policies and procedures for the formation of a national bank, Federal savings association, or Federal branch or agency as well as entry into the Federal banking system by other institutions and corporate expansion and structural changes by existing banks. The Licensing Manual includes sample documents to assist the applicant in understanding the types of information the OCC needs in order to process a filing. An applicant may use the format of the sample documents or any other format that provides for the submission of sufficient information for the OCC to act on a particular filing, including the OCC's electronic filing system, the Central Application Tracking System.

The OCC is seeking approval of Form AC, which is used when a Federal savings association seeks to convert from a mutual to stock form of

[1] Following the close of this notice's 60-day comment period, the OCC will publish a second notice with a 30-day comment period.

ownership. The OCC must give prior approval for a Federal savings association to convert from a mutual to stock form. Applicants may seek a waiver of certain requirements as well as the extension of certain timeframes. As the process for waiver or extension is minimal, the associated burden is de minimis in nature. Form AC requires submission of the following information:

- Application;
- Plan of conversion;
- Proxy statement and offering circular;
- Form of proxy;
- Additional information required for conversion with a charitable contribution;
- Sequence and timing of the plan;
- Record dates;
- Expenses incident to the conversion; and
- Indemnification.

Type of Review: Revision of a currently approved collection.

Affected Public: Individuals; Businesses or other for-profit.

Frequency of Response: On occasion.

Estimated Number of Respondents for Licensing Manual: 3,717.

Estimated Total Annual Burden for Licensing Manual: 13,038 hours.

Comments submitted in response to this notice will be summarized and included in the submission to OMB. Comments are requested on:

(a) Whether the information collections are necessary for the proper performance of the OCC's functions, including whether the information has practical utility;

(b) The accuracy of the OCC's estimates of the burden of the information collections, including the validity of the methodology and assumptions used;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(d) Ways to minimize the burden of information collections on respondents, including through the use of automated collection techniques or other forms of information technology.

Theodore J. Dowd,

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

[FR Doc. 2020–18153 Filed 8–18–20; 8:45 am]

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FEDERAL REGISTER

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Part II

Department of Defense

Office of the Secretary

2 CFR Parts 1103, 1104, et al.

32 CFR Parts 21, 22, et al.

Implementation of Governmentwide Guidance for Grants and Cooperative Agreements, Award Format for DoD Grants and Cooperative Agreements, Administrative Requirements Terms and Conditions for Cost-Type Grants and Cooperative Agreements to Nonprofit and Governmental Entities, National Policy Requirements: General Award Terms and Conditions, Definitions for DoD Grant and Agreement Regulations, and DoD Grant and Agreement Regulations; Final Rules

DEPARTMENT OF DEFENSE

Office of the Secretary

2 CFR Parts 1103, 1104, and 1125

[DOD–2016–OS–0048]

RIN 0790–AJ45

Implementation of Governmentwide Guidance for Grants and Cooperative Agreements

AGENCY: Office of the Secretary, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: This final rule is the first of a sequence of six rules in this issue of the **Federal Register**, which were published as Notices of Proposed Rulemaking (NPRMs) on November 7, 2016. The six rules collectively establish for DoD grants and cooperative agreements an updated interim implementation of Governmentwide guidance on administrative requirements, cost principles, and audit requirements for Federal awards. This final rule removes outdated portions of the DoD Grant and Agreement Regulations (DoDGARs) and replaces it with a new DoDGARs part containing revised implementation of the guidance, and establishes seven subchapters within DoD's chapter of the Grants and Agreements title of the Code of Federal Regulations.

DATES: This rule is effective October 19, 2020.

FOR FURTHER INFORMATION CONTACT: Barbara Orlando, Basic Research Office, telephone 571–372–6413.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Purpose of the Final Rule

The Department of Defense Grant and Agreement Regulations (DoDGARs) are being updated to, among other things, implement Office of Management and Budget (OMB) guidance to Federal agencies on administrative requirements, cost principles, and audit requirements applicable to Federal grants, cooperative agreements, and other assistance instruments (2 CFR part 200). DoD established an interim implementation of that guidance at 2 CFR part 1103 in December 2014 (79 FR 76047), pending comprehensive updates to the DoDGARs.

This final rule and the five additional rules immediately following it in this issue of the **Federal Register** implement the OMB guidance as it applies to general terms and conditions of DoD grants and cooperative agreements. The six final rules establish eleven new DoDGARs parts and make conforming changes to existing DoDGARs parts. They represent a major step toward completion of the needed updating of the DoDGARs. Additional updates to complete the overall revision of the DoDGARs will be published for public comment in subsequent notices of proposed rulemaking. Those proposals will focus on portions of the DoDGARs that specify pre-award, time-of-award requirements, and post-award requirements. All portions of the DoDGARs remaining in chapter I, subchapter C of title 32 of the CFR ultimately will be relocated to chapter XI of title 2 of the CFR, with any updating that may be needed.

B. Revisions Implemented by This Rule

This final rule establishes 2 CFR part 1104 to serve as the central part of the DoDGARs that specifies for DoD Components which portions of the DoDGARs apply to DoD grants and cooperative agreements for various pre-award, time-of-award, and post-award purposes, pending completion of the remaining updates to the DoDGARs that are needed to fully implement the OMB guidance. It also removes the interim implementation of the guidance published in December 2014 at 2 CFR part 1103, as that implementation is superseded by this 2 CFR part 1104.

2 CFR part 1104 serves as the central hub to direct DoD Components' use of the other ten new parts issued as final rules in the **Federal Register** in chapter XI of 2 CFR, as well as parts of the DoDGARs that will remain for the time being in subchapter C, chapter I of title 32 of the CFR.

C. Legal Authorities for the Regulatory Action

There are two statutory authorities for this final rule:

- 10 U.S.C. 113, which establishes the Secretary of Defense as the head of the Department of Defense; and
- 5 U.S.C. 301, which authorizes the head of an Executive department to prescribe regulations for the governance of that department and the performance of its business.

II. Regulatory History

In December 2014 (79 FR 76047), DoD established an interim implementation of the final guidance, ''Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards,'' published by the Office of Management and Budget (OMB) on December 26, 2013, in 2 CFR part 200 (Uniform Guidance—available at 78 FR 78589). DoD then published a Notice of Proposed Rulemaking (November 7, 2016 (81 FR 78356)) that proposed changes to 2 CFR parts 1103, 1104, and 1125 in order to provide an organizing framework for the DoDGARs to make it easier for users of the regulations to locate the content that they need. This action responds to comments received on the proposed rule and finalizes the proposed changes.

III. Comments and Responses

DoD received one public comment on the November 7, 2016 NPRM that proposed to (1) remove 2 CFR part 1103, the part of the DoDGARs that DoD adopted on December 19, 2014, as its interim implementation of the OMB guidance at 2 CFR part 200; and (2) replace that part with a new DoDGARs part–2 CFR part 1104—containing a revised implementation of the guidance. That comment from an anonymous individual pertains to this rulemaking and the other five related rulemakings in today's **Federal Register**, thus it is addressed here.

Comment: The commenter indicated that consistent public concerns arise with the bureaucracy or even government at-large centered on perceived accountability and efficiency and this proposed rule provides an opportunity for accessibility and increases overall agency efficiency. The commenter noted that (1) the changes impact a wide range of institutions and will allow for improvements in communication between government and the institutions it interacts with at each level, and (2) this regulatory action has the potential to provide much needed uniformity to the grant process. The commenter further indicated that this regulatory action will increase the efficiency for individuals attempting to access grant and agreement information by allocating a central hub of information. It will allow affected parties to identify and utilize information at a faster rate and will eliminate the complications of sorting through multiple sources. The commenter also recognized that, while some may argue that the time required to centralize this process and communicate changes could increase problems in the short-term, it is his or her belief that standardizing the overall process will result in positive long-term benefits.

The commenter also specified that the additional NPRMs regarding the DoDGARs create an increase in the ability of the process to be understandable by all agencies and institutions that interact with the DoD. Differences in definitions or how guidelines are worded would be

reduced through these regulatory actions, and it would promote necessary standardization for the awards process. The commenter's belief is that adoption of the proposed rules will assist the intended groups listed such as hospitals, higher education institutions, and alternate levels of government by increasing accessibility across the board. The intention to create a central hub, providing standard definitions and wording and utilizing plain language, will allow for an increase in governmental accountability and efficiency that can heavily influence overall public trust.

Response: We appreciate the commenter's insights concerning the intent and expected outcomes of this rulemaking.

Title 2 CFR part 1104 incorporates, with limited changes as indicated below, ten other new DoDGARs parts, which are in four of the five final rules following this one, by referencing their applicability. Those final rules (1) provide standard wording of general terms and conditions governing administrative requirements for DoD grants and cooperative agreements awarded to institutions of higher education, nonprofit organizations, States, local governments, and Indian tribes; (2) provide standard wording for general terms and conditions addressing national policy requirements for DoD grants and cooperative agreements awarded to all types of entities; (3) establish a standard award format for DoD grants and cooperative agreements, and (4) establish a central DoDGARs part with definitions of terms used in those regulations. The fifth final rule provides conforming changes in existing parts of the DoDGARs.

The changes in 2 CFR part 1104 are as follows:

- In 2 CFR 1104.105(a)(2) and 1104.110(b), we removed the word ''new'' as a modifier since 32 CFR part 34 has been continuously in effect and the administrative requirements contained therein (except as modified by the technical amendments to that part being made today) are to be used in all applicable awards until superseded.
- In 2 CFR 1104.115, we added at the end of the paragraph the words ''. . .and other applicable Defense Grant and Agreement Regulatory System (DGARS) policies'' to recognize that pending overall completion of the DoDGARs some policies that apply to DoD Components reside in the DGARS.
- Throughout, changed usage from ''grant and cooperative agreements awards'' to ''grants and cooperative agreements'' or ''grants and cooperative agreements awarded to . . . '' depending on the context to eliminate the redundancy of using the defined term ''award(s)'' to modify ''grants and cooperative agreements.''

IV. Regulatory Analyses

We developed this rule after considering numerous statutes and Executive Orders (E.O.s) related to rulemaking. Below we summarize our analyses based on these statutes or E.O.s.

A. Regulatory Planning and Review

Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review) 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 (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 rule has been designated as a ''not significant'' regulatory action, and not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has not been reviewed by the Office of Management and Budget (OMB) under the requirements of these Executive Orders.

Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs) directs agencies to reduce regulation and control regulatory costs and provides that ''for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process.'' This rule is not subject to the requirements of this Executive Order because it is not significant under Executive Order 12866.

Cost

DOD has found that this rule will not impose costs to the public because this consolidation standardizes multiple approaches to the award and administration of DoD grants and cooperative agreements.

Benefits

DoD determined that issuing a revision of the implementation of OMB guidance in 2 CFR part 200 and creating a central hub in the DoD Grant and Agreement Regulations will help maximize long-term benefits to the public by standardizing multiple approaches to the award and administration of DoD grants and cooperative agreements previously used by DoD Components.

Alternatives

1. No Action—If no action was taken, DoD would not be in compliance with OMB requirements to move all financial assistance regulations to 2 CFR.

2. Next Best alternative—The next best alternative is to subject all awards, regardless of where they are in their current life cycle, to the requirements of this final rule. Since awards are performed over a 1–5-year life cycle, it would not be beneficial to the public to impose the requirements of this final rule on an award that is near the end of its life cycle. Therefore, this is not an acceptable alternative, as it would impose additional requirements on award recipients without offering an added benefit.

B. Congressional Review Act (5 U.S.C. 801, et seq.)

Under the Congressional Review Act, a major rule may not take effect until at least 60 days after submission to Congress of a report regarding the rule. A major rule is one that would have an annual effect on the economy of $100 million or more or have certain other impacts. This rule is not a major rule under the Congressional Review Act.

C. 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. This rule will not impose any impacts on any entities. This means that there will be no economic impacts on any entities. Therefore, the Department of Defense under the Regulatory Flexibility Act [1] certifies that this rule will not have a significant economic impact on a substantial number of small entities.

D. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121, we want to assist small entities in understanding this rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule

[1] 5 U.S.C. 601 et seq (1980).

would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this rule.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business 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.

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 1 year. Although this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

F. Collection of Information

The Paperwork Reduction Act (PRA) (44 U.S.C. 3501–3520) applies to collections of information using identical questions posed to, or reporting or recordkeeping requirements imposed on, ten or more members of the public. This rule does not call for a new collection of information under the PRA.

G. Federalism

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. This proposed rule does not have federalism implications that warrant the preparation of a federalism assessment in accordance with Executive Order 13132.

List of Subjects in 2 CFR Parts 1103, 1104, and 1125

Business and Industry, Colleges and universities, Cooperative agreements, Grants administration, Hospitals, Indians, Nonprofit organizations, Small business, State and local governments.

Accordingly, under the authority of 5 U.S.C. 301 and 10 U.S.C. 113, 2 CFR chapter XI is amended as follows:

PART 1103—[REMOVED]

■ 1. Part 1103 is removed.

■ 2. Subchapter A to chapter XI, consisting of parts 1100 through 1109, is added to read as follows:

Subchapter A —General Matters and Definitions

PARTS 1100–1103—[RESERVED]

PART 1104—IMPLEMENTATION OF GOVERNMENTWIDE GUIDANCE FOR GRANTS AND COOPERATIVE AGREEMENTS

Sec.
1104.1 Purpose of this part.
1104.100 Award format for DoD Components' grants and cooperative agreements.
1104.105 Regulations governing DoD Components' general terms and conditions.
1104.110 Regulations governing DoD Components' award-specific terms and conditions.
1104.115 Regulations governing DoD Components' internal procedures.
1104.120 Definitions.

Authority: 5 U.S.C. 301 and 10 U.S.C. 113.

§ 1104.1 Purpose of this part.

This part provides an update to the DoD interim implementation of Office of Management and Budget (OMB) guidance in 2 CFR part 200. It supersedes the initial interim implementation of that guidance that DoD adopted in 2 CFR part 1103 on December 19, 2014.

§ 1104.100 Award format for DoD Components' grants and cooperative agreements.

DoD Components must conform the format of new grants and cooperative agreements to the standard award format specified in part 1120 of the DoD Grant and Agreement Regulations (DoDGARS) (2 CFR part 1120). The standard format provides locations within the award for:

(a) General terms and conditions, including the administrative and national policy requirements discussed in § 1104.105(a) and (b), respectively.

(b) Any award-specific terms and conditions discussed in § 1104.110.

§ 1104.105 Regulations governing DoD Components' general terms and conditions.

(a) *Administrative requirements.* On an interim basis pending completion of the update of the DoDGARs to implement OMB guidance published in 2 CFR part 200, the following regulatory provisions govern the administrative requirements to be included in general terms and conditions of DoD Components' new grants and cooperative agreements:

(1) The provisions of parts 1126 through 1138 of the DoDGARs (2 CFR parts 1126 through 1138, which comprise subchapter D of this chapter) govern the administrative requirements to be included in the general terms and conditions of DoD Components' new grants and cooperative agreements awarded to institutions of higher education, nonprofit organizations, States, local governments, and Indian tribes.

(2) Part 34 of the DoDGARs (32 CFR part 34) governs the administrative requirements to be included in general terms and conditions of DoD Components' grants and cooperative agreements awarded to for-profit entities.

(b) *National policy requirements.* Part 1122 of the DoDGARs (2 CFR part 1122) governs the national policy requirements to be included in DoD Components' new grants and cooperative agreements awarded to all types of entities.

§ 1104.110 Regulations governing DoD Components' award-specific terms and conditions.

On an interim basis pending completion of the update of the DoDGARs to implement OMB guidance published in 2 CFR part 200:

(a) The guidance in 2 CFR part 200 governs administrative requirements to be included in any award-specific terms and conditions used to supplement the general terms and conditions of a new grant or cooperative agreement awarded to an institution of higher education, nonprofit organization, State, local government, or Indian tribe.

(b) Part 34 of the DoDGARs (32 CFR part 34) governs the administrative requirements to be included in any award-specific terms and conditions of DoD Components' grants and cooperative agreements awarded to for-profit entities.

§ 1104.115 Regulations governing DoD Components' internal procedures.

On an interim basis pending completion of the update of the DoDGARs to implement OMB guidance published in 2 CFR part 200, DoD Components' internal pre-award, time-of-award, and post-award procedures will continue to comply with requirements in parts 21 and 22 of the DoDGARs (32 CFR parts 21 and 22) and other applicable Defense Grant and Agreement Regulatory System (DGARS) policies.

§ 1104.120 Definitions.

(a) *DoD Grant and Agreement Regulations or DoDGARs* means the regulations in chapter I, subchapter C of title 32, Code of Federal Regulations, and chapter XI of title 2, Code of Federal Regulations.

(b) *Other terms.* See part 1108 of the DoDGARs for definitions of other terms used in this part.

PARTS 1105–1109—[RESERVED]

■ 3. Subchapter B to chapter XI, consisting of parts 1110 through 1119, is added and reserved to read as follows:

Subchapter B—[RESERVED]

PARTS 1110–1119—[RESERVED]

■ 4. Subchapter C to chapter XI, consisting of parts 1120 through 1125, is added to read as follows:

Subchapter C—Award Format and National Policy Terms and Conditions for All Grants and Cooperative Agreements

PARTS 1120—1124—[RESERVED]

PART 1125—[TRANSFERRED TO SUBCHAPTER C]

■ 5. Part 1125 is transferred to subchapter C.

■ 6. Subchapter D to chapter XI, consisting of parts 1126 through 1140, is added to read as follows:

Subchapter D—Administrative Requirements Terms and Conditions for Cost-Type Grants and Cooperative Agreements to Nonprofit and Governmental Entities

PART 1126–1140—[RESERVED]

■ 7. Subchapter E to chapter XI, consisting of parts 1141 through 1155, is added and reserved to read as follows:

Subchapter E—[Reserved]

PARTS 1141–1155—[RESERVED]

■ 8. Subchapter F to chapter XI, consisting of parts 1156 through 1170, is added and reserved to read as follows:

Subchapter F—[RESERVED]

PART 1156–1170—[RESERVED]

■ 9. Subchapter G to chapter XI, consisting of parts 1171 through 1199, is added and reserved to read as follows:

Subchapter G—[RESERVED]

PART 1171–1199—[RESERVED]

Dated: July 24, 2020.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2020–16416 Filed 8–18–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT of DEFENSE

Office of the Secretary

2 CFR Part 1120

[DOD–2016–OS–0052]

RIN 0790–AJ47

Award Format for DoD Grants and Cooperative Agreements

AGENCY: Office of the Secretary, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: This final rule is the second of a sequence of six final rules in this issue of the **Federal Register** that collectively establish for DoD grants and cooperative agreements an updated interim implementation of Government wide guidance on administrative requirements, cost principles, and audit requirements for Federal awards and make other needed updates to the DoD Grant and Agreement Regulations (DoDGARs). This rule adds a new DoDGARs part to establish a standard format for organizing the content of DoD Components' awards of grants and cooperative agreements and modifications to them.

DATES: This rule is effective October 19, 2020.

FOR FURTHER INFORMATION CONTACT: Barbara Orlando, Basic Research Office, telephone 571–372–6413.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Purpose of the Final Rule

As explained in the **SUPPLEMENTARY INFORMATION** section of the final rulemaking immediately preceding this one in this issue of the **Federal Register**, this is one of six rules that collectively make needed updates to the Department of Defense Grant and Agreement Regulations (DoDGARs). These rules were published as Notices of Proposed Rulemaking (NPRM) on November 7, 2016 (81 FR 78356).

One purpose of the overall updating is to implement Office of Management and Budget (OMB) guidance to Federal agencies on administrative requirements, cost principles, and audit requirements applicable to Federal grants, cooperative agreements, and other assistance instruments (2 CFR part 200).

This final rule does that by implementing provisions of the OMB guidance on the minimum content that Federal agencies' awards must include. Another purpose of this rule is to provide greater uniformity in the content and organization of DoD grants and cooperative agreements. It does so by:

- Establishing requirements for uniform content, beyond the minimum identified in the OMB guidance; and
- Specifying a standard format for organizing the content of DoD Component grants and cooperative agreements to all types of entities, including entities other than those addressed in the OMB guidance.

B. Revisions Implemented by This Rule

This final rule implements provisions of the OMB guidance on the minimum content that Federal agencies' awards must include on the notice of award. This rule revises current practices by:

- Establishing requirements for uniform content, beyond the minimum identified in the OMB guidance; and
- Specifying a standard format for organizing the content of DoD Component grants and cooperative agreements to all types of entities, including entities other than those addressed in the OMB guidance.

C. Legal Authorities for the Regulatory Action

There are two statutory authorities for this final rulemaking:

- 10 U.S.C. 113, which establishes the Secretary of Defense as the head of the Department of Defense; and
- 5 U.S.C. 301, which authorizes the head of an Executive department to prescribe regulations for the governance of that department and the performance of its business.

II. Regulatory History

In December 2014 (79 FR 76047), DoD established an interim implementation of the final guidance, ''Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards,'' published by the Office of Management and Budget (OMB) on December 26, 2013, in 2 CFR part 200 (Uniform Guidance—available at 78 FR 78589). DoD then published a Notice of Proposed Rulemaking (November 7, 2016 (81 FR 78369)) that proposed to add 2 CFR part 1120 to establish a standard format for organizing the content of DoD

Components' grant and cooperative agreement awards and modifications to them.

III. Comments and Responses

DoD received no public comments on the proposed addition of 2 CFR part 1120, including the several areas cited in the NPRM as variations from the OMB guidance, *i.e.,* providing more detailed explanations of some of the information elements listed in the OMB guidance in 2 CFR 200.210(a); clarifying the guidance in 2 CFR 200.210(a)(15) on the inclusion in each award of the recipient's indirect cost rate for the award; and translation of awards into a language other than English.

DoD made several changes in this final rule for accuracy and consistency with other parts of the DoDGARs being made final today as follows:

- In 2 CFR 1120.105(a)(10)(iii), we added language to clarify that DoD Components are required to make known to recipients (1) where portions of the award (as specified in 2 CFR 1120.105(a)(10)(ii)) are located, and, (2) when incorporating any portion of the award by reference, what is being incorporated and where to find the full text.
- To make the wording of part 1120 consistent with the scope of Subchapter D of the DoDGARs (parts 1126 through 1138), we added the phase ''cost-type'' to modify ''awards'' in 2 CFR 1120.510(a) and 1120.515(a).

In addition, we made several minor editorial changes for clarity and to conform to current terminology, *e.g.,* substituting ''funding opportunity announcement'' for ''program announcement.''

IV. Regulatory Analyses

We developed this rule after considering numerous statutes and Executive Orders (E.O.s) related to rulemaking. Below we summarize our analyses based on these statutes or E.O.s.

A. Regulatory Planning and Review

Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review) 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 (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 rule has been designated as a ''not significant'' regulatory action, and not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has not been reviewed by the Office of Management and Budget (OMB) under the requirements of these Executive Orders.

Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs) directs agencies to reduce regulation and control regulatory costs and provides that ''for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process.'' This is not subject to the requirements of this Executive Order because it is not significant under Executive Order 12866.

Costs

DoD has found that this rule will not impose costs on the public, as there are not any costs associated with standardizing the DoD award forms.

Benefits

The benefits of this regulatory action result from:

- Standardization across DoD of the location of basic information about the award and requirements contained in award terms and conditions across awards made by about 100 DoD Component awarding offices; and
- DoD Components incorporating DoD-wide standard wording for administrative and national policy requirements into their general terms and conditions by reference, making it easier to identify how each awarding office's general terms and conditions vary from the DoD standard wording.

For the first time, there is a uniform implementation for DoD of OMB guidance, national policy requirements, and DoD policy through general terms and conditions. In addition, the standard format should enable recipients to more easily and quickly find requirements in different offices' awards, as each requirement should appear in a standard location across awards.

Standard wording and use of plain language should reduce the time that otherwise would be spent reading and interpreting differently worded terms and conditions for the same requirements. Based on comments DoD has received from recipients since it established the DoDGARs in the 1990s, we expect that the standard award format and use of standard wording and plain language in general terms and conditions will reduce administrative burdens for recipients while improving transparency and ease of compliance. The primary benefit will be to those recipients that receive awards from multiple DoD Components, but all recipients should benefit from the use of such a format.

Alternatives

1. No action—If no action was taken, DoD would not be compliant with OMB requirements to move all financial assistance regulations to 2 CFR.
2. Next Best alternative—The next best alternative would be to implement requirements beyond the mandatory minimum content that Federal agencies' awards must include. By creating additional requirements, the public will experience an additional regulatory burden without, necessarily, gaining an additional benefit. Therefore, this alternative was not chosen as the preferred alternative.

B. Congressional Review Act (5 U.S.C. 801, et seq.)

Under the Congressional Review Act, a major rule may not take effect until at least 60 days after submission to Congress of a report regarding the rule. A major rule is one that would have an annual effect on the economy of $100 million or more or have certain other impacts. This rule is not a major rule under the Congressional Review Act.

C. 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. This rule will not impose any impacts on any entities. This means that there will be no economic impacts on any entities. Therefore, the Department of Defense under 5 U.S.C. 601 *et seq.* certifies that this rule will not have a significant economic impact on a substantial number of small entities.

D. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121, we want to assist small entities in understanding this rule so that they can better evaluate its effects on them and participate in the rulemaking. 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 in the **FOR FURTHER INFORMATION CONTACT** section of this rule.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business 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.

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 1 year. Although this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

F. Collection of Information

The Paperwork Reduction Act (PRA) (44 U.S.C. 3501–3520) applies to collections of information using identical questions posed to, or reporting or recordkeeping requirements imposed on, ten or more members of the public. This rule does not call for a new collection of information under the PRA.

G. Federalism

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. This proposed rule does not have federalism implications that warrant the preparation of a federalism assessment in accordance with Executive Order 13132.

List of Subjects in 2 CFR Part 1120

Business and Industry, Colleges and universities, Cooperative agreements, Grants administration, Hospitals, Indians, Nonprofit organizations, Small business, State and local governments.

■ Accordingly, 2 CFR chapter XI, subchapter C is amended by adding part 1120 to read as follows:

PART 1120—AWARD FORMAT FOR DOD GRANTS AND COOPERATIVE AGREEMENTS

Sec.
1120.1 Purpose of this part.
1120.2 Applicability of this part.
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1120.710 Examples of programmatic requirements.

Authority: 5 U.S.C. 301 and 10 U.S.C. 113.

§ 1120.1 Purpose of this part.

This part of the DoD Grant and Agreement Regulations (DoDGARs) establishes a standard award format for DoD Components' grants and cooperative agreements. It thereby makes the content easier for a recipient to locate in different DoD Components' awards.

§ 1120.2 Applicability of this part.

(a) *To whom it applies.* This part:

(1) Sets forth requirements for DoD Components that award grants and cooperative agreements.

(2) Does not impose requirements on recipients of DoD Components' awards.

(b) *To what awards it applies.* This part applies to grants and cooperative agreements, other than technology investment agreements (TIAs), awarded to any type of recipient entity.

§ 1120.3 DoD Component implementation.

Each DoD Component that awards grants or cooperative agreements must:

(a) Conform the format of its awards to the standard format established by this part no later than [18 months after the effective date of the final rule].

(b) Update electronic systems it maintains for generating awards within 18 months of the issuance of a new or updated DoD form for the award cover pages, in order to implement that form in those systems, unless it has an approved deviation in accordance with § 1120.110.

§ 1120.4 Elements and subelements of the standard award format in relation to the organization of this part.

(a) The standard award format has three major elements that are designated as Divisions I through III of the award.

(1) The first major element of the standard award format is comprised of the award cover pages. It is designated as Division I of the award.

(2) The second major element is comprised of any award-specific terms and conditions. That element is designated as Division II of the award.

(3) The last of the three major elements of the standard award format is comprised of the general terms and conditions. That element is designated as Division III of the award. It has four subelements that are designated as Subdivisions A through D of the general terms and conditions.

(i) The first subelement of the general terms and conditions is the preamble, which is designated as Subdivision A.

(ii) The second subelement of the general terms and conditions is comprised of terms and conditions addressing administrative requirements.

That subelement is designated as Subdivision B of the general terms and conditions.

(iii) The third subelement of the general terms and conditions is comprised of terms and conditions addressing national policy requirements. That subelement is designated as Subdivision C of the general terms and conditions.

(iv) The last of the four subelements of the general terms and conditions is comprised of any programmatic requirements that apply to awards using those general terms and conditions. That subelement is designated as Subdivision D of the general terms and conditions.

(b) This part has seven subparts. Each subpart addresses one major element or subelement of the standard award format, as shown in Table 1:

TABLE 1 TO PARAGRAPH (b)

Major element or subelement of the standard award format	Subpart of this part
(1) Division I—Award cover pages	Subpart A.
(2) Division II—Award-specific terms and conditions, if any	Subpart B.
(3) Division III—General terms and conditions, comprised of four subelements:	Subpart C.
(i) Subdivision A—The preamble to the general terms and conditions	Subpart D.
(ii) Subdivision B—General terms and conditions for administrative requirements	Subpart E.
(iii) Subdivision C of the—General terms and conditions for national policy requirements	Subpart F.
(iv) Subdivision D—General terms and conditions for programmatic requirements, if any	Subpart G.

Subpart A—Award Cover Pages

§ 1120.100 Purpose of the award cover pages.

The award cover pages comprise the portion of each DoD Component award of a grant or cooperative agreement or modification to an award that the DoD Component transmits to the recipient when it makes the award or modification. It:

(a) Contains basic information about the award or modification and the recipient, as described in § 1120.105;

(b) Is signed by a DoD grants officer; and

(c) Also is signed by the recipient's authorized organizational representative if the award or modification is a bilateral action that is to be signed on behalf of both the DoD Component and recipient.

§ 1120.105 Content of the award cover pages.

The award cover pages of each DoD Component grant or cooperative agreement or modification:

(a) Must include, as a minimum, the following information about the award or modification:

(1) The name of the DoD Component awarding office that made the award or modification.

(2) The award number (Federal Award Identification Number or FAIN) and, if the action is a modification, the modification number.

(3) The type of award—*i.e.,* grant or cooperative agreement.

(4) The type of award action—*e.g.,* new award, funding modification, or administrative (non-funding) modification. For an administrative modification, the award cover pages should include a brief description of the purpose of the modification (*e.g.,* a no-cost extension of the end date of the period of performance).

(5) For a new award or funding modification:

(i) A brief description of the project or program supported by the award.

(ii) The amount of the obligation or deobligation of Federal funds due to the current action and any accompanying change in the total amount of cost sharing or matching required under the award.

(iii) The cumulative amounts of Federal funds and any corresponding non-Federal share obligated to date (*i.e.,* the sums of the amounts of the current action and the cumulative amounts of prior obligations and deobligations).

(iv) The total amount of the project costs in the currently approved budget through the end of the period of performance, the Federal share of that amount, and the non-Federal share even if that share is ''zero.''

(v) The total value of the award; the Federal share of that total value (which includes Federal funding obligated to date; future incremental funding actions; and options for which amounts have been predetermined, whether or not they have been exercised yet); and the non-Federal share of that total value (*i.e.,* total cost sharing or matching required under the award).

(vi) A table such as the following may be helpful in clearly presenting the information described in paragraphs (a)(5)(ii) through (vi) of this section:

	Federal funds	Corresponding non-Federal share	Total amount
(A) Obligated or deobligated this action			
(B) Cumulative obligations to date, including this and previous actions			
(C) Planned project costs in the currently approved budget through the end of the period of performance, to include any future incremental funding obligations			
(D) Total value, which includes any unexercised options for which amounts were established in the award			

(6) The obligation date (*i.e.,* the date of the grants officer's signature) and, if different, the effective date.

(7) The start date and current end date of the period of performance.

(8) The statutory authority or authorities under which the award or modification was made.

(9) The number and title of the program listed in the Catalog of Federal Domestic Assistance under which the award or modification was made.

(10) For a new award (or, as needed, in a modification that amends any of the following information):

(i) Whether the project or program under the award is research and development (R&D). This information is needed by auditors performing single audits of recipients because the OMB guidance to the auditors treats all Federal agencies' R&D programs as a single group (or ''cluster'') of programs for audit sampling purposes (see the Single Audit Act requirements implemented in subpart E of 2 CFR part 1128 and FMS Article V in appendix E to part 1128).

(ii) What the award includes in addition to the cover pages—*i.e.,* the:

(A) Scope of work or other appropriate content to specify the goals and objectives of the project or program supported by the award;

(B) Approved budget; and

(C) General, and any award specific, terms and conditions of the award.

(iii) Where the portions of the award listed in paragraph (a)(10)(ii) of this section are located, which content the DoD Component generally should incorporate into the award by reference. When incorporating that content into the award by reference, the DoD Component must both:

(A) Indicate in the award cover pages that the award incorporates those items into the award by reference, thereby making them an integral part of the award; and

(B) Specify their location (see § 1120.315), rather than transmit them in their entirety with each award.

(iv) The order of precedence in the event of conflict among the general and any award-specific terms and conditions and other potential sources of requirements (*e.g.,* Federal statutes).

(v) The name of, and contact information for, the individual or office in the DoD responsible for post-award administration of the award. If there are multiple individuals and offices for different post-award functions (*e.g.,* payments and property administration), the award cover pages should provide information about each.

(vi) The name of, and contact information for, the DoD Component's program manager or other point of contact for programmatic matters.

(b) Must include, as a minimum, the following information about the recipient entity:

(1) The recipient's unique entity identifier required for its registration in the System for Award Management (SAM). Currently, that is the Dun and Bradstreet Data Universal Numbering System (DUNS) number.

(2) The recipient's business name and address, which must be the legal business or ''doing business as'' name and physical address in SAM at the time of award corresponding to the recipient's unique entity identifier.

(3) The name and title of the recipient's authorized representative, either the individual who signed the application or proposal on behalf of the recipient entity or another individual designated by that entity.

(4) The name of the recipient's Project or Program Director (PD) or Principal Investigator (PI) and his or her organization, if different from the name of the recipient organization. If there are multiple PDs or co-PIs, the name and organization of each should be included.

(5) The indirect cost rate in effect at the start of the performance period for the award, which generally is a Governmentwide rate negotiated by the recipient's cognizant agency for indirect costs. However, this requirement does not apply—*i.e.,* the award cover pages need not include the recipient's indirect cost rate—if the recipient entity affirms that it treats its indirect cost rate as proprietary information.

(c) May also include, as applicable, elements such as:

(1) A statement that the award can be amended only by a grants officer. The statement might also explain how amendments are issued.

(2) Information about any planned, future incremental funding or options for which amounts were pre-determined.

§ 1120.110 Use of alternative to DoD form.

(a) A DoD Component may use something other than a DoD form as its award cover pages only if:

(1) There is not currently any DoD form for the award cover pages; or

(2) The DoD Component obtains approval for a deviation from the requirement to use a DoD form from the Office of the Assistant Secretary of Defense for Research and Engineering, in accordance with the procedures specified in 32 CFR 21.340.

(b) If a DoD Component does not use a DoD form for its award cover pages, as described in paragraph (a) of this section, its award cover pages must include all information specified in § 1120.105.

Subpart B—Award-specific Terms and Conditions

§ 1120.200 Purpose and inclusion of award-specific terms and conditions.

A DoD Component must include with each award, for transmission to the recipient, any terms and conditions needed to communicate requirements specific to the individual award as distinct from the more broadly applicable requirements in the general terms and conditions. For a modification to an award, only changes to previously transmitted terms and conditions must be included.

§ 1120.205 Organization and wording of award-specific terms and conditions.

DoD Components should organize and word award-specific terms and conditions to make them as clear and easy to understand as possible for the benefit of recipients, award administrators, auditors, and others who may need to use them. The DoDGARs specify neither a standard organization nor standard wording for award-specific terms and conditions.

Subpart C—General Terms and Conditions

§ 1120.300 Purpose of general terms and conditions.

The general terms and conditions comprise the portion of the award with requirements that apply to a class of awards (*e.g.,* awards under a particular program or type of program activity, such as research or education, or for a class of recipients, such as for-profit entities).

§ 1120.305 Requirement for general terms and conditions.

Each DoD Component must establish at least one set of general terms and conditions. A DoD Component may have more than one set, as it deems appropriate to reflect differences in its award terms and conditions across different programs, classes of recipients, or types of activity.

§ 1120.310 Use of plain language.

(a) DoD Components must use plain language in:

(1) General terms and conditions of grants and cooperative agreements to institutions of higher education, nonprofit organizations, States, local governments, and Indian tribes. Those awards are subject to the DoDGARs provisions in:

(i) 2 CFR parts 1128 through 1138, the appendices to which provide standard wording for general terms and conditions addressing administrative requirements. That standard wording uses personal pronouns.

(ii) 2 CFR part 1122, the appendices to which provide standard wording for general terms and conditions addressing commonly applicable national policy requirements. That standard wording also uses personal pronouns.

(2) The national policy requirements in Subdivision B of general terms and conditions of grants and cooperative

agreements to for-profit entities, which also are subject to 2 CFR part 1122.

(b) Although the DoDGARs currently do not provide standard wording for terms and conditions addressing administrative requirements for use in awards to for-profit entities, DoD Components are strongly encouraged to use plain language and personal pronouns in their terms and conditions of those other awards. The DoDGARs provisions that specify the administrative requirements to incorporate into those terms and conditions are listed in § 1120.510(b).

§ 1120.315 Availability of general terms and conditions.

(a) A DoD Component that issues a funding opportunity announcement under which grants or cooperative agreements may be awarded must maintain on the internet the general terms and conditions for those awards if:

(1) The distribution of the funding opportunity announcement is unlimited; and

(2) The DoD Component anticipates making 10 or more awards per year using those general terms and conditions.

(b) Each DoD Component that maintains a set of general terms and conditions on the internet must also maintain an archive of previous versions of that set at the same internet location, for use by recipients, post-award administrators, auditors, and others. Each version must be labeled with its effective dates.

(c) If a DoD Component has a set of general terms and conditions that is not subject to the requirement in paragraph (a) of this section and the DoD Component chooses not to maintain that set on the internet:

(1) It must tell potential applicants or proposers in the funding opportunity announcement, if there is one, how they may view or obtain a copy of the general terms and conditions; or

(2) If there is no funding opportunity announcement (*e.g.,* if it is a noncompetitive program for which all recipients are known in advance), the DoD Component must provide the general terms and conditions to each recipient no later than the time of award.

Subpart D—Preamble to the General Terms and Conditions

§ 1120.400 Requirement to include a preamble.

Each DoD Component must include a preamble as Subdivision A of each set of general terms and conditions it maintains, to provide information to help recipients understand how to use those terms and conditions.

§ 1120.405 Content of the preamble.

The preamble for each set of general terms and conditions must include at least the following information elements, organized in the order shown:

(a) *Table of contents.* This should show the articles within each other subdivision of the general terms and conditions (Subdivisions B and C for administrative and national policy requirements and, if needed, Subdivision D for programmatic requirements).

(b) *Scope.* This element identifies the programs, types of awards, and types of recipient entities that are subject to the set of general terms and conditions.

(c) *Effective date.* This is the date on which the particular version of the set of general terms and conditions became effective, which enables a recipient to easily distinguish it from any earlier or subsequent versions. The version date of each article within the general terms and conditions must be indicated in parentheses following the title of the article, to help a recipient identify the articles that changed from previous versions of the general terms and conditions.

(d) *English language.* The purpose of this element of the preamble is to implement OMB guidance in 2 CFR 200.111(b) by informing each recipient that:

(1) It must translate any of the award content (including attachments to it and any material incorporated into the award by reference) into another language to the extent that the recipient's compliance with the award's terms and conditions depends upon a significant number of its employees who are not fluent in English being able to read and comprehend that content.

(2) If it does translate any award content into another language, either as required by paragraph (d)(1) of this section or at its own initiative, the original award content in the English language will take precedence in the event of an inconsistency between the award requirements in the English and translated versions.

(e) *Plain language.* This section of the preamble is required when the general terms and conditions use personal pronouns, in accordance with § 1120.310. Its purpose is to inform recipients about the meanings of those personal pronouns.

(f) *Definitions.* Providing the definitions of words and phrases that are used in the general terms and conditions and defined in the DoDGARs is more helpful to recipients than referring them to the DoDGARs to find the definitions.

Subpart E—Administrative Requirements Portion of the General Terms and Conditions

§ 1120.500 Scope of administrative requirements.

The administrative requirements in an award are post-award and after-the-award requirements for recipients in the following subject matter areas:

(a) Financial and program management, to include financial management system standards, payment, allowable costs, program and budget revisions, audits, cost sharing or matching, and program income.

(b) Property administration, to include title vesting, property management system standards, and use and disposition of tangible and intangible property.

(c) Recipient procurement procedures.

(d) Financial, programmatic, property, and other reporting.

(e) Records retention and access, remedies, claims and disputes, and closeout.

§ 1120.505 Location of administrative requirements in the standard award format.

As shown in the table in § 1120.4(b), the standard award format includes administrative requirements as Subdivision B of the general terms and conditions.

§ 1120.510 Sources of administrative requirements.

The source of administrative requirements is:

(a) Subchapter D of this chapter for cost-type grant and cooperative agreement awards to institutions of higher education, nonprofit organizations, States, local governments, and Indian tribes. Subchapter D provides a standard set of articles into which a DoD Component organizes the administrative requirements. It also provides standard wording for the general terms and conditions in those articles, as explained in the overview of subchapter D in 2 CFR part 1126.

(b) 32 CFR part 34 for grant and cooperative agreement awards to for-profit entities. That part of the DoDGARs specifies the administrative requirements for awards to those entities but does not provide standard articles or terms and conditions.

§ 1120.515 Incorporation of administrative requirements into general terms and conditions by reference.

(a) For cost-type awards to institutions of higher education,

nonprofit organizations, States, local governments, and Indian tribes, DoD Components are strongly encouraged to construct the portion of their general terms and conditions addressing administrative requirements by:

(1) Incorporating the standard wording of each article of administrative requirements provided in subchapter D of this chapter (the standard wording of the articles is in the appendices to 2 CFR parts 1128 through 1138) into those general terms and conditions by reference; and

(2) Stating any variations from that standard wording (*e.g.,* any sections or paragraphs that the DoD Component adds, revises, or omits, consistent with the DoDGARs prescription for use of the standard wording).

(b) Incorporating that standard wording into general terms and conditions by reference, rather than including the full text of each article of the general terms and conditions, will make it easier for those who must use terms and conditions of multiple DoD Components' awards (*e.g.,* recipients, DoD Components' post-award administrators, and auditors) to quickly identify how each Component's general terms and conditions differ from the DoD standard wording.

Subpart F—National Policy Requirements Portion of the General Terms and Conditions

§ 1120.600 Scope of national policy requirements.

National policy requirements, as defined in 2 CFR 1122.2, are requirements:

(a) That are prescribed by a statute, Executive order, policy guidance issued by the Executive Office of the President, or regulation that specifically refer to grants, cooperative agreements, or financial assistance in general;

(b) With which a recipient of a grant or cooperative agreement must comply during the period of performance; and

(c) That are outside subject matter areas covered by administrative requirements, as described in § 1120.500.

§ 1120.605 Location of national policy requirements in the standard award format.

As shown in the table in § 1120.4(b), the standard award format includes national policy requirements as Subdivision C of the general terms and conditions.

§ 1120.610 Source of national policy requirements.

The source of national policy requirements to be included in a grant or cooperative agreement is 2 CFR part 1122.

§ 1120.615 Incorporation of national policy requirements into general terms and conditions by reference.

For the same reason given in § 1120.515(b), DoD Components are strongly encouraged to construct the portion of their general terms and conditions addressing national policy requirements for awards to all types of recipient entities, including for-profit entities, by:

(a) Incorporating the standard wording of each article of national policy requirements provided in the appendices to 2 CFR part 1122 into those general terms and conditions by reference; and

(b) Stating any variations from that standard wording (*e.g.,* any added, omitted, or revised paragraphs, based on which national policy requirements apply to programs and recipients for which the general terms and conditions are used).

Subpart G—Programmatic Requirements Portion of the General Terms and Conditions

§ 1120.700 Scope of programmatic requirements.

A requirement is most appropriately included in the programmatic requirements portion of the general terms and conditions if it:

(a) Is not in one of the subject matter areas covered by the administrative requirements in Subdivision B of the general terms and conditions, as described in § 1120.500.

(b) Does not meet the criteria in § 1120.600 for a national policy requirement.

(c) Broadly applies to awards using the general terms and conditions. Requirements that apply to relatively few of those awards are more appropriately included in the award-specific terms and conditions of the individual awards to which they apply.

(d) Is expected to be in effect for the foreseeable future, rather than for a limited period of time. For example, a requirement in an annual appropriations act that applies specifically to funding made available by that act is better addressed through the award-specific terms and conditions of awards or modifications to which it applies.

§ 1120.705 Location of programmatic requirements in the standard award format.

As shown in the table in § 1120.4(b), the standard award format includes programmatic requirements as Subdivision D of the general terms and conditions.

§ 1120.710 Examples of programmatic requirements.

Examples of provisions appropriately included as programmatic requirements in Subdivision D of the general terms and conditions include:

(a) Requirements for recipients to acknowledge the DoD Component's support in publications of results of the projects or programs performed under awards.

(b) Requirements for recipients to promptly alert the DoD Component if they develop any information in the course of performing the projects or programs under their awards that, in their judgment, might adversely affect national security if disclosed.

(c) Reservation of the Government's right to use non-Federal personnel in any aspect of post-award administration of awards, with appropriate nondisclosure requirements placed on those personnel to protect sensitive information about recipients or the projects or programs supported by their awards.

Dated: July 24, 2020.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

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DEPARTMENT OF DEFENSE

Office of the Secretary

2 CFR Parts 1126, 1128, 1130, 1132, 1134, 1136, and 1138

[DOD–2016–OS–0054]

RIN 0790–AJ49

Administrative Requirements Terms and Conditions for Cost-Type Grants and Cooperative Agreements to Nonprofit and Governmental Entities

AGENCY: Office of the Secretary of Defense, DoD.

ACTION: Final rule.

SUMMARY: This final rule is the third in a sequence of six final rules this issue of the **Federal Register** that update the Department of Defense Grant and Agreement Regulations (DoDGARs). This final rule adds seven new DoDGARs parts to address the administrative requirements included in general terms and conditions of DoD cost-type grants and cooperative agreements awarded to institutions of higher education, nonprofit

organizations, States, local governments, and Indian tribes. The administrative requirements are in areas such as financial and program management; property administration; recipient procurement procedures; financial, programmatic, and property reporting; and subawards. These new parts establish a uniform way for DoD Components' awarding offices to organize the administrative requirements in their general terms and conditions, and provide standard wording for those terms and conditions, with associated regulatory prescriptions for DoD Components to provide latitude to vary from the standard wording where variation is appropriate.

DATES: This rule is effective October 19, 2020.

FOR FURTHER INFORMATION CONTACT: Barbara Orlando, Basic Research Office, telephone 571–372–6413.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Purpose of the Regulatory Action

The Department of Defense Grant and Agreement Regulations (DoDGARs) implement statutes and Governmentwide guidance for grants and cooperative agreements, as needed, to ensure that DoD Component offices make and administer assistance awards consistent with agency policy. They need updating, in part due to the issuance of the Office of Management and Budget's (OMB) guidance to Federal agencies on administrative requirements, cost principles, and audit requirements that apply to Federal grants, cooperative agreements, and other assistance instruments (2 CFR part 200). This rule provides a major portion of the implementation of that guidance by addressing the administrative requirements to be included in general terms and conditions of DoD Components' awards to institutions of higher education, nonprofit organizations, States, local governments, and Indian tribes.

Revisions Implemented by This Rule

This final rule establishes seven new DoDGARs parts that collectively govern a DoD Component's construction of the administrative requirements portion of its general terms and conditions for awards to institutions of higher education, nonprofit organizations, States, local governments, and Indian tribes. The seven proposed new parts comprise a subchapter of the DoDGARs—subchapter D in Chapter XI of 2 CFR.

The first of the proposed parts in the subchapter, 2 CFR part 1126, provides an overview of the subchapter's content. In addition to addressing the purpose and applicability, the overview part describes what the subchapter's remaining six parts address and how they are organized.

Each of the subchapter's other six parts provides both: (1) Standard wording for articles of general terms and conditions specifying requirements for recipients and subrecipients within a given subject matter area; and (2) the associated direction to DoD Components on the use of the standard wording for those articles.

Those six parts are:

1. Part 1128—General terms and conditions on recipient financial and program management
2. Part 1130—General terms and conditions on property administration
3. Part 1132—General terms and conditions on recipient procurement procedures
4. Part 1134 -General terms and conditions on reporting
5. Part 1136—General terms and conditions on other administrative requirements
6. Part 1138—General terms and conditions related to subawards

In addition to minor editorial changes, we made the following changes to correct omissions in the NPRM, or for clarity, consistency, or conformance with the OMB guidance, as indicated:

1. In appendix F to 2 CFR part 1128, FMS Article VI, paragraph A.1, we modified the wording to clearly delineate the potential sources of cost sharing or matching, *i.e.,* cash contributions and third-party in-kind contributions.

2. We corrected appendix B to 2 CFR part 1130, PROP Article II, paragraph B.2.b to indicate that an inventory of federally owned property is required annually as specified in 2 CFR 200.312(a). We also made conforming a change in PROP Article II by adding a paragraph C.3 to explicitly require an annual inventory of federally owned property for which institutions of higher education, nonprofit organizations, local governments, or Indian tribes are accountable under an award.

3. In appendix C to 2 CFR part 1130, PROP Article III, paragraph A.1.a, we corrected ''may'' to ''must'' to ensure consistency with the intent of 2 CFR 200.313(c)(4) with respect to application of disposition proceeds to the acquisition of replacement equipment.

4. We modified appendix D to 2 CFR part 1130, PROP Article IV, to remove language that conflicts with PROP Article I. The language in the NPRM limited the identification of exempt property to inclusion in PROP Article I, whereas PROP Article IV indicated that the exemption could be in either the general terms and conditions (PROP Article I) or in award-specific conditions. We believe the latter potential for inclusion in award-specific conditions would occur only in conjunction with inclusion in PROP Article I, *i.e.,* in an instance where the general terms and conditions include the exemption but it is overridden on an individual award, *e.g.,* based on a risk assessment.

5. We corrected appendix G to 2 CFR part 1130, PROP Article VI, paragraph A.2, to accurately reflect the language and intent of 2 CFR 200.315(b).

6. The requirement included in appendix C to 2 CFR part 1132, PROC Article III, Section B.3, regarding the Copeland Act, was incorrectly shown in the NPRM as a freestanding requirement; however, it is linked to the Wage Rate requirements, as shown in 2 CFR part 200, Appendix II. We have corrected this accordingly.

7. We made a change in appendix C to 2 CFR part 1132, PROC Article III, Section B.10, to conform the Fly America requirements in contracts under grants and cooperative agreements with those in 2 CFR part 1122 that would apply to awards and subawards. As explained in the final rule in today's **Federal Register** that addresses national policy requirements (2 CFR part 1122), we added clarifying language to indicate that ''Fly America'' requirements apply to transport of persons, as well as personal effects, and added language to refer to both the statute and its implementing regulations.

8. In 2 CFR 1134.210((b)(3)(iii), to ensure that DoD Components appropriately monitor advances in those limited instances when predetermined advances are used and to conform to the OMB guidance on the frequency of financial reporting in 2 CFR 200.327, we changed the language to indicate that, when using such advances, DoD Components must require in their general terms and conditions quarterly financial reporting.

9. In appendix C to 2 CFR part 1136, we added a new Section A to OAR Article III to clarify the use of award-specific conditions as a means of addressing non-compliance and redesignated the other Sections of the Article. The redesignated Section B of the Article addresses the remedies outlined in the OMB guidance in 2 CFR 200.338(a) through (f). In addition, we removed the term ''materially'' from the lead-in language to Section B because

the standard for use of those remedies could be a failure to comply that does not rise to that level of significance. Termination for material failure to comply is addressed in the redesignated Section C.

10. In appendix D to 2 CFR part 1136, OAR Article IV, we added a new section G to indicate that the Grant Appeal Authority's decision is the final administrative decision of DoD and cannot be appealed further within the Department. This serves to emphasize current policy.

11. For consistency between the reporting prescriptions and articles and the closeout article (appendix G to 2 CFR part 1136, OAR Article VI), we made the following changes.

a. Because appendix B to 2 CFR part 1134, REP Article II, indicates that all final financial reports are due 120 days after the end of the period of performance, in 2 CFR 1136.605(b)(2)(ii), we deleted ''financial'' from the lead-in and removed paragraph (ii)(B).

b. We added a new Subpart D, ''Other reporting,'' and REP Article V to allow for inclusion of reports in general terms and conditions other than those covered in REP Articles I–IV, as envisioned by Appendix F to 2 CFR part 1136, OAR Article VI, Section C.4.

12. In Appendices A–L to 2 CFR part 1138, the subaward articles, we added wording to clarify what coverage pertained only to cost-type subawards, what coverage pertained to both cost-type and fixed-amount-type subawards, and what coverage applied (or did not apply) specifically to fixed-amount-type subawards. Several specific clarifying changes were made in SUB Article II, Section C.2, where we elaborated on the location of applicable requirements for fixed amount-type subawards, and SUB Article III Section G, with the respect to the inapplicability of the requirement to include indirect cost information in a fixed amount-type subaward.

13. To ensure clarity in the application of the administrative requirements and consistency within the various parts of the DoDGARs, we made the following changes:

a. Rather than have multiple paragraphs of direction to DoD Components at the beginning and, in some cases, within the individual Articles of terms and conditions, we consolidated the prescriptive language at the beginning of each article.

b. We changed the numbering in several of the Articles to avoid confusion between the alphabetical section designator (*e.g.,* A, B, C) and paragraphs within the text of the Article that have a similar designation.

B. Legal Authorities for the Regulatory Action

There are two statutory authorities for this final rule:

- 10 U.S.C. 113, which establishes the Secretary of Defense as the head of the Department of Defense; and
- 5 U.S.C. 301, which authorizes the head of an Executive department to prescribe regulations for the governance of that department and the performance of its business.

II. Regulatory History

In December 2014 (79 FR 76047), DoD established an interim implementation of the final guidance, ''Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards,'' published by the Office of Management and Budget (OMB) on December 26, 2013, in 2 CFR part 200 (Uniform Guidance—available at 78 FR 78589). DoD then published a Notice of Proposed Rulemaking (November 7, 2016 (81 FR 78382)) that proposed to add title 2 CFR parts 1126, 1128, 1130, 1132, 1134, 1136, and 1138 to address the administrative requirements included in general terms and conditions of DoD cost-type grants and cooperative agreements awarded to institutions of higher education, nonprofit organizations, States, local governments, and Indian tribes.

III. Comments and Responses

We received one set of public comments from an organization that represents universities in their collective relationship with the Federal Government. The affected sections of the proposed rule, the specific comments, and responses to those comments, including whether there is a resulting change in this final rule, are specified below.

Comment: As a general comment, the commenter noted that, while separating the prescriptive language from the language of the terms and conditions makes sense, the format could be more user friendly. The comment indicates that possibly this was a function of how the administrative requirements Subchapter D, in particular, appeared when published in the **Federal Register** and the issue might be resolved when the final rule is published.

Response: In part, this issue was the result of the ''translation'' from a Word document into the **Federal Register** format. In response to this comment, working within the Office of the **Federal Register**'s parameters, we have attempted throughout to show in a clearer manner where the Articles of terms and conditions begin and end and set off the Article headings from the text that follows.

Comment: The commenter indicated that 2 CFR 1128.419(h)(4) would allow a DoD Component to modify the default wording as appropriate to the awards using its general terms and conditions and provides an example of limiting the authorization for pre-award costs to less than 90 days. The commenter also indicated that this would have the potential to create added burden if DoD Components vary significantly in their requirements and pointed out that financial assistance awards at research institutions have been operating under ''expanded authorities.'' The commenter further asked whether there will be a central review of terms and conditions to ensure that there is consistency across the DoD Components in implementing this provision.

Response: We believe that the intended reference is 2 CFR 1128.415(h)(4), as it relates to the direction to DoD Components on the applicable language. This comment also pertains to the policy enunciated in § 1128.415(g). Understanding that most of the universities' grant and cooperative agreement activity with DoD is in research, we have made changes in these two sections to clarify and strengthen the policy that the cited flexibility is not intended for use by DoD Components in general terms and conditions for research grants and cooperative agreements. Rather, the ''up to 90 days'' is at the applicant entity's option. Also, it should be noted that, pending issuance of this final rule, DoD is using general terms and conditions in DoD research awards that reflect the expanded authority, *i.e.,* to incur at the entity's own risk without requesting DoD prior approval pre-award costs up to 90 calendar days before the start date of the period of performance.

Comment: The commenter indicated that, although it was not a deviation from the OMB guidance in 2 CFR part 200, Appendix D, FMS Article IV, Section B.1.h. varied substantially from current practice because that section incorporates 2 CFR 200.308(e). That section of the OMB guidance would require prior approval for budget transfers exceeding 10 percent of the total award if the award amount is greater than the simplified acquisition threshold, which would represent a departure from the Prior Approval Matrix in which the participating DoD Components waived that prior approval requirement and a departure from what other major Federal agencies have implemented in this area. The commenter also stated that it appreciates the flexibility previously

provided and asks that it be reinstated to avoid having a unique requirement for DoD that would increase the administrative burden on recipients.

Response: No change in the current DoD practice or departure from the practice of other Federal research agencies was intended by the referenced language. However, because the comment indicated some confusion concerning whether this provision represented an option rather than a requirement, we added the phrase ''for general terms and conditions'' in 2 CFR 1128.415(f)(3). Although the proposed language in that paragraph stated that this *option* (emphasis added) was not appropriate for research, the addition of these words should alleviate that concern. Further, the general terms and conditions being used in DoD research awards (as cited above) do not include this as a prior approval requirement.

Comments: The commenter indicated that 2 CFR 1132.1(b) does not recognize the grace period allowed by 2 CFR 200.110(a) with respect to the potential for delayed implementation of the procurement standards in 2 CFR part 200. This and a related comment also indicated that the language of this section does not consider the Federal statutory language in the National Defense Authorization Act (NDAA) enacted after issuance of the Notice of Proposed Rulemaking (NPRM) regarding the micro-purchase threshold.

Response: With respect to the grace period, 2 CFR 1132.3 implements 2 CFR 200.110(a), including the delayed implementation, which was subsequently extended by a year, for recipients and 2 CFR 1138.600(b) does so for subrecipients; however, for emphasis, we added a new 2 CFR 1132.3(b) to tie back directly to the procurement grace period specified in 2 CFR 200.110(a). We believe that including the specific duration of that grace period in the DoDGARs will be confusing, as it may be subject to further change, and is unnecessary. As far as a statutory change, the NDAA would have Governmentwide applicability. By deciding to extend the grace period for an additional year, OMB signaled a delay in implementing the statutory provision. It should be noted that the general research terms and conditions in use by DoD Components (as cited above) specify in the Preamble to those terms and conditions that OMB amended 2 CFR 200.110(a) on May 17, 2017 to permit recipients to continue to comply with the procurement standards in previously applicable OMB guidance, rather than the procurement standards in 2 CFR 200.317–200.326, for three full recipient fiscal years that begin on or after December 26, 2014. We believe that language is sufficient and in line with the actions of other Federal research agencies.

Comment: The commenter indicated that 2 CFR 1134.125(b)(2)(ii) states that final reports for research awards should be cumulative and questions whether the use of the word ''should'' means that DoD Components may adopt inconsistent practices for final reporting, which would make reporting challenging.

Response: In response to this comment, we have changed ''should'' to ''must.''

Comment: The commenter indicated that 2 CFR 1134.125(c)(1)(i) enables a DoD Component to pre-approve a 30-day extension for performance reports; however, the reporting article (REP Article I) states that final performance reports are due 90 days after the end of the period of performance. The comment goes on to observe that REP Article II states that final financial reports are due 120 days after the end of the period of performance, resulting in the potential for inconsistent due dates for the same reports across DoD Components, which would make reporting challenging. The commenter suggested that final reports would be more easily administered if there were one consistent due date of 120 days after the end of the period of performance.

Response: To resolve this inconsistency and reflect our intent that the 120-day due date applies to research awards, we have added language to distinguish research awards from other non-construction awards, both in the prescriptive language (2 CFR 1134.125) and in Section C.1 of Appendix A to part 1134 (REP Article I), to make clear that the 120 days is the default for research awards generally and is not an exception, and the pre-approval requirement applies only to non-research awards. We also made other conforming changes, as appropriate, in addressing this comment. Further, the general terms and conditions being used in DoD research awards (as cited above) reflect the 120-day time frame for submission of both final performance and financial reports.

IV. Regulatory Analyses

We developed this rule after considering numerous statutes and Executive Orders (E.O.s) related to rulemaking. Below we summarize our analyses based on these statutes or E.O.s.

A. Regulatory Planning and Review

Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review) 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 (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 rule has been designated as a ''not significant'' regulatory action, and not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has not been reviewed by the Office of Management and Budget (OMB) under the requirements of these Executive Orders.

Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs) directs agencies to reduce regulation and control regulatory costs and provides that ''for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process.'' This rule is not subject to the requirements of this Executive Order because it is not significant under Executive Order 12866.

Costs

DoD has found that this rule will not impose costs on the public because this rule is standardizing terms and conditions for administrative requirements without imposing additional requirements or burdens on the public. In fact, the public will benefit from a time savings resulting from the standardization.

Benefits

DoD determined that a standard format for, and wording of, general terms and conditions for grants and cooperative agreements within the DoDGARs, along with specifying the limits of flexibility afforded to DoD Components, will help maximize long term benefits in relation to costs and burdens for recipients of those awards.

The major benefit of this rule is use of standard terms and conditions for administrative requirements, provided in a uniform format with consistent placement and numbering, included in DoD grants and cooperative agreements awarded to institutions of higher education, nonprofit organizations, States, local governments, and Indian tribes. Greatly increased uniformity across the Department's approximately

100 offices will help to lessen administrative burdens and costs for recipients, especially those that receive awards from multiple DoD Components and enhance the productivity of projects and programs supported by DoD awards.

Any added administrative burdens and associated costs to recipients due to this regulatory action are primarily existing burdens resulting from the Governmentwide guidance to agencies that OMB issued in 2 CFR part 200. In the NPRM, DoD invited input on any area in which potential recipients of DoD awards perceive an increase in burden relative to the OMB guidance that is not justified by the commensurate value of an improvement in DoD's ability to carry out its responsibilities for good stewardship of Federal taxpayers' dollars. Any area where a commenter indicated the potential for an increase in burden or costs is addressed in the responses in Section III, ''Comments and Responses.''

Alternatives

No action—If no action was taken DoD would not be compliance with OMB requirements to move all financial assistance regulations to 2 CFR.

B. Congressional Review Act (5 U.S.C. 801, et seq.)

Under the Congressional Review Act, a major rule may not take effect until at least 60 days after submission to Congress of a report regarding the rule. A major rule is one that would have an annual effect on the economy of $100 million or more or have certain other impacts. This rule is not a major rule under the Congressional Review Act.

C. 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. This rule will not impose any impacts on any entities. This means that there will be no economic impacts on any entities. Therefore, the Department of Defense under 5 U.S.C. 601 *et seq.* certifies that this rule will not have a significant economic impact on a substantial number of small entities.

D. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121, we want to assist small entities in understanding this rule so that they can better evaluate its effects on them and participate in the rulemaking. 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 in the **FOR FURTHER INFORMATION CONTACT** section of this rule.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business 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.

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 1 year. Although this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

F. Collection of Information

The Paperwork Reduction Act (PRA) (44 U.S.C. 3501–3520) applies to collections of information using identical questions posed to, or reporting or recordkeeping requirements imposed on, ten or more members of the public. This rule does not call for a new collection of information under the PRA.

G. Federalism

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. This proposed rule does not have federalism implications that warrant the preparation of a federalism assessment in accordance with Executive Order 13132.

List of Subjects

2 CFR Part 1126

Cooperative agreements, Grant programs, Grants administration.

2 CFR Part 1128

Accounting, Business and Industry, Cooperative agreements, Grants administration, Hospitals, Indians, Nonprofit organizations, Reporting and recordkeeping requirements, Small business, State and local governments.

2 CFR Part 1130

Cooperative agreements, Grants administration, Hospitals, Indians, Nonprofit organizations, Reporting and recordkeeping requirements, Small business, State and local governments.

2 CFR Part 1132

Business and Industry, Cooperative agreements, Grants administration, Hospitals, Indians, Nonprofit organizations, Reporting and recordkeeping requirements, Small business, State and local governments.

2 CFR Part 1134

Cooperative agreements, Grants administration, Hospitals, Indians, Nonprofit organizations, Reporting and recordkeeping requirements, Small business, State and local governments.

2 CFR Part 1136

Cooperative agreements, Grants administration, Hospitals, Indians, Nonprofit organizations, Reporting and recordkeeping requirements, Small business, State and local governments.

2 CFR Part 1138

Accounting, Business and Industry, Cooperative agreements, Grants administration, Hospitals, Indians, Nonprofit organizations, Reporting and recordkeeping requirements, Small business, State and local governments.

■ Accordingly, under the authority of 5 U.S.C. 301 and 10 U.S.C. 113, 2 CFR chapter XI, subchapter D, is amended by adding parts 1126, 1128, 1130, 1132, 1134, 1136, and 1138 to read as follows:

PART 1126—SUBCHAPTER D OVERVIEW

Sec.
1126.1 Purposes of this subchapter.
1126.2 Applicability of this subchapter.
1126.3 Exceptions from requirements in this subchapter.
1126.4 Relationship to other portions of the DoD grant and agreement regulations.
1126.5 Organization of this subchapter.
1126.6 Organization of the other parts of this subchapter.

Authority: 5 U.S.C. 301 and 10 U.S.C. 113.

§ 1126.1 Purposes of this subchapter.

This subchapter of the DoD Grant and Agreement Regulations:

(a) Addresses general terms and conditions governing administrative

requirements for use by DoD Components when awarding cost-type grants and cooperative agreements to institutions of higher education, nonprofit organizations, States, local governments, and Indian tribes. It does so by providing:

(1) A standard organization of the administrative requirements into articles of general terms and conditions, each of which is in a specific subject area.

(2) Standard wording for those articles; and

(3) Associated prescriptions for DoD Component's use of the standard wording to construct their general terms and conditions, which allow for adding, omitting, or varying in other ways from the standard wording in certain situations.

(b) Thereby implements OMB guidance in 2 CFR part 200 as it relates to general terms and conditions of grants and cooperative agreements to institutions of higher education, nonprofit organizations, States, local governments, and Indian tribes.

§ 1126.2 Applicability of this subchapter.

(a) *Entities.* This subchapter:

(1) Applies to DoD Components that award cost-type grants and cooperative agreements to institutions of higher education, nonprofit organizations, States, local governments, and Indian tribes.

(2) Does not directly impose requirements on a recipient of a DoD Component's award but does do so indirectly, through the DoD Component's compliance with this subchapter when it constructs its general award terms and conditions. The terms and conditions delineate the rights and responsibilities of the recipient and the Federal Government under the award.

(b) *Awards.* This subchapter applies to DoD Components' cost-type grants and cooperative agreements to types of entities identified in paragraph (a)(1) of this section, other than Technology Investment Agreements that are addressed in 32 CFR part 37.

§ 1126.3 Exceptions from requirements in this subchapter.

(a) *Exceptions that are not permitted.* A DoD Component may not grant any exception to the requirements in this subchapter if the exception is:

(1) Prohibited by statute, executive order, or regulation;

(2) Inconsistent with the OMB implementation of the Single Audit Act in Subpart F of 2 CFR part 200.

(b) *Other exceptions.* Other exceptions are permitted from requirements in this subchapter for institutions of higher education, nonprofit organizations, States, local governments, and Indian tribes as follows:

(1) *Statutory or regulatory exceptions.* A DoD Component's general terms and conditions may incorporate a requirement that is inconsistent with the requirements in this subchapter if that requirement is specifically authorized or required by a statute or regulation adopted in the Code of Federal Regulations after opportunity for public comment.

(2) *Individual exceptions.* The Head of the DoD Component or his or her designee may approve an individual exception affecting only one award in accordance with procedures stated in 32 CFR 21.340.

(3) *Small awards.* A DoD Component's terms and conditions for small awards may apply less restrictive requirements than those specified in this subchapter (a small award is an award for which the total value of obligated funding through the life of the award is not expected to exceed the simplified acquisition threshold).

(4) *Other class exceptions.* The Assistant Secretary of Defense for Research and Engineering or his or her designee may approve any class exception affecting multiple awards other than small awards, with OMB concurrence if the class exception is for a requirement that is inconsistent with OMB guidance in 2 CFR part 200. Procedures for DoD Components' requests for class exceptions are stated in 32 CFR 21.340.

§ 1126.4 Relationship to other portions of the DoD grant and agreement regulations.

The administrative requirements specified in this subchapter complement:

(a) Provisions of 32 CFR part 34 that address administrative requirements for DoD Components' grants and cooperative agreements to for-profit entities; and

(b) Requirements in 32 CFR part 37 for technology investment agreements.

§ 1126.5 Organization of this subchapter.

This subchapter is organized into six parts in addition to this overview part. Each part provides standard wording and prescriptions for articles of general terms and conditions that address administrative requirements in a particular subject area. Table 1 shows the subject area and articles corresponding to each part:

TABLE 1 TO § 1126.5

In . . .	Of this subchapter, you will find terms and conditions with associated prescriptions for the following articles related to . . .
Part 1128	Recipient financial and program management (designated as "FMS" when referring to articles prescribed by this part): —FMS Article I—Financial management system standards. —FMS Article II—Payments. —FMS Article III—Allowable costs, period of availability of funds, and fee or profit. —FMS Article IV—Revision of budget and program plans. —FMS Article V—Non-Federal audits. —FMS Article VI—Cost sharing or matching. —FMS Article VII—Program income.
Part 1130	Property administration (designated as "PROP" when referring to articles prescribed by this part): —PROP Article I—Title to property. —PROP Article II—Property management system. —PROP Article III—Use and disposition of real property. —PROP Article IV—Use and disposition of equipment and supplies. —PROP Article V—Use and disposition of federally owned property. —PROP Article VI—Intangible property.
Part 1132	Recipient procurement procedures (designated as "PROC" when referring to articles prescribed by this part): —PROC Article I—Procurement standards for States. —PROC Article II—Procurement standards for institutions of higher education, nonprofit organizations, local governments, and Indian tribes. —PROC Article III—Contract provisions for recipient procurements.
Part 1134	Financial, programmatic, and property reporting (designated as "REP" when referring to articles prescribed by this part):

TABLE 1 TO § 1126.5—Continued

In . . .	Of this subchapter, you will find terms and conditions with associated prescriptions for the following articles related to . . .
	—REP Article I—Performance management, monitoring, and reporting. —REP Article II—Financial reporting. —REP Article III—Reporting on property. —REP Article IV—Reporting on subawards and executive compensation. —REP Article V—Other reporting.
Part 1136	Other administrative requirements (designated as ''OAR'' when referring to articles prescribed by this part): —OAR Article I—Submitting and maintaining recipient information. —OAR Article II—Records retention and access. —OAR Article III—Remedies and termination. —OAR Article IV—Claims, disputes, and appeals. —OAR Article V—Collection of amounts due. —OAR Article VI—Closeout. —OAR Article VII—Post-closeout adjustments and continuing responsibilities.
Part 1138	Requirements related to subawards (designated as ''SUB'' when referring to articles prescribed by this part): —SUB Article I—Distinguishing subawards and procurements. —SUB Article II—Pre-award and time of award responsibilities. —SUB Article III—Informational content of subawards. —SUB Article IV—Financial and program management requirements for subawards. —SUB Article V—Property requirements for subawards. —SUB Article VI—Procurement procedures to include in subawards. —SUB Article VII—Financial, programmatic, and property reporting requirements for subawards. —SUB Article VIII—Other administrative requirements for subawards. —SUB Article IX—National Policy Requirements for Subawards. —SUB Article X—Subrecipient monitoring and other post-award administration. —SUB Article XI—Requirements concerning subrecipients' lower-tier subawards. —SUB Article XII—Fixed-amount subawards.

§ 1126.6 Organization of the other parts of this subchapter.

(a) Each of parts 1128 through 1138 of this subchapter is organized into subparts and appendices.

(1) Each appendix provides the standard wording of general terms and conditions for one of the articles of general terms and conditions that the part addresses.

(2) For each appendix addressing a particular article, the part has an associated subpart that provides the prescription for DoD Components' use of the standard wording for that article.

(b) For example, Table 1 to § 1126.5 indicates that 2 CFR part 1128 provides the standard wording of general terms and conditions for FMS Articles I through VII and the prescriptions for DoD Components' use of that standard wording.

(1) FMS Article I on financial management system standards is the first of the articles that 2 CFR part 1128 covers. Appendix A to 2 CFR part 1128 provides the standard wording of general terms and conditions for FMS Article I. The associated subpart of 2 CFR part 1128, subpart A, provides the prescription for DoD Components' use of the standard wording of that article.

(2) Appendices B through G of 2 CFR part 1128 provide the standard wording of general terms and conditions for FMS Articles II through VII, respectively. The associated subparts, Subparts B through G, provide the corresponding prescriptions for DoD Components.

PART 1128—RECIPIENT FINANCIAL AND PROGRAM MANAGEMENT: GENERAL AWARD TERMS AND CONDITIONS

Sec.
1128.1 Purpose of this part.
1128.2 Applicability of this part.
1128.3 Exceptions from requirements of this part.
1128.4 Organization of this part.

Subpart A—Financial Management System Standards (FMS Article I)

1128.100 Purpose of FMS Article I.
1128.105 Content of FMS Article I.

Subpart B—Payments (FMS Article II)

1128.200 Purpose of FMS Article II.
1128.205 Content of FMS Article II.
1128.210 Payment requirements for States.
1128.215 Payment requirements for institutions of higher education, nonprofit organizations, local governments, and Indian tribes.
1128.220 Electronic funds transfer and other payment procedural instructions or information.

Subpart C—Allowable Costs, Period of Availability of Funds, and Fee or Profit (FMS Article III)

1128.300 Purpose of FMS Article III.
1128.305 Content of FMS Article III.
1128.310 Cost principles.
1128.315 Clarification concerning allowability of publication costs.
1128.320 Period of availability of funds.
1128.325 Fee or profit.

Subpart D—Revision of Budget and Program Plans (FMS Article IV)

1128.400 Purpose of FMS Article IV.
1128.405 Content of FMS Article IV.
1128.410 Approved budget.
1128.415 Prior approvals for non-construction activities.
1128.420 Prior approvals for construction activities.
1128.425 Additional prior approval for awards that support both non-construction and construction activities.
1128.430 Procedures for prior approvals.

Subpart E—Non-Federal audits (FMS Article V)

1128.500 Purpose of FMS Article V.
1128.505 Content of FMS Article V.

Subpart F—Cost Sharing or Matching (FMS Article VI)

1128.600 Purpose of FMS Article VI.
1128.605 Content of FMS Article VI.
1128.610 General requirement for cost sharing or matching.
1128.615 General criteria for determining allowability as cost sharing or matching.
1128.620 Allowability of unrecovered indirect costs as cost sharing or matching.
1128.625 Allowability of program income as cost sharing or matching.
1128.630 Valuation of services or property contributed or donated by recipients or subrecipients.
1128.635 Valuation of third-party in-kind contributions.

Subpart G—Program Income (FMS Article VII)

1128.700 Purpose of FMS Article VII.
1128.705 Content of FMS Article VII.
1128.710 What program income includes.

1128.715 Recipient obligations for license fees and royalties.
1128.720 Program income use.
1128.725 Program income after the period of performance.
Appendix A to Part 1128—Terms and conditions for FMS Article I, ''Financial management system standards''
Appendix B to Part 1128—Terms and conditions for FMS Article II, ''Payments''
Appendix C to Part 1128—Terms and conditions for FMS Article III, ''Allowable costs, period of availability of funds, and fee or profit''
Appendix D to Part 1128—Terms and conditions for FMS Article IV, ''Revision of budget and program plans''
Appendix E to Part 1128—Terms and conditions for FMS Article V, ''Non-Federal audits''
Appendix F to Part 1128—Terms and conditions for FMS Article VI, ''Cost sharing or matching''
Appendix G to Part 1128—Terms and conditions for FMS Article VII, ''Program income''

Authority: 5 U.S.C. 301 and 10 U.S.C. 113.

§ 1128.1 Purpose of this part.

(a) This part specifies standard wording of general terms and conditions concerning financial and program management, including recipients' financial management systems, payments, cost sharing or matching, program income, budget and program revisions, audits, allowable costs, and periods of availability of funds.

(b) It thereby implements OMB guidance in the following portions of 2 CFR part 200, as they apply to general terms and conditions of grants and cooperative agreements:

(1) Sections 200.80, 200.209, and 200.302 through 200.309;

(2) Sections 200.301 and 200.328, as they relate to associations between financial data and performance accomplishments and reporting; and

(3) Subparts E and F.

§ 1128.2 Applicability of this part.

The types of awards and entities to which this part and other parts in this subchapter apply are described in the subchapter overview at 2 CFR 1126.2.

§ 1128.3 Exceptions from requirements of this part.

Exceptions are permitted from the administrative requirements in this part only as described at 2 CFR 1126.3.

§ 1128.4 Organization of this part.

(a) The content of this part is organized into subparts and associated appendices.

(1) Each subpart provides direction to DoD Components on how to construct one article of general terms and conditions for grants and cooperative agreements.

(2) For each subpart, there is a corresponding appendix with standard wording for terms and conditions of the article addressed by the subpart. Terms and conditions address rights and responsibilities of the Federal Government and recipients.

(b) A DoD Component must use the wording provided in each appendix in accordance with the direction in the corresponding subpart. That direction may permit DoD Components to vary from the standard wording in some situations.

(c) Table 1 shows which article of general terms and conditions may be found in each of appendices A through G to this part (with the associated direction to DoD Components in Subparts A through G, respectively):

TABLE 1 TO PARAGRAPH (c)

In . . .	You will find terms and conditions specifying recipients' rights and responsibilities related to . . .	That would appear in an award within FMS Article . . .
Appendix A	Financial management system standards	I.
Appendix B	Payments	II.
Appendix C	Allowable costs, period of availability of funds, and fee or profit	III.
Appendix D	Revision of budget and program plans	IV.
Appendix E	Non-Federal audits	V.
Appendix F	Cost sharing or matching	VI.
Appendix G	Program income	VII.

Subpart A—Financial Management System Standards (FMS Article I)

§ 1128.100 Purpose of FMS Article I.

FMS Article I specifies standards for recipients' financial management systems. It thereby implements OMB guidance in:

(a) 2 CFR 200.302, 200.303, and 200.328; and

(b) 2 CFR 200.301 and 200.328, as they relate to associations between financial data and performance accomplishments and reporting.

§ 1128.105 Content of FMS Article I.

(a) *Requirement.* A DoD Component's general terms and conditions must address requirements for recipients' financial management systems.

(b) *Award terms and conditions*—(1) *General.* Except as provided in paragraph (b)(2) of this section, a DoD Component's general terms and conditions must include the wording appendix A to this part provides for FMS Article I.

(2) *Exceptions.* A DoD Component's general terms and conditions may:

(i) Reserve Section A of FMS Article I if the DoD Component determines that it is not possible that any States will receive:

(A) DoD Component awards using those general terms and conditions; or

(B) Subawards from recipients of DoD Component awards using those general terms and conditions.

(ii) Reserve paragraph B.6 of FMS Article I if the DoD Component determines that it will not require recipients of awards using those general terms and conditions to relate financial data to performance accomplishments (*e.g.,* through unit costs). Because the nature of research makes the use of unit costs and other relationships between financial data and performance accomplishments generally inappropriate, DoD Components should reserve paragraph B.6 in general terms and conditions for awards supporting research.

Subpart B—Payments (FMS Article II)

§ 1128.200 Purpose of FMS Article II.

FMS Article II contains requirements related to payments under an award. It thereby implements OMB guidance in 2 CFR 200.305.

§ 1128.205 Content of FMS Article II.

(a) *Requirement.* A DoD Component's general terms and conditions must address payment method; payment timing and amounts, which relate to cash management; frequency of payment requests; and matters related to recipients' depositories, including interest earned on advance payments.

(b) *Award terms and conditions.* A DoD Component's general terms and conditions must include the wording

appendix B to this part provides for FMS Article II with appropriate additions, deletions, and substitutions as described in §§ 1128.210 through 1128.220.

§ 1128.210 Payment requirements for States.

(a) *Policy.* Payments to States are subject to requirements in Department of the Treasury regulations at 31 CFR part 205 that implement the Cash Management Improvement Act. Those regulations are in two subparts with distinct requirements that apply to different programs:

(1) Subpart A of 31 CFR part 205 contains requirements for payments to States under ''major programs,'' as defined in that part. The Department of the Treasury negotiates Treasury-State agreements for major programs. Those agreements specify the appropriate timing and amounts of payments. They further specify a State's interest liability if it receives an advance payment too many days before it disburses the funds for program purposes, as well as the Federal Government's interest liability if it reimburses the State too many days after the State disburses the funds. Most DoD awards to States are not under major programs, so Subpart A applies relatively infrequently.

(2) Subpart B of 31 CFR part 205 applies to all other DoD grants and cooperative agreements to States—*i.e.,* awards that are not under major programs.

(b) *Award terms and conditions*—(1) *General.* Because few DoD awards to States are under major programs, appendix B to this part includes wording for Section A of FMS Article II that specifies the requirements of Subpart B of 31 CFR part 205. A DoD Component's general terms and conditions must include this wording for Section A of FMS Article II if no award using those terms and conditions will be made to a State under a program designated as a major program in the applicable Treasury-State agreement.

(2) *Exception for awards under major programs.* If a DoD Component is establishing general terms and conditions that will be used for awards to States, only some of which are subject to requirements for major programs in Subpart A of 31 CFR part 205, then the DoD Component should:

(i) Use appendix B's wording for Section A of FMS Article II in its general terms and conditions; and

(ii) In each award subject to Subpart A of 31 CFR part 205, include award-specific terms and conditions that make payments to the recipient subject to the requirements in Subpart A of 31 CFR part 205 and the applicable Treasury-State agreement, thereby overriding the wording of Section A of FMS Article II.

§ 1128.215 Payment requirements for institutions of higher education, nonprofit organizations, local governments, and Indian tribes.

(a) *Policy.* OMB guidance in 2 CFR 200.305 addresses the use of three payment methods for grants and cooperative agreements—advance payments, reimbursement, and working capital advances. Two of the methods pertain to a DoD Component's general terms and conditions, as described in paragraphs (a)(1) and (2) of this section.

(1) *Advance payments.* With the possible exception of construction awards, as provided in paragraph (a)(2) of this section, a DoD Component's general terms and conditions must authorize each recipient to request payments in advance as long as the recipient maintains, or demonstrates the willingness to maintain, both:

(i) Written procedures that minimize the time elapsing between its receipt of funds from the Federal Government and its disbursement of the funds for project or program purposes; and

(ii) Financial management systems that meet the standards for fund control and accountability specified in the wording of FMS Article I (see Subpart A and appendix A to this part).

(2) *Reimbursement.* A DoD Component's general terms and conditions may specify the reimbursement method if the awards using those terms and conditions will support construction projects financed in whole or in part by the Federal Government.

(b) *Award terms and conditions*—(1) *General.* Appendix B provides wording for Section B of FMS Article II that a DoD Component:

(i) Must use in general terms and conditions for non-construction awards to authorize recipients to request advance payments; and

(ii) May use in general terms and conditions for construction awards if it elects to authorize recipients of those awards to request advance payments.

(2) *Alternative award terms and conditions.* A DoD Component may develop an alternative to appendix B's wording for Section B of FMS Article II to use in general terms and conditions for construction awards, if it elects to specify reimbursement as the payment method for those awards. The alternative:

(i) Would replace appendix B's wording for paragraph B.1 with wording to specify the reimbursement method of payment;

(ii) Must include appendix B's wording for paragraphs B.2.b and c, B.4, and B.5, which may be renumbered as appropriate, because those paragraphs apply to reimbursements as well as advance payments;

(iii) Should omit appendix B's wording for paragraphs B.2.a, B.3, and B.6 because those paragraphs apply specifically to advance payments; and

(iv) Must inform recipients that the DoD payment office generally makes payment within 30 calendar days after receipt of the request for reimbursement by the award administration office, unless the request is reasonably believed to be improper.

§ 1128.220 Electronic funds transfer and other payment procedural instructions or information.

(a) *Policy.* A DoD Component's general terms and conditions must specify that payments will be made by electronic funds transfer (EFT) unless a recipient is excepted in accordance with Department of the Treasury regulations at 31 CFR part 208 from the Governmentwide requirement to use EFT.

(b) *Award terms and conditions*—(1) *Electronic funds transfer.* Appendix B provides wording for Section C of FMS Article II that a DoD Component must use to specify payment by EFT, when awards are not excepted from the Governmentwide requirement.

(2) *Other payment procedures or instructions.* A DoD Component may insert one or more paragraphs in its general terms and conditions in lieu of the reserved paragraph C.2 in appendix B, to provide procedural instructions or information regarding payments that is common to awards using those terms and conditions. For example, it may insert wording to give detailed instructions on where and how recipients are to submit payment requests. All forms, formats, and data elements for payment requests must be OMB-approved information collections.

Subpart C—Allowable Costs, Period of Availability of Funds, and Fee or Profit (FMS Article III)

§ 1128.300 Purpose of FMS Article III.

FMS Article III of the general terms and conditions specifies what costs are allowable as charges to awards and when they are allowable. It also specifies restrictions on payment of fee or profit. It thereby implements OMB guidance in §§ 200.209 and 200.309 and Subpart E of 2 CFR part 200. It also partially implements 2 CFR 200.201(b)(1) and 200.323(c), as those sections apply to the cost principles to

be used in relation to subawards and contracts, respectively.

§ 1128.305 Content of FMS Article III.

(a) *Requirement.* A DoD Component's general terms and conditions must address allowability of costs and permissibility of fee or profit.

(b) *Award terms and conditions.* A DoD Component's general terms and conditions must include the wording appendix C to this part provides for FMS Article III with appropriate reservations as described in §§ 1128.310 through 1128.325.

§ 1128.310 Cost principles.

(a) *Policy.* The set of Governmentwide cost principles applicable to a particular entity type governs the allowability of costs that may be:

(1) Charged to each cost-type:

(i) DoD grant or cooperative agreement to a recipient of that entity type;

(ii) Subaward to a subrecipient of that entity type at any tier below a DoD grant or cooperative agreement; and

(iii) Procurement transaction with a contractor of that entity type awarded by a recipient of a DoD grant or cooperative agreement or a subrecipient that received a subaward at any tier below that grant or cooperative agreement.

(2) Considered in establishing the amount of any:

(i) Fixed-amount subaward, at any tier under a grant or cooperative agreement, to a subrecipient of that entity type; or

(ii) Fixed-price procurement transaction with a contractor of that entity type that is awarded by either a recipient of a DoD grant or cooperative agreement or a subrecipient that received a subaward at any tier below that grant or cooperative agreement.

(b) *Award terms and conditions*—(1) *General.* Because almost all DoD grants and cooperative agreements are cost-type awards, appendix C includes wording for Section A of FMS Article III that specifies use of the applicable Governmentwide cost principles in the determination of the allowability of costs.

(2) *Exception.* A DoD Component may reserve any paragraph of appendix C's wording for Section A of FMS Article III in its general terms and conditions if the Component is certain that no entities of the type to which the paragraph applies could be recipients of awards using those general terms and conditions or recipients of subawards or procurement transactions at any tier under those awards.

§ 1128.315 Clarification concerning allowability of publication costs.

(a) *Requirement.* A DoD Component's general terms and conditions must clarify that a recipient must charge publication costs consistently as either direct or indirect costs in order for those costs to be allowable charges to DoD grants and cooperative agreements.

(b) *Award terms and conditions*—(1) *General.* To clarify the allowability of publication costs, a DoD Component's general terms and conditions must include the wording appendix C to this part provides for Section B of FMS Article III.

(2) *Exception.* A DoD Component may instead reserve Section B of FMS Article III in its general terms and conditions if the DoD Component determines that there will be no publication costs under any of the awards using those general terms and conditions.

§ 1128.320 Period of availability of funds.

(a) *Requirement.* A DoD Component's general terms and conditions must specify the period during which Federal funds are available for obligation by recipients for project or program purposes.

(b) *Award terms and conditions.* A DoD Component's general terms and conditions must include the wording appendix C to this part provides for Section C of FMS Article III to specify the period of availability of funds.

§ 1128.325 Fee or profit.

(a) *Requirement.* A DoD Component's general terms and conditions must specify that recipients may neither receive fee or profit nor pay fee or profit to subrecipients.

(b) *Award terms and conditions.* A DoD Component must use the wording appendix C to this part provides for Section D of FMS Article III to specify the limitation on payment of fee or profit.

Subpart D—Revision of Budget and Program Plans (FMS Article IV)

§ 1128.400 Purpose of FMS Article IV.

FMS Article IV of the general terms and conditions specifies requirements related to changes in recipients' budget and program plans. It thereby implements OMB guidance in § 200.308 of 2 CFR part 200 and partially implements § 200.209 and Subpart E of that part.

§ 1128.405 Content of FMS Article IV.

(a) *Requirement.* A DoD Component's general terms and conditions must specify the changes in budget and program plans for which a recipient is required to request DoD Component prior approval and the procedures for submitting those requests.

(b) *Award terms and conditions.* A DoD Component's general terms and conditions must include as FMS Article IV the § wording appendix D to this part provides, with any revisions to the wording that are authorized by §§ 1128.410 through 1128.430.

§ 1128.410 Approved budget.

(a) *OMB guidance.* As described in 2 CFR 200.308(a), the approved budget for a grant or cooperative agreement may include both the Federal and non-Federal shares of funding under the award or only the Federal share.

(b) *DoD implementation.* For DoD grants and cooperative agreements, the approved budget includes the Federal share and any cost sharing or matching that the recipient is required to provide under the award.

(c) *Award terms and conditions.* A DoD Component's general terms and conditions therefore must include the wording appendix D to this part provides for Section A of FMS Article IV.

§ 1128.415 Prior approvals for non-construction activities.

(a) *OMB guidance.* OMB guidance in 2 CFR 200.308(c) through (e) addresses prior approval requirements for revisions of a recipient's budget and program plans under a non-construction grant or cooperative agreement, which includes, for the purposes of this section, non-construction activities under an award that supports both construction and non-construction.

(b) *DoD implementation of the guidance.* The following paragraphs (c) through (g) of this section provide details of the DoD implementation of the guidance in 2 CFR 200.308(c) through (e) and paragraph (h) specifies the corresponding award terms and conditions. A DoD Component's general terms and conditions for non-construction awards may require additional prior approvals for budget and program revisions (*i.e.,* prior approvals other than those authorized by this subpart) only in accordance with the exceptions provisions of 2 CFR 1126.3.

(c) *Scope or objective, cost sharing or matching, and additional Federal funds.* A DoD Component's general terms and conditions for non-construction awards must require that a recipient obtain DoD Component prior approval:

(1) For a change in scope or objective of the project or program, as described in 2 CFR 200.308(c)(1)(i).

(2) For any change in the cost sharing or matching included in the approved

budget for which FMS Article VI requires prior approval, as described in OMB guidance at 2 CFR 200.308(c)(1)(vii).

(3) If the need arises for additional Federal funds to complete the project or program, as described in 2 CFR 200.308(c)(1)(viii).

(d) *Personnel changes, disengagements, or reductions in time.* A DoD Component must include the following prior approval requirements in general terms and conditions of research awards and may include them in general terms and conditions of other non-construction awards:

(1) A change in a key person, as described in 2 CFR 200.308(c)(1)(ii).

(2) A principal investigator's or project director's disengagement from, or reduction in time devoted to, the project or program, as described in 2 CFR 200.308(c)(1)(iii).

(e) *Costs requiring prior approval under the cost principles.* With respect to waivers of prior approvals required by the cost principles, as described in 2 CFR 200.308(c)(1)(iv):

(1) Any waiver of a cost principles requirement for prior approval by a recipient entity's cognizant agency for indirect costs is appropriately addressed in award-specific terms and conditions, rather than general terms and conditions, because the general terms and conditions must be appropriate for use in awards to multiple recipient entities.

(2) A DoD Component may waive requirements in the cost principles for recipients to request prior approval before charging certain costs as direct costs to awards. However, the DoD Component should carefully consider each prior approval requirement individually and decide:

(i) Which, if any, to waive; and

(ii) Whether to make the waiver of the prior approval requirement contingent on specified conditions (*e.g.,* a DoD Component might waive the prior approval required for direct charging of special purpose equipment purchases under an award but elect to waive it only up to a certain dollar value).

(f) *Transfers of funds and subawards.* A DoD Component's general terms and conditions for non-construction awards may include prior approval requirements for:

(1) Transfers of funds for participant support costs, as described in 2 CFR 200.308(c)(1)(v).

(2) Subawarding of work under an award, as described in 2 CFR 200.308(c)(1)(vi).

(3) Transfers of funds among direct cost categories, as described in 2 CFR 200.308(e), but the wording in the general terms and conditions must make clear that the prior approval requirement applies only to awards using those terms and conditions if the Federal share of the total value is in excess of the simplified acquisition threshold. As a matter of DoD policy, requiring prior approvals for transfers among direct cost categories generally is not appropriate for the general terms and conditions of grants and cooperative agreements that support research.

(g) *Pre-award costs, carry forward of unobligated balances, and no-cost extensions.* (1) A DoD Component's general terms and conditions may authorize recipients to incur project costs up to 90 calendar days prior to the beginning date of the period of performance, at their own risk, as described in 2 CFR 200.308(d)(1). OMB guidance in 2 CFR 200.308(d)(4) makes that authorization the default policy for research awards. Therefore, a DoD Component must use this policy in general terms and conditions for research awards unless exceptional circumstances provide the basis for overriding that policy.

(2) If a DoD Component's general terms and conditions are used for awards that have multiple periods of performance, the DoD Component should authorize recipients to carry forward unobligated balances to subsequent periods of performance, as described in 2 CFR 200.308(d)(3), unless there are compelling reasons not to do so.

(3) A DoD Component's general terms and conditions may authorize recipients to initiate one-time extensions in the periods of performance of their awards by up to 12 months, subject to the conditions described in 2 CFR 200.308(d)(2), but only if the DoD Component judges that authorizing no-cost extensions for awards using the general terms and conditions will not cause the DoD Component to fail to comply with DoD funding policies (*e.g.,* the incremental program budgeting and execution policy for research funding) contained in Volume 2A of the DoD Financial Management Regulation, DoD 7000.14–R.

(h) *Award terms and conditions.* Appendix D to this part provides wording for inclusion in Section B of a DoD Component's general terms and conditions in accordance with paragraphs (c) through (g) of this section. Specifically:

(1) In accordance with paragraph (c) of this section, a DoD Component's general terms and conditions for non-construction awards must include the wording that appendix D provides for paragraphs B.1.a and B.1.i of FMS Article IV and, if there will be cost sharing or matching required under any awards using the general terms and conditions, paragraph B.1.g.

(2) In accordance with paragraph (d) of this section, a DoD Component's general terms and conditions for research awards must include the wording that appendix D provides for paragraphs B.1.b and B.1.c of FMS Article IV. A DoD Component also may include paragraphs B.1.b and B.1.c in general terms and conditions for other non-construction awards.

(3) In accordance with paragraph (e) of this section, a DoD Component's general terms and conditions for non-construction awards must include the wording that appendix D provides for paragraph B.1.d of FMS Article IV unless the DoD Component decides to waive any requirements in the applicable cost principles for recipients to obtain prior approval before including certain types of costs as direct charges to awards. If a DoD Component elects to waive any of those prior approval requirements, it must add wording to paragraph B.1.d to identify the specific types of costs for which recipients need not obtain DoD Component prior approval (thereby leaving in place the other prior approval requirements in the cost principles).

(4) In accordance with paragraphs (f) and (g) of this section, a DoD Component's general terms and conditions for non-construction awards may include the wording that appendix D provides for paragraphs B.1.e, B.1.f, and B.1.h (except as noted for research awards in paragraph (f)(3) of this section) and Section C of FMS Article IV. A DoD Component may modify the wording as specified in paragraphs (f) and (g) of this section (*e.g.,* to limit the authorization for pre-award costs in non-construction awards other than research to a period of less than 90 calendar days prior to the beginning date of the period of performance).

(5) If no awards using a DoD Component's general terms and conditions will support non-construction activities, the DoD Component may reserve section B.1 of the wording that appendix D provides for FMS Article IV.

§ 1128.420 Prior approvals for construction activities.

(a) *OMB guidance.* OMB guidance in 2 CFR 200.308(g)(1) through (4) addresses prior approval requirements for revisions of a recipient's budget and program plans under a construction grant or cooperative agreement or construction activities under an award

that supports both construction and non-construction activities.

(b) *DoD implementation of the guidance.* DoD implements the guidance in 2 CFR 200.308(g)(1) through (4) through terms and conditions of awards for construction. A DoD Component's general terms and conditions for construction awards may require additional prior approvals for budget and program revisions (*i.e.,* prior approvals other than those authorized by this subpart) only in accordance with the exceptions provisions of 2 CFR 1126.3.

(c) *Award terms and conditions.* In a DoD Component's general terms and conditions for construction awards or awards supporting construction activities, the DoD Component:

(1) Must include the wording that appendix D to this part provides for paragraph B.2 of FMS Article IV.

(2) May reserve or remove the wording appendix D to this part provides for paragraph B.1 and Section C of FMS Article IV unless some awards using the general terms and conditions will also support non-construction activities (if the DoD Component elects to remove Section C, it should redesignate Section D in the article as Section C).

§ 1128.425 Additional prior approval for awards that support both non-construction and construction activities.

(a) *OMB guidance.* Guidance on an additional prior approval requirement for grants or cooperative agreements that support both construction and non-construction activities is contained in 2 CFR 200.308(g)(5).

(b) *DoD implementation of the guidance.* DoD implements the guidance in 2 CFR 200.308(g)(5) through terms and conditions for awards that support both non-construction and construction activities.

(c) *Award terms and conditions.* If a DoD Component establishes general terms and conditions for awards that support both non-construction and construction activities, the DoD Component may add the prior approval requirement for funding or budget transfers between construction and non-construction activities that is described in OMB guidance in 2 CFR 200.308(g)(5). The wording that appendix D to this part provides for Section B of FMS Article IV includes a reserved paragraph B.3 in which the DoD Component may add appropriate wording to include that prior approval requirement.

§ 1128.430 Procedures for prior approvals.

(a) *OMB guidance.* Guidance on procedures related to recipient requests for prior approval is contained in 2 CFR 200.308(h) and (i).

(b) *DoD implementation of the guidance.* DoD implements the guidance in 2 CFR 200.308(h) and (i) for prior approval requests through award terms and conditions.

(c) *Award terms and conditions.* A DoD Component must:

(1) Include the wording appendix D to this part provides for paragraph D.1 of FMS Article IV of its general terms and conditions.

(2) Insert appropriate wording in lieu of the reserved paragraph D.2 that appendix D to this part includes in FMS Article IV to specify:

(i) The format the recipient must use when it requests approval for budget revisions. As described in 2 CFR 200.308(h), the award term may allow the recipient to submit a letter of request or otherwise must specify that the recipient use the same format it used for budget information in its application or proposal.

(ii) Any other procedural instructions related to requests for prior approvals for budget or program revisions (*e.g.,* to whom requests must be submitted) that are common to the awards using the general terms and conditions. For procedural instructions that will vary from one award to another, it is appropriate to include wording that points to the award-specific terms and conditions as the source of the information.

Subpart E—Non-Federal Audits (FMS Article V)

§ 1128.500 Purpose of FMS Article V.

FMS Article V of the general terms and conditions specifies requirements related to audits required under the Single Audit Act, as amended (31 U.S.C., chapter 75). The article thereby implements for grants and cooperative agreements the OMB guidance in Subpart F of 2 CFR part 200.

§ 1128.505 Content of FMS Article V.

(a) *Requirement.* A DoD Component's general terms and conditions must address audit requirements.

(b) *Award terms and conditions*—(1) *General.* A DoD Component's general terms and conditions must include the wording appendix E to this part provides for FMS Article V.

(2) *Exception.* A DoD Component may reserve Section B of the wording in appendix E if there will be no subawards to for-profit entities under any award using those terms and conditions.

Subpart F–Cost Sharing or Matching (FMS Article VI)

§ 1128.600 Purpose of FMS Article VI.

FMS Article VI sets forth requirements concerning recipients' cost sharing or matching under awards. It thereby implements OMB guidance in:

(a) 2 CFR 200.306 and 200.308(c)(1)(vii); and

(b) 2 CFR 200.434, in conjunction with FMS Article III in appendix C to this part.

§ 1128.605 Content of FMS Article VI.

(a) *Requirement.* A DoD Component's general terms and conditions for awards under which there may be required cost sharing or matching must specify the criteria for determining allowability, methods for valuation, and requirements for documentation of cost sharing or matching.

(b) *Award terms and conditions*—(1) *General.* A DoD Component's general terms and conditions must include as FMS Article VI the wording appendix F to this part provides, with any revisions to the wording that are authorized by §§ 1128.610 through 1128.635.

(2) *Exception.* A DoD Component may reserve FMS Article VI of its general terms and conditions if it determines that there will be no cost sharing or matching required under any of the awards using those terms and conditions.

§ 1128.610 General requirement for cost sharing or matching.

(a) *Requirement.* (1) FMS Article VI of the general terms and conditions must tell a recipient that:

(i) It may find the amount or percentage of cost sharing or matching required under its award in the award cover pages.

(ii) The cost sharing or matching amount or percentage identified in the award includes all required (but not voluntary uncommitted) contributions to the project or program by the recipient and its subrecipients, including any that involve third-party contributions or donations to the recipient and subrecipients.

(iii) It must obtain the DoD Component's prior approval for any change in the required amount or percentage of cost share or match.

(2) At a DoD Component's option, FMS Article VI also may require a recipient to obtain the DoD Component's prior approval if it wishes to substitute alternative cost sharing or matching contributions in lieu of specific contributions included in the approved budget (*e.g.,* to use a third-party in-kind contribution not included in the approved budget).

(b) *Award terms and conditions.* To implement paragraph (a) of this section, a DoD Component's general terms and conditions must include the wording appendix F to this part provides as Section A of FMS Article VI. A DoD Component may insert wording in lieu of the reserved paragraph A.2.b if it elects to require recipients to obtain prior approval before substituting alternative cost sharing or matching contributions, as described in paragraph (a)(2) of this section.

§ 1128.615 General criteria for determining allowability as cost sharing or matching.

(a) *OMB guidance.* The OMB guidance in 2 CFR 200.306(b) lists the basic criteria for the allowability of cost sharing or matching under grants and cooperative agreements.

(b) *Award terms and conditions*—(1) *General.* A DoD Component's general terms and conditions must include the wording appendix F to this part provides as Section B of FMS Article VI to specify the allowability of cash or third-party in-kind contributions as cost sharing or matching.

(2) *Exception.* A DoD Component may reserve paragraph B.4 of Section B of FMS Article VI in its general terms and conditions, or replace it with appropriate alternative wording, if the DoD Component has statutory authority to accept costs reimbursed by other Federal awards as cost sharing or matching under the awards using its general terms and conditions.

§ 1128.620 Allowability of unrecovered indirect costs as cost sharing or matching.

(a) *OMB guidance.* The OMB guidance in 2 CFR 200.306(c) provides that unrecovered indirect costs may only be included as part of cost sharing and matching with the prior approval of the Federal awarding agency.

(b) *DoD implementation.* DoD Components must allow any recipient that either has an approved negotiated indirect cost rate or is using the de minimis rate described in 2 CFR 200.414(f) to count unrecovered indirect costs toward any required cost sharing or matching under awards. The basis for this policy is that recipients' indirect costs that are allowable and allocable to DoD projects and programs are legitimate costs of carrying out those projects and programs.

(c) *Award terms and conditions.* To implement the policy in paragraph (b) of this section, a DoD Component's general terms and conditions must include the wording appendix F to this part provides as Section C of FMS Article VI unless a statute requires otherwise.

§ 1128.625 Allowability of program income as cost sharing or matching.

(a) *OMB guidance.* OMB guidance in 2 CFR 200.307(e)(3) specifies that, with the prior approval of the Federal awarding agency, recipients may use program income to meet cost sharing or matching requirements of their awards.

(b) *Award terms and conditions*—(1) *General.* A DoD Component's general terms and conditions must include the wording appendix F to this part provides as Section D of FMS Article VI if, in FMS Article VII of those terms and conditions, the DoD Component specifies that recipients dispose of program income using either:

(i) The cost sharing or matching alternative described in paragraph (b)(1)(iii) of § 1128.720; or

(ii) A combination alternative, as described in paragraph (b)(1)(iv) of § 1128.720, that includes use of at least some program income as cost sharing or matching.

(2) *Exception.* A DoD Component may reserve Section D of FMS Article VI if FMS Article VII of those terms and conditions does not provide that recipients will use any program income as cost sharing or matching.

§ 1128.630 Valuation of services or property contributed or donated by recipients or subrecipients.

(a) *OMB guidance.* OMB guidance in 2 CFR 200.306(d) specifies:

(1) That values for recipients' and subrecipients' contributions of services or property toward cost sharing or matching must be established in accordance with the cost principles in Subpart E of 2 CFR part 200; and

(2) Types of projects or programs under which recipients' or subrecipients' donations of buildings or land are allowable as cost sharing or matching, with the prior approval of the Federal awarding agency, and how the donations are to be valued in those cases.

(b) *DoD implementation.* DoD implements the guidance in 2 CFR 200.306(d) through award terms and conditions, with the following clarifications:

(1) *Cost principles to be used for valuation.* (i) Values for recipients' and subrecipients' contributions of services or property toward cost sharing or matching must be established in accordance with the cost principles applicable to the entity making the contribution.

(ii) Consistent with the cost principles, what generally should be charged to awards for real property and equipment is depreciation rather than allowing a recipient's or subrecipient's donation of the property (*i.e.,* counting the full value of the property toward cost sharing or matching). However, depreciation included in a recipient's or subrecipient's indirect costs is not appropriate for counting as cost sharing or matching under an individual award.

(2) *Donations of property to projects or programs under awards.* (i) In addition to donations of buildings or land described in 2 CFR 200.306(d), recipients and subrecipients may, with the prior approval of the DoD Component, donate other capital assets described in the cost principles in 2 CFR 200.439(b)(1) through (3). The basis for clarifying that recipients may donate other capital assets to projects or programs under awards is that, with the DoD Component's approval:

(A) Capital expenditures to acquire those types of capital assets are allowable as direct charges to awards; and

(B) The costs therefore satisfy the allowability criterion in 2 CFR 200.306(b)(4) and can qualify as cost sharing or matching if they meet the other criteria listed in 2 CFR 200.306(b).

(ii) However, when there are alternative ways for recipients to meet requirements for cost sharing or matching, DoD Components should not approve donations of capital assets to projects or programs under awards. Inclusion of the full value of a donated asset as project costs in the approved budget of an award is analogous to inclusion of the acquisition cost for an asset that is purchased under the award. Through the donation, the Federal Government acquires an interest in the donated asset that must be resolved at time of disposition of the asset, which is best avoided if possible.

(iii) Whenever a DoD Component permits a recipient to donate a capital asset to a project or program under an award, the DoD Component should inform the cognizant Federal agency that negotiates the indirect cost rate for that recipient. Doing so enables the cognizant agency to take the donation into account when it establishes the recipient's indirect cost rate, given that the recipient may not include depreciation for the donated asset as indirect costs that enter into the computation of that rate.

(c) *Award terms and conditions*—(1) *General.* A DoD Component's general terms and conditions must use the wording appendix F to this part provides as Section E of FMS Article VI.

(2) *Exception.* A DoD Component's general terms and conditions may reserve paragraph E.2 of the wording appendix F to this part provides if the DoD Component does not allow

recipients to donate buildings, land, or other capital assets to projects or programs under awards using those terms and conditions.

§ 1128.635 Valuation of third-party in-kind contributions.

(a) *OMB guidance.* OMB guidance in 2 CFR 200.306(e) through (j) and 2 CFR 200.434(b) through (g) specifies how to value and document various types of third-party in-kind contributions for cost sharing or matching purposes.

(b) *Award terms and conditions*—(1) *General.* To implement the OMB guidance described in paragraph (a) of this section as it applies to valuation and documentation of third-party in-kind contributions, a DoD Component's general terms and conditions must use the wording Section VI of appendix F to this part provides as Section F of FMS Article VI.

(2) *Exception.* A DoD Component's general terms and conditions may reserve any paragraph of the wording appendix F to this part provides for Section F of FMS Article VI if the DoD Component determines that there will be no possibility of third-party in-kind contributions under awards using those terms and conditions.

Subpart G–Program Income (FMS Article VII)

§ 1128.700 Purpose of FMS Article VII.

FMS Article VII of the general terms and conditions specifies requirements for program income that recipients earn. The article thereby implements OMB guidance in 2 CFR 200.80 and 200.307.

§ 1128.705 Content of FMS Article VII.

(a) *Requirement.* A DoD Component's general terms and conditions must address the kinds of income included as program income, the way or ways in which a recipient may use it, the duration of the recipient's accountability for it, and related matters.

(b) *Award terms and conditions.* A DoD Component's general terms and conditions must include as FMS Article VII the wording appendix G to this part provides, unless, as authorized by §§ 1128.710 through 1128.725, there are revisions to the wording of Sections A and E of the article or Section D is reserved.

§ 1128.710 What program income includes.

(a) *OMB guidance.* Under the definition of ''program income'' at 2 CFR 200.80 and related OMB guidance at 2 CFR 200.307, an agency's regulations or terms and conditions of grants and cooperative agreements may include as program income:

(1) Rebates, credits, discounts, and interest earned on any of them; and

(2) Taxes, special assessments, levies, fines and other similar revenue raised by a governmental recipient.

(b) *DoD implementation.* Unless a statute or program regulation adopted in the Code of Federal Regulations after opportunity for public comment specifies otherwise, each DoD Component must exclude the types of income listed in paragraphs (a)(1) and (2) of this section from program income for which recipients are accountable to the Federal Government.

(c) *Award terms and conditions* — (1) *General.* Except as provided in paragraph (c)(2) of this section, a DoD Component must use the wording provided in appendix G to this part as Section A of FMS Article VII in its general terms and conditions. Doing so excludes the types of income listed in paragraphs (a)(1) and (2) of this section from program income for which recipients are accountable to the Federal Government.

(2) *Exceptions.* If a DoD Component has a statutory or regulatory basis for including either or both types of income described in paragraphs (a)(1) and (2) of this section, it may do so by appropriately revising the wording appendix G provides for Section A of FMS Article VII. For example, to include as program income:

(i) Rebates, credits, discounts, and interest earned on them, a DoD Component would reserve paragraph A.3.c and insert the wording of that paragraph as a new paragraph at the end of section A.2, thereby adding them to the list of items included as program income subject to FMS Article VII.

(ii) Taxes, special assessments, levies, fines and other similar revenue raised by a governmental recipient, a DoD Component would reserve paragraph A.3.d and insert that wording as a new paragraph at the end of section A.2, thereby adding them to the list of items included as program income subject to FMS Article VII.

§ 1128.715 Recipient obligations for license fees and royalties.

(a) *Policy.* Unless a statute or program regulation adopted in the Code of Federal Regulations after opportunity for public comment provides otherwise, a DoD Component's general terms and conditions may not specify that recipients have obligations to the Federal Government with respect to program income from license fees and royalties for patents or patent applications, copyrights, trademarks, or inventions produced under DoD awards.

(b) *Award terms and conditions*—(1) *General.* Except as provided in paragraph (b)(2) of this section, a DoD Component's general terms and conditions must implement the policy in paragraph (a) of this section by including the wording provided in appendix G to this part as Section D of FMS Article VII.

(2) *Exception.* If a DoD Component has a statutory or regulatory basis for establishing recipient obligations for the license fees and royalties described in paragraph (a) of this section, it may reserve Section D of FMS Article VII in its general terms and conditions.

§ 1128.720 Program income use.

(a) *OMB guidance.* OMB guidance in 2 CFR 200.307(e) identifies alternative ways that a Federal agency might specify that recipients use program income they earn.

(b) *DoD implementation.* A DoD Component's general terms and conditions must specify how recipients are to use program income under awards using those terms and conditions.

(1) The terms and conditions may specify one of the following ways for recipients to use program income:

(i) *Addition.* A recipient under this alternative adds program income to the total amount of the approved budget, which consists of the Federal share of funding and any required matching or cost sharing.

(ii) *Deduction.* A recipient using this alternative subtracts program income from total allowable costs to determine net allowable costs for purposes of determining the Federal share of funding and any required cost sharing or matching.

(iii) *Cost sharing or matching.* Under this alternative, a recipient counts program income toward its required cost sharing or matching.

(iv) *Combination.* The fourth alternative is a combination of any of the three alternatives described in paragraphs (b)(1)(i) through (iii) of this section. For example, an agency might specify one alternative to be used for program income up to a dollar limit and a second alternative for any program income beyond that amount.

(2) For research awards, absent compelling reasons to do otherwise for a specific set of general terms and conditions, a DoD Component must specify the addition alternative described in paragraph (b)(1)(i) of this section.

(3) For general terms and conditions of other awards, a Component may

specify any of the alternatives described in paragraph (a) of this section. However, the cost sharing or matching alternative is best used as part of a combination alternative, as described in paragraph (b)(1)(iv) of this section, unless the DoD Component knows at the time awards are made how much program income recipients will earn in relation to the amounts of their required cost sharing or matching.

(c) *Award terms and conditions.* (1) *Default—addition alternative.* In accordance with the DoD implementation in paragraph (b) of this section, a DoD Component must use the wording provided in appendix G to this part as Section E of FMS Article VII in:

(i) Research awards; and

(ii) Other awards for which it elects to specify the addition alternative for use of program income.

(2) *Deduction alternative.* A DoD Component electing to specify the deduction alternative for use of program income must modify the wording appendix G to this part provides for Section E by:

(i) Substituting the following wording for the wording of paragraph E.1: ''1. You must use any program income that you earn during the period of performance under this award as a deduction from the total approved budget of this award. The program income must be used for the purposes and in accordance with the terms and conditions of the award.''

(ii) Including an additional paragraph E.4, such as the following, to inform recipients how the award will change if program income is deducted: ''If you report program income on the Federal Financial Report (SF–425), we will recalculate the Federal share of the budget and the non-Federal share if there is one. We also will modify the award to reflect the recalculated share or shares and the amount of program income you must spend on the project, which is the difference between the originally approved and recalculated budget amounts.''

(3) *Cost-sharing or matching alternative.* A DoD Component electing to specify the cost-sharing or matching alternative for use of program income must replace the wording appendix G to this part provides for Section E with the following wording: ''You must use any program income that you earn during the period of performance under this award to meet any cost-sharing or matching requirement under this award. The program income must be used for the purposes and in accordance with the terms and conditions of the award.''

(4) *A combination of alternatives.* A DoD Component electing to specify some combination of addition, deduction, and cost-sharing or matching alternatives must use wording in Section E of FMS Article VII that specifies requirements for each alternative in the combination that is consistent with the requirements specified for that alternative in paragraphs (c)(1), (2), or (3) of this section.

§ 1128.725 Program income after the period of performance.

(a) *OMB guidance.* OMB guidance in 2 CFR 200.307(f) provides that an agency may specify in agency regulations, grant or cooperative agreement terms and conditions, or agreements negotiated with recipients during the closeout process that a recipient is accountable to the Federal Government for program income earned after the end of the period of performance.

(b) *DoD implementation.* A DoD Component should rarely, if ever, establish a requirement for a recipient to be accountable to the Federal Government for program income earned after the end of the period of performance.

(c) *Award terms and conditions.* A DoD Component's general terms and conditions must include as Section F of FMS Article VII the wording for that section that is provided in appendix G to this part. That wording specifies that recipients are not accountable to the Federal Government for program income earned after the end of the performance period. If an exception is warranted for an individual award, the exception is properly addressed at the time of award in the award-specific terms and conditions.

Appendix A to Part 1128—Terms and Conditions for FMS Article I, ''Financial Management System Standards''

Unless any part of this appendix is reserved, as provided in § 1128.105, a DoD Component's general terms and conditions must include the following wording for FMS Article I.

FMS Article I. Financial Management System Standards. (DECEMBER 2014)

Section A. System standard for States. As a State, you must expend and account for funds under this award in accordance with:

1. Applicable State laws; and

2. To the extent they comply with the requirements of Section B of this Article, your procedures for expending and accounting for your own State funds.

Section B. System standards for all recipients. Your financial management system must provide for:

1. Inclusion, in your accounts, of the following information about each DoD grant or cooperative agreement that you receive:

a. That you received the award from DoD;

b. The number and title listed in the Catalog of Federal Domestic Assistance for the DoD program under which the award was made;

c. The DoD award number; and

d. The year (your fiscal year) in which you received the award.

2. Accurate, current, and complete disclosure of the financial results of the award needed to comply with financial and programmatic reporting requirements that are specified in REP Articles I and II of these general terms and conditions, as supplemented by any award-specific terms and conditions of this award concerning reporting requirements. If you are asked at any time under this award to report financial information on an accrual basis, you:

a. Need not establish an accrual accounting system if you maintain your records on a different basis; and

b. May develop the accrual data based on an analysis of the data you have on hand.

3. Records that identify adequately the sources of funds for all activities funded by DoD awards, including any required cost sharing or matching, and the application of those funds. This includes funding authorizations; your obligations and expenditures of the funds; unobligated balances; property and other assets under the award; program income; and interest.

4. Effective control over, and accountability for, all funds, property, and other assets under this award. You must adequately safeguard all assets and ensure they are used solely for authorized purposes (see Section C of this article for additional requirements concerning internal controls).

5. Comparison of expenditures under this award for project or program purposes with amounts in the approved budget for those purposes.

6. The ability to relate financial data to performance accomplishments under this award if you are required to do so by the programmatic reporting requirements in REP Article I of these general terms and conditions, as supplemented by any award-specific terms and conditions of this award concerning reporting requirements.

7. Written procedures:

a. To implement requirements specified in FMS Article II, ''Payments;''

b. For determining the allowability of costs, which for this award are determined in accordance with FMS Article III, ''Allowable costs, period of availability of funds, and fee or profit,'' of these general terms and conditions, as supplemented by any award-specific terms and conditions of this award that relate to allowability of costs.

Section C. Internal controls. Your system of internal controls must conform to OMB guidance in 2 CFR 200.303. With respect to paragraph (e) of 2 CFR 200.303, your internal control system must include measures to safeguard any information that Federal statute, Executive order, or regulation requires to be protected (*e.g.,* personally identifiable or export controlled information), whether generated under the

award or provided to you and identified as being subject to protection.

Appendix B to Part 1128—Terms and Conditions for FMS Article II, ''Payments''

Unless a DoD Component adds, deletes, or modifies wording, as permitted by §§ 1128.210 through 1128.220, a DoD Component's general terms and conditions must include the following wording for FMS Article II.

FMS Article II. Payments. (DECEMBER 2014)

Section A. Awards to States. If the award-specific terms and conditions of this award do not identify it as an award subject to Subpart A of 31 CFR part 205 (Department of the Treasury regulations implementing the Cash Management Improvement Act), then this award is subject to Subpart B of that part. Consistent with Subpart B of 31 CFR part 205:

1. *Payment method, timing, and amounts. You must:*

a. Minimize the time between your receipt of a payment under this award and your disbursement of those funds for program purposes.

b. Limit the amount of each advance payment request to the minimum amount you need to meet your actual, immediate cash requirements for carrying out the program or project.

c. Submit each advance payment request approximately 10 days before you anticipate disbursing the requested amount for program purposes, so that your receipt of the funds will be as close in time as is administratively feasible to your actual cash outlay for direct project costs and the proportionate share of any allowable indirect costs.

2. *Interest.* Unlike awards subject to Subpart A of 31 CFR part 205, neither you nor we will incur any interest liability due to a difference in timing between your receipt of payments under this award and your disbursement of those funds for project or program purposes.

Section B. Awards to institutions of higher education, nonprofit organizations, local governments, and Indian tribes.

1. *Payment method.* Unless the award-specific terms and conditions of this award provide otherwise, you are authorized to request advance payments under this award. That authorization is contingent on your continuing to maintain, or demonstrating the willingness to maintain, written procedures that minimize the time elapsing between your receipt of each payment and your disbursement of the funds for program purposes. Note that you are not required to request advance payments and may instead, at your option, request reimbursements of funds after you disburse them for project or program purposes.

2. *Amounts requested.* You must:

a. Limit the amount of any advance payment request to the minimum amount needed to meet your actual, immediate cash requirements for carrying out the purpose of the approved program or project, including direct project costs and a proportionate share of any allowable indirect costs.

b. Exclude from any payment request amounts you are withholding from payments to contractors to assure satisfactory completion of the work. You may request those amounts when you make the payments to the contractors or to escrow accounts established to ensure satisfactory completion of the work.

c. Exclude from any payment request amounts from any of the following sources that are available to you for program purposes under this award: program income, including repayments to a revolving fund; rebates; refunds; contract settlements; audit recoveries; and interest earned on any of those funds. You must disburse those funds for program purposes before requesting additional funds from us.

3. *Timing of requests.* For any advance payment you request, you should submit the request approximately 10 days before you anticipate disbursing the requested amount for project or program purposes. With time for agency processing of the request, that should result in payment as close as is administratively feasible to your actual disbursements for project or program purposes.

4. *Frequency of requests.* You may request payments as often as you wish unless you have been granted a waiver from requirements to receive payments by electronic funds transfer (EFT). If you have been granted a waiver from EFT requirements, the award-specific terms and conditions of this award specify the frequency with which you may submit payment requests.

5. *Withholding of payments.* We will withhold payments for allowable costs under the award at any time during the period of performance only if one or more of the following applies:

a. We suspend either payments or the award, or disallow otherwise allowable costs, as a remedy under OAR Article III due to your material failure to comply with Federal statutes, regulations, or the terms and conditions of this award. If we suspend payments and not the award, we will release withheld payments upon your subsequent compliance. If we suspend the award, then amounts of payments are subject to adjustment in accordance with the terms and conditions of OAR Article III.

b. You are delinquent in a debt to the United States as defined in OMB Circular A–129, ''Policies for Federal Credit Programs and Non-Tax Receivables,'' in which case we may, after reasonable notice, inform you that we will not make any further payments for costs you incurred after a specified date until you correct the conditions or liquidate the indebtedness to the Federal Government.

c. The award-specific terms and conditions of this award include additional requirements that provide for withholding of payments based on conditions identified during our pre-award risk evaluation, in which case you should have been notified about the nature of those conditions and the actions needed to remove the additional requirements.

6. *Depository requirements.*

a. There are no eligibility requirements for depositories you use for funds you receive under this award.

b. You are not required to deposit funds you receive under this award in a depository account separate from accounts in which you deposit other funds. However, FMS Article I requires that you be able to account for the receipt, obligation, and expenditure of all funds under this award.

c. You must deposit any advance payments of funds you receive under this award in insured accounts whenever possible and, unless any of the following apply, you must deposit them in interest-bearing accounts:

i. You receive a total of less than $120,000 per year under Federal grants and cooperative agreements.

ii. You would not expect the best reasonably available interest-bearing account to earn interest in excess of $500 per year on your cash balances of advance payments under Federal grants and cooperative agreements.

iii. The best reasonably available interest-bearing account would require you to maintain an average or minimum balance higher than it would be feasible for you to do within your expected Federal and non-Federal cash balances.

iv. A foreign government or banking system precludes your use of interest-bearing accounts.

d. You may retain for administrative expenses up to $500 per year of interest that you earn in the aggregate on advance payments you receive under this award and other Federal grants and cooperative agreements. You must remit annually the rest of the interest to the Department of Health and Human Services, Payment Management System, using the procedures set forth in OMB guidance in 2 CFR 200.305(b)(9).

Section C. Electronic funds transfer and other payment procedural instructions or information.

1. *Electronic funds transfer.* Unless the award-specific terms and conditions of this award provide otherwise, you will receive payments under this award by electronic funds transfer.

2. [Reserved].

Appendix C to Part 1128—Terms and Conditions for FMS Article III, ''Allowable Costs, Period of Availability of Funds, and Fee or Profit''

Unless a DoD Component reserves sections or paragraphs of this article, as permitted by §§ 1128.310 through 1128.325, a DoD Component's general terms and conditions must include the following wording for FMS Article III.

FMS Article III. Allowable Costs, Period of Availability of Funds, and Fee or Profit (December 2014)

Section A. Allowable costs. This section, with the clarification provided in Section B, specifies which Federal cost principles must be used in determining the allowability of costs charged to this award, a subrecipient's costs charged to any cost-type subaward that you make under this award, and a contractor's costs charged to any cost-type procurement transaction into which you enter under this award. These cost principles also govern the allowable costs that you or a subrecipient of a subaward at any tier

below this award may consider when establishing the amount of any fixed-amount subaward or fixed-price procurement transaction at the next lower tier. The set of cost principles to be used in each case depends on the type of entity incurring the cost under the award, subaward, or contract.

1. *General case.* If you, your subrecipient, or your contractor is:

a. *An institution of higher education*, the allowability of costs must be determined in accordance with provisions of Subpart E of OMB guidance in 2 CFR part 200 other than 2 CFR 200.400(g), supplemented by appendix III to that part.

b. *A hospital*, the allowability of costs must be determined in accordance with provisions of appendix IX to 2 CFR part 200, which currently specifies the cost principles in appendix IX to 45 CFR part 75 as the applicable cost principles.

c. *A nonprofit organization other than a hospital or institution of higher education*, the allowability of costs must be determined in accordance with provisions of Subpart E of OMB guidance in 2 CFR part 200 other than 2 CFR 200.400(g), supplemented by appendices IV and VIII to that part. In accordance with guidance in 2 CFR 200.401(c), a nonprofit organization listed in appendix VIII to 2 CFR part 200 is subject to the cost principles for for-profit entities specified in paragraph 1.e of this section.

d. *A State, local government, or Indian tribe*, the allowability of costs must be determined in accordance with applicable provisions of Subpart E of OMB guidance in 2 CFR part 200 other than 2 CFR 200.400(g), supplemented by appendices V through VII to that part.

e. *A for-profit entity (other than a hospital) or a nonprofit organization listed in appendix VIII to 2 CFR part 200:*

i. The allowability of costs must be determined in accordance with:

(A) The cost principles for commercial organizations in the Federal Acquisition Regulation (FAR) at Subpart 31.2 of 48 CFR part 31, as supplemented by provisions of the Defense Federal Acquisition Regulation Supplement (DFARS) at Subpart 231.2 of 48 CFR part 231; and

(B) For a for-profit entity, the additional provisions on allowability of audit costs, in 32 CFR 34.16(f).

ii. The indirect cost rate to use in that determination is:

(A) The for-profit entity's federally negotiated indirect cost rate if it has one.

(B) Subject to negotiation between you and the for-profit entity if it does not have a federally negotiated indirect cost rate. The rate that you negotiate may provide for reimbursement only of costs that are allowable in accordance with the cost principles specified in paragraph A.1.e.i of this article.

2. *Exception.* You may use your own cost principles in determining the allowability of a contractor's costs charged to a cost-type procurement transaction under this award—or in pricing for a fixed-price contract based on estimated costs—as long as your cost principles comply with the Federal cost principles that paragraph A.1 of this section identifies as applicable to the contractor.

Section B. Clarifications concerning charges for professional journal publications. For an entity that Section A of this article makes subject to the cost principles in Subpart E of 2 CFR part 200:

1. Costs of publishing in professional journals are allowable under 2 CFR 200.461(b) only if they are consistently applied across the organization. An organization may not charge costs of journal publications as direct costs to this award if it charges any of the same type of costs for other journal publications as indirect costs.

2. ''Costs of publication or sharing of research results'' in 2 CFR 200.461(b)(3) are the ''charges for professional journal publications'' described in 2 CFR 200.461(b) and subject to the conditions of 2 CFR 200.461(b)(1) and (2).

Section C. Period of availability of funds. You may charge to this award only:

1. Allowable costs incurred during the period of performance specified in this award, including any subsequent amendments to it;

2. Any pre-award costs that you are authorized (by either the terms and conditions of FMS Article IV or the DoD awarding official) to incur prior to the start of the period of performance, at your own risk, for purposes of the project or program under this award; and

3. Costs of publishing in professional journals incurred after the period of performance, as permitted under 2 CFR 200.461(b)(3), if:

a. We receive the request for payment for such costs no later than the date on which REP Article II requires you to submit the final financial report to us (or, if we grant your request for an extension of the due date, that later date on which the report is due); and

b. Your reported expenditures on the final financial report include the amount you disbursed for those costs.

Section D. Fee or profit.

1. You may not receive any fee or profit under this award.

2. You may not use funds available to you under this award to pay fee or profit to an entity of any type to which you make a subaward.

3. You may pay fee or profit to an entity with which you enter into a procurement transaction to purchase goods or general support services for your use in carrying out the project or program under the award.

Appendix D to Part 1128—Terms and Conditions for FMS Article IV, ''Revision of Budget and Program Plans''

Unless a DoD Component reserves a section or paragraph or adds or modifies wording, as permitted by §§ 1128.410 through 1128.430, a DoD Component's general terms and conditions must include the following wording for FMS Article IV.

FMS Article IV. Revision of Budget and Program Plans (DECEMBER 2014)

Section A. Approved budget. The approved budget of this award:

1. Is the most recent version of the budget that you submitted, and we approved (either at the time of the initial award or a more recent amendment), to summarize planned expenditures for project or program purposes.

2. Includes all Federal funding that we make available to you under this award to use for project or program purposes and any cost sharing or matching that you are required to provide under this award for those same purposes.

Section B. Revisions requiring prior approval.

1. *Non-construction activities.* You must request prior approval from us for any of the following program or budget revisions in non-construction activities:

a. A change in the scope or objective of the project or program under this award, even if there is no associated budget revision that requires our prior approval.

b. A change in a key person identified in the award cover pages.

c. The approved principal investigator's or project director's disengagement from the project for more than three months, or a 25 percent reduction in his or her time devoted to the project.

d. The inclusion of direct costs that require prior approval in accordance with the applicable cost principles, as identified in FMS Article III.

e. The transfer to other categories of expense of funds included in the approved budget for participant support costs, as defined at 2 CFR 200.75.

f. A subaward to another entity under which it will perform a portion of the substantive project or program under the award, if it was not included in the approved budget. This does not apply to your contracts for acquisition of supplies, equipment, or general support services you need to carry out the project or program.

g. Any change in the cost sharing or matching you provide under the award, as included in the approved budget, for which FMS Article VI requires prior approval.

h. A transfer of funds among direct cost categories or programs, functions, and activities, if the Federal share of the total value for your award exceeds the simplified acquisition threshold and the cumulative amount of the transfers exceeds or is expected to exceed 10 percent of the approved budget.

i. The need arises for additional Federal funds to complete the project or program.

2. *Construction activities.* You must request prior approval from us for any of the following program or budget revisions in construction activities:

a. A change in the scope or objective of the project or program under this award, even if there is no associated budget revision that requires our prior approval.

b. The need arises for additional Federal funds to complete the project or program.

c. The inclusion of direct costs that require prior approval in accordance with the applicable cost principles, as identified in FMS Article III.

3. *Funding transfers between construction and non-construction activities.* [Reserved.]

Section C. Pre-award costs, carry forward of unobligated balances, and one-time no-cost extensions. You are authorized, without requesting prior approval from us, to:

1. Charge to this award after you receive it pre-award costs that you incurred, at your own risk, up to 90 calendar days before the start date of the period of performance, as long as they are costs that would be allowable charges to the project or program under the terms and conditions of FMS Article III if they were incurred during the period of performance.

2. Carry forward an unobligated balance to a subsequent period of performance under this award.

3. Initiate a one-time extension of the period of performance by up to 12 months, as long as:

a. You notify us in writing with the supporting reasons and revised end date of the period of performance at least 10 calendar days before the current end date.

b. The extension does not require any additional Federal funding.

c. The extension does not involve any change in the scope or objectives of the project or program.

Section D. Procedures.

1. We will review each request you submit for prior approval for a budget or program change and, within 30 calendar days of our receipt of your request, we will respond to you in writing to either:

a. Notify you whether your request is approved; or

b. Inform you that we still are considering the request, in which case we will let you know when you may expect our decision.

2. [Reserved.]

Appendix E to Part 1128—Terms and Conditions for FMS Article V, ''Non-Federal Audits''

Unless a DoD Component reserves Section B, as permitted by § 1128.605, a DoD Component's general terms and conditions must use the following wording for FMS Article V.

FMS Article V. Non-Federal Audits (DECEMBER 2014)

Section A. Requirements for entities subject to the Single Audit Act. You and each subrecipient under this award that is an institution of higher education, nonprofit organization, State, local government, or Indian tribe must comply with the audit requirements specified in Subpart F of 2 CFR part 200, which is the OMB implementation of the Single Audit Act, as amended (31 U.S.C. chapter 75).

Section B. Requirements for for-profit entities. Any for-profit entity that receives a subaward from you under this award is subject to the audit requirements specified in 32 CFR 34.16. Your subaward terms and conditions will require the subrecipient to provide the reports to you if it is willing to do so, so that you can resolve audit findings that pertain specifically to your subaward (*e.g.,* disallowance of costs). If the for-profit entity is unwilling to agree to provide the auditor's report to you, contact the grants officer for this award to discuss an alternative approach for carrying out audit oversight of the subaward. If the grants officer does not provide an alternative approach within 30 days of receiving your request, you may determine an approach to ensure the for-profit subrecipient's compliance with the subaward terms and conditions, as described in OMB guidance at 2 CFR 200.501(h).

Appendix F to Part 1128—Terms and Conditions for FMS Article VI, ''Cost Sharing or Matching''

Unless a DoD Component reserves FMS Article VI in its entirety, reserves one or more paragraphs within sections of the article, or includes added or alternate wording, as permitted by §§ 1128.610 through 1128.635, a DoD Component's general terms and conditions must use the following wording for FMS Article VI.

FMS Article VI. Cost Sharing or Matching (DECEMBER 2014)

Section A. Required cost sharing or matching.

1. If any cost sharing or matching is required under this award, the total amount or percentage required is shown in the award cover pages and included in the approved budget. That cost sharing or matching includes all:

a. Cash contributions to the project or program either made by or through (if made by a third party) you and any subrecipients.

b. Third-party in-kind contributions to the project or program.

2. You must obtain our prior approval if you wish to:

a. Change the amount or percentage of cost sharing or matching required under this award.

b. [Reserved].

Section B. Allowability as cost sharing or matching. Each cash or third party in-kind contribution toward any cost sharing or matching required under this award, whether put forward by you or a subrecipient under a subaward that you make, is allowable as cost sharing or matching if:

1. You (or the subrecipient, if it is a subrecipient contribution) maintain records from which one may verify that the contribution was made to the project or program and, if it is a third-party in-kind contribution, its value.

2. The contribution is not counted as cost sharing or matching for any other Federal award.

3. The contribution is:

a. Allowable under the cost principles applicable to you (or the subrecipient, if it is a subrecipient contribution) under FMS Article III of these terms and conditions; and

b. Allocable to the project or program and reasonable.

4. The Government does not pay for the contribution through another Federal award, unless that award is under a program that has a Federal statute authorizing application of that program's Federal funds to other Federal programs' cost sharing or matching requirements.

5. The value of the contribution is not reimbursed by the Federal share of this award as either a direct or indirect cost.

6. The contribution conforms to the other terms and conditions of this award, including the award-specific terms and conditions.

Section C. Allowability of unrecovered indirect costs as cost sharing or matching. You may use your own or a subrecipient's unrecovered indirect costs as cost sharing or matching under this award. Unrecovered indirect costs means the difference between the amount of indirect costs charged to the award and the amount that you and any subrecipients could have charged in accordance with your respective approved indirect cost rates, whether those rates are negotiated or de minimis (as described in 2 CFR 200.414(f)).

Section D. Allowability of program income as cost sharing or matching. If FMS Article VII of these general terms and conditions or the award-specific terms and conditions of this award specify that you are to use some or all of the program income you earn to meet cost-sharing or matching requirements under the award, then program income is allowable as cost sharing or matching to the extent specified in those award terms and conditions.

Section E. Valuation of services or property that you or subrecipients contribute or donate. You must establish values for services or property contributed or donated toward cost sharing or matching by you or subrecipients in accordance with the provisions of this section. These contributions or donations are distinct from third-party in-kind contributions to you or subrecipients, which are addressed in Section F of this article.

1. *Usual valuation of services or property that you or subrecipients contribute or donate.* Values established for contributions of services or property by you or a subrecipient must be the amounts allowable in accordance with the cost principles applicable to the entity making the contribution (*i.e.,* you or the subrecipient), as identified in FMS Article III. For property, that generally is depreciation.

2. *Needed approvals for, and valuation of, property that you or subrecipients donate.*

a. *Types of property that may be donated.*

i. *Buildings or land.* If the purposes of this award include construction, facilities acquisition, or long-term use of real property, you may donate buildings or land to the project if you obtain our prior approval. Donation of property to the project, as described in PROP Article I, means counting the value of the property toward cost sharing or matching, rather than charging depreciation.

ii. *Other capital assets.* If you obtain our prior approval, you may donate to the project other capital assets identified in 2 CFR 200.439(b)(1) through (3).

b. *Usual valuation of donated property.* Unless you obtain our approval as described in paragraph E.2.c of this article, the value for the donated property must be the lesser of:

i. The value of the remaining life of the property recorded in your accounting records at the time of donation, or

ii. The current fair market value.

c. *Approval needed for alternative valuation of property.* If you obtained our approval in the approved budget, you may count as cost sharing or matching the current fair market value of the donated property even if it exceeds the value of the remaining life of the property recorded in your accounting records at the time of donation.

d. *Federal interest in donated property.* Donating buildings, land, or other property to

the project, rather than charging depreciation, results in a Federal interest in the property in accordance with PROP Article I of these terms and conditions.

Section F. Valuation of third-party in-kind contributions.

1. *General.* If a third party furnishes goods or services to you or subrecipients that are to be counted toward cost sharing or matching under this award, the entity to which the third party furnishes the goods or services (*i.e.,* you or a subrecipient) must document the fair market value of those in-kind contributions and, to the extent feasible, support those values using the same methods the entity uses internally.

2. *Valuation of third-party services.* You must establish values for third-party volunteer services and services of third parties' employees furnished to you or subrecipients as follows:

a. *Volunteer services.* Volunteer services furnished by third-party professional and technical personnel, consultants, and other skilled and unskilled labor must be valued in accordance with 2 CFR 200.306(e).

b. *Services of third parties' employees.* When a third-party organization furnishes the services of its employees to you or a subrecipient, values for the contributions must be established in accordance with 2 CFR 200.306(f).

c. *Additional requirement for donations to nonprofit organizations.* For volunteer services or services of third parties' employees furnished to a nonprofit organization:

i. OMB guidance in 2 CFR 200.434(e) also applies and may require the nonprofit organization to allocate a proportionate share of its applicable indirect costs to the donated services.

ii. The indirect costs that the nonprofit organization allocates to the donated services in that case must be considered project costs and may be either reimbursed under the award or counted toward required cost sharing or matching, but not both.

3. *Valuation of third-party property.* You must establish values for third-party property furnished to you or subrecipients as follows:

a. *Supplies donated by third parties.* When a third-party organization donates supplies (*e.g.,* office, laboratory, workshop, or classroom supplies), the value that may be counted toward cost sharing or matching may not exceed the fair market value of the supplies at the time of donation.

b. *Equipment, buildings, or land donated by third parties.*

i. The value of third-party donations of equipment, buildings, or land that may be counted toward cost sharing or matching when the third party transferred title to you or a subrecipient depends on the purpose of the award in accordance with the following:

(A) If one of the purposes of the award is to assist you or the subrecipient in the acquisition of equipment, buildings, or land, you may count the aggregate fair market value of the donated property toward cost sharing or matching.

(B) If the award's purposes instead include only the support of activities that require the use of equipment, buildings, or land, you may only charge depreciation unless you obtain our prior approval to count as cost sharing or matching the fair market value of equipment or other capital assets and fair rental charges for land.

ii. The values of the donated property must be determined in accordance with the usual accounting policies of the entity to which the third party transferred title to the property, with the qualifications specified in 2 CFR 200.306(i)(1) and (2) for donated land and buildings and donated equipment, respectively.

c. *Use of space donated by third parties.* If a third party makes space available for use by you or a subrecipient, the value that you may count toward cost sharing or matching may not exceed the fair rental value of comparable space as established by an independent appraisal, as described in 2 CFR 200.306(i)(3).

d. *Equipment loaned by third parties.* If a third party loans equipment for use by you or a subrecipient, the value that you may count toward cost sharing or matching may not exceed its fair rental value.

Appendix G to Part 1128—Terms and Conditions for FMS Article VII, ''Program Income''

Unless a DoD Component revises the wording of Section A or E or reserves Section D, as permitted by §§ 1128.710 through 1128.725, a DoD Component's general terms and conditions must use the following wording for FMS Article VII.

FMS Article VII. Program Income (December 2014)

Section A. Definition. The term ''program income'' as used in this award:

1. Is gross income that:

a. You earn that is directly generated by a supported activity or earned as a result of this award; or

b. A subrecipient earns as a result of a subaward you make under this award.

2. Includes, but is not limited to, income earned under this award from:

a. Fees for services performed;

b. The use or rental of real or personal property acquired under any Federal award and currently administered under this award;

c. The sale of commodities or items fabricated under this award;

d. License fees and royalties on patents and copyrights; and

e. Payments of principal and interest on loans made with Federal award funds.

3. Does not include for purposes of this award any:

a. Interest earned on advance payments, disposition of which is addressed in FMS Article II;

b. Proceeds from the sale of real property, equipment or supplies, which is addressed in PROP Articles III and IV;

c. Rebates, credits, discounts, and interest earned on any of them; and

d. Governmental revenues, including any taxes, special assessments, levies, fines and similar revenues you raise.

Section B. Encouragement to earn program income. You are encouraged to earn program income under this award when doing so does not interfere with the program or project the award supports.

Section C. Costs of generating program income. You may deduct costs incidental to the generation of program income from the amount that you use in accordance with Section E of this Article, as long as those costs are not charged to this award (which includes their being counted toward any cost sharing or matching you are required to provide).

Section D. License fees and royalties. You have no obligations to the Federal Government with respect to program income earned under this award from license fees and royalties for patents or patent applications, copyrights, trademarks, or inventions developed or produced under the award.

Section E. Use of program income.

1. You must use any program income that you earn during the period of performance under this award to increase the amount of the award (the sum of the Federal share and any cost sharing or matching you are required to provide), thereby increasing the amount budgeted for the project. The program income must be used for the purposes and under the terms and conditions of the award.

2. Your use of the additional funding is subject to the terms and conditions of this award, including:

a. FMS Article II concerning your use of balances of program income before you request additional funds from us; and

b. FMS Article III concerning allowability of costs for which the funds may be used.

3. You must report on each Federal Financial Report (SF–425) that you submit in accordance with REP Article II the program income that you earn and any that you use during the reporting period covered by that SF–425.

Section F. Duration of accountability for program income. The requirements concerning disposition of program income in Section E of this Article apply only to program income you earn during the period of performance. There are no requirements under this award applicable to program income you earn after the end of the period of performance.

PART 1130—PROPERTY ADMINISTRATION: GENERAL AWARD TERMS AND CONDITIONS

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Appendix F to Part 1130—Terms and conditions for PROP Article VI, ''Intangible property''

Authority: 5 U.S.C. 301 and 10 U.S.C. 113.

§ 1130.1 Purpose of this part.

(a) This part specifies standard wording of general terms and conditions concerning equipment, supplies, and real, intangible, and federally owned property.

(b) It thereby implements OMB guidance in 2 CFR 200.310 through 200.316, as that guidance applies to general terms and conditions of grants and cooperative agreements.

§ 1130.2 Applicability of this part.

The types of awards and entities to which this part and other parts in this subchapter apply are described in the subchapter overview at 2 CFR 1126.2.

§ 1130.3 Exceptions from requirements of this part.

Exceptions are permitted from the administrative requirements in this part only as described at 2 CFR 1126.3.

§ 1130.4 Organization of this part.

(a) The content of this part is organized into subparts and associated appendices.

(1) Each subpart provides direction to DoD Components on how to construct one article of general terms and conditions for grants and cooperative agreements.

(2) For each subpart, there is a corresponding appendix with standard wording for terms and conditions of the article addressed by the subpart. Terms and conditions address rights and responsibilities of the Federal Government and recipients.

(b) A DoD Component must use the wording provided in each appendix in accordance with the direction in the corresponding subpart. That direction may permit DoD Components to vary from the standard wording in some situations.

(c) Table 1 shows which article of general terms and conditions may be found in each of appendices A through F to this part (with the associated direction to DoD Components in Subparts A through F, respectively):

TABLE 1 TO PARAGRAPH (c)

In . . .	You will find terms and conditions specifying recipients' rights and responsibilities related to . . .	That would appear in an award within PROP Article . . .
Appendix A	Title to property	I.
Appendix B	Property management system	II.
Appendix C	Use and disposition of real property	III.
Appendix D	Use and disposition of equipment and supplies	IV.
Appendix E	Use and disposition of federally owned property	V.
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Subpart A—Title to Property (PROP Article I)

§ 1130.100 Purpose of PROP Article I.

PROP Article I specifies in whom and under what conditions title to property vests under the award. It thereby implements OMB guidance for grants and cooperative agreements:

(a) Pertaining to vesting of title to property, in 2 CFR 200.311(a), 200.312(a), 200.313(a), 200.314(a), and 200.315(a).

(b) Pertaining to the property trust relationship in 2 CFR 200.316.

§ 1130.105 Title to property acquired under awards.

(a) *General policy.* Title to tangible property that a recipient acquires under an award (whether by purchase, construction or fabrication, development, or otherwise), and title to intangible property that a recipient acquires other than by developing or producing it under an award, generally vests in the recipient subject to the conditions in PROP Articles II–IV and Section D of PROP Article VI, which protect the Federal interest in the property.

(b) *Exceptions to the general policy when there is statutory authority*—(1) *Exempt property in general.* If a DoD Component has statutory authority to do so, it may vest title in recipients to property acquired under awards either unconditionally or subject to fewer conditions than those in PROP Articles II–IV and VI. This subpart refers to acquired property for which a DoD Component has such statutory authority—and elects to use it—as ''exempt property.''

(2) *Research awards.* (i) Under 31 U.S.C. 6306, a DoD Component may vest

title to tangible personal property (*i.e.,* equipment and supplies) in a nonprofit institution of higher education or nonprofit organization whose primary purpose is conducting scientific research—without further obligation to the Federal Government or subject to conditions the DoD Component deems appropriate—if the property is bought with amounts provided under a grant or cooperative agreement for basic or applied research.

(ii) As a matter of policy, to enhance the university infrastructure for future performance of defense research and research-related education and training, DoD Components must make maximum use of the authority of 31 U.S.C. 6306 to vest title to equipment in nonprofit institutions of higher education subject to only the following three conditions:

(A) The recipient uses the equipment for the authorized purposes of the project or program until the property is no longer needed for those purposes.

(B) The recipient manages the equipment as provided in PROP Article II of the general terms and conditions (see Subpart B of this part). This includes maintaining property records that include the percentage of Federal participation in the costs of the project or program under which the recipient acquired the exempt property, so that the recipient may deduct the Federal share if it wishes to use the property in future contributions for cost sharing or matching purposes on Federal awards.

(C) The DoD Component reserves the right to transfer title to the equipment to another recipient entity if the Principal Investigator relocates his or her research program to that entity.

(c) *Award terms and conditions*—(1) *General.* Unless a DoD Component has a statute authorizing it to identify acquired property as exempt property, as described in paragraph (b) of this section, it must use the wording appendix A to this part provides for Section A of PROP Article I.

(2) *Exceptions.* (i) If a DoD Component has statutory authority such as described in paragraph (b) of this section, and elects to use that authority for awards subject to its general terms and conditions, it must insert wording in paragraph A.2 of PROP Article I to:

(A) Identify the type or types of property it is exempting from the standard requirements for title vesting, use, and disposition contained in PROP Articles II through IV and VI and reporting requirements contained in REP Article III of the general terms and conditions.

(B) If it is exempting the property from some, but not all, of the standard requirements, identify the requirements to which the exempt property will be subject.

(ii) Paragraph A.2 of PROP Article I in general terms and conditions used for research awards to institutions of higher education and nonprofit organizations whose primary purpose is conducting scientific research generally should provide for vesting of title to acquired equipment and supplies in those types of entities when they are conducting basic or applied research subject only to the three conditions described in paragraph (b)(2)(ii) of this section.

§ 1130.110 Property trust relationship.

(a) *OMB guidance.* OMB guidance in 2 CFR 200.316 describes the property trust relationship. It states that:

(1) Recipients must hold real property, equipment, and intangible property acquired or improved under grants or cooperative agreements in trust for the beneficiaries of the projects or programs under which the property was acquired or improved; and

(2) A Federal agency may require a recipient to record liens or other appropriate notices of record to indicate that personal or real property was acquired or improved under a grant or cooperative agreement, making the property's use and disposition subject to the award terms and conditions.

(b) *DoD implementation.* A DoD Component's general terms and conditions must specify that recipients hold title to real property, equipment, and intangible property acquired or improved under DoD grants and cooperative agreements in trust for the beneficiaries of the projects or programs carried out under those awards.

(c) *Award terms and conditions.* A DoD Component's general terms and conditions:

(1) Must include the wording appendix A to this part provides for paragraph B.1 of PROP Article I, except that a DoD Component may instead reserve Section B if there will be no acquisition or improvement of real property, equipment, or intangible property under awards using those general terms and conditions or subawards under those awards.

(2) May add wording to the reserved paragraph B.2 of the wording of Section B of PROP Article I to require recipients to record liens or other notices of record, as described in paragraph (a) of this section.

§ 1130.115 Title to federally owned property.

(a) *Requirement.* A DoD Component's general terms and conditions must inform recipients that title to federally owned property remains with the Federal Government and include the wording appendix A to this part provides for Section C of PROP Article I.

(b) *Award terms and conditions.* A DoD Component's general terms and conditions must either:

(1) Include the wording appendix A to this part provides for Section C of PROP Article I to indicate that title to federally owned property remains with the Federal Government; or

(2) Reserve Section C if it provides no federally owned property under its awards.

§ 1130.120 Federal interest in donated property.

(a) *Requirement.* A DoD Component's general terms and conditions must inform recipients that the Federal Government acquires an interest in any real property or equipment for which the value of the remaining life of the property in the recipient's accounting records or the fair market value of the property is counted toward required cost sharing or matching, rather than charging depreciation.

(b) *Award terms and conditions.* A DoD Component's general terms and conditions therefore must either:

(1) Include the wording appendix A to this part provides for Section D of PROP Article I to specify the Federal interest in donated real property or equipment; or

(2) Reserve Section D of PROP Article I if the DoD Component does not permit recipients to count the fair market value of real property or equipment toward cost sharing or matching.

§ 1130.125 Federal interest in property improved under awards.

(a) *Requirement.* A DoD Component's general terms and conditions must address the Federal interest in improvements to real property or equipment that results if a recipient directly charges the costs of the improvements to an award.

(b) *Award terms and conditions.* A DoD Component's general terms and conditions therefore must either:

(1) Include the wording appendix A to this part provides for Section E of PROP Article I to specify the Federal interest in improved real property or equipment; or

(2) Reserve Section E of PROP Article I if there will be no improvements to real property or equipment under awards using those general terms and conditions or subawards under those awards.

Subpart B—Property Management System (PROP Article II)

§ 1130.200 Purpose of PROP Article II.

(a) PROP Article II prescribes standards for:

(1) Insurance coverage for real property and equipment acquired or improved under awards;

(2) The system that a recipient uses to manage both equipment that is acquired or improved in whole or in part under awards and federally owned property.

(b) It thereby implements OMB guidance in 2 CFR 200.310 and 200.313(d)(1) through (4), and partially implements 2 CFR 200.313(b).

§ 1130.205 Insurance coverage for real property and equipment.

(a) *OMB guidance.* OMB guidance in 2 CFR 200.310 includes a requirement for recipients' insurance coverage for real property and equipment acquired or improved under grants and cooperative agreements and states that federally owned property need not be insured unless required by Federal award terms and conditions.

(b) *DoD implementation.* A DoD Component's general terms and conditions must require recipients to provide insurance coverage for real property and equipment acquired or improved under awards. However, unless a statute or program regulation adopted in the Code of Federal Regulations after opportunity for public comment specifies otherwise, DoD awards will not require recipients to insure federally owned property.

(c) *Award terms and conditions.* A DoD Component's general terms and conditions therefore must either:

(1) Include the wording appendix B to this part provides for Section A of PROP Article II; or

(2) Reserve Section A of PROP Article II if there will be no real property or equipment acquired or improved under awards using those terms and conditions or subawards under those awards.

§ 1130.210 Other property management system standards for States.

(a) *Requirement.* A DoD Component's general terms and conditions must address the standards for States' property management systems.

(b) *Award terms and conditions.* A DoD Component's general terms and conditions therefore must either:

(1) Include the wording appendix B to this part provides for Section B of PROP Article II; or

(2) Reserve Section B of PROP Article II if no State will acquire or improve equipment, in whole or in part, or be accountable for federally owned property under awards using those general terms and conditions or subawards under those awards.

§ 1130.215 Other property management system standards for institutions of higher education, nonprofit organizations, local governments, and Indian tribes.

(a) *Requirement.* A DoD Component's general terms and conditions must address the standards for property management systems of institutions of higher education, nonprofit organizations, local governments, and Indian tribes.

(b) *Award terms and conditions.* A DoD Component's general terms and conditions therefore must either:

(1) Include the wording appendix B to this part provides for Section C of PROP Article II; or

(2) Reserve Section C of PROP Article II if no institution of higher education, nonprofit organization, local government, or Indian tribe will acquire or improve equipment, in whole or in part, or be accountable for federally owned property under awards using those general terms and conditions or subawards under those awards.

Subpart C—Use and Disposition of Real Property (PROP Article III)

§ 1130.300 Purpose of PROP Article III.

PROP Article III specifies requirements for recipients' use and disposition of real property acquired or improved under an award. It thereby implements OMB guidance in 2 CFR 200.311(b) and (c).

§ 1130.305 Use of real property.

(a) *OMB guidance.* OMB guidance in 2 CFR 200.311(b) states that, except as otherwise provided by Federal statute or the Federal awarding agency, a recipient must use real property acquired or improved under a grant or cooperative agreement for the originally authorized purpose as long as needed for that purpose, during which time the recipient must not dispose of the property or encumber its title or other interests.

(b) *DoD implementation.* Unless a statute or program regulation adopted in the Code of Federal Regulations after opportunity for public comment specifies otherwise, DoD awards must permit recipients to do the following:

(1) While real property acquired or improved under an award still is needed for the authorized purpose, also use it for other projects or programs that either are supported by DoD Components or other Federal agencies or not federally supported, as long as that use does not interfere with the property's use for the authorized purpose.

(2) After the real property no longer is needed for the authorized purpose, with the written approval of the award administration office, use the property on other federally supported projects or programs that have purposes consistent with those authorized for support by the DoD Component that made the award under which the property was acquired or improved.

(c) *Award terms and conditions.* A DoD Component's general terms and conditions must either:

(1) Include the wording appendix C to this part provides for Section A of PROP Article III; or

(2) If a statute or program regulation in the Code of Federal Regulations specifies different requirements for recipients' use of real property, substitute alternative wording for Section A to specify those requirements.

§ 1130.310 Disposition of real property.

(a) *OMB guidance.* OMB guidance in 2 CFR 200.311(c):

(1) Addresses the recipient's responsibility to request disposition instructions for real property when the recipient no longer needs it for the originally authorized purpose; and

(2) Identifies three alternative disposition methods those instructions may specify.

(b) *DoD implementation.* DoD implements the guidance in 2 CFR 200.311(c) through award terms and conditions that govern disposition of real property acquired or improved under awards.

(c) *Award terms and conditions.* A DoD Component's general terms and conditions must include the wording appendix C to this part provides for Section B of PROP Article III to specify requirements concerning disposition of real property acquired or improved under awards.

Subpart D—Use and Disposition of Equipment and Supplies (PROP Article IV)

§ 1130.400 Purpose of PROP Article IV.

PROP Article IV specifies requirements for recipients' use and disposition of equipment and supplies in which there is a Federal interest. It thereby implements OMB guidance in:

(a) 2 CFR 200.313(a) through (c), 200.313(d)(5), and 200.313(e) as that guidance applies to requirements for use and disposition of equipment; and

(b) 2 CFR 200.314, as that guidance applies to requirements for use and disposition of supplies.

§ 1130.405 Property subject to PROP Article IV.

(a) *Requirement.* A DoD Component's general terms and conditions must identify the types of non-exempt property to which requirements for use and disposition of equipment and supplies apply.

(b) *Award terms and conditions.* To implement the requirement in paragraph (a) of this section, a DoD Component's general terms and conditions must use the wording appendix D to this part provides for Section A of PROP Article IV. That wording identifies the categories of equipment and supplies in which there is a Federal interest.

§ 1130.410 Requirements for a State's use and disposition of equipment.

(a) *OMB guidance.* OMB guidance in:

(1) 2 CFR 200.313(a) sets forth basic conditions for use of equipment acquired under a grant or cooperative agreement that apply when title to the equipment is vested in a recipient conditionally, because the awarding agency either does not have statutory authority to vest title in the equipment unconditionally or elects not to do so.

(2) 2 CFR 200.313(b) provides that a State must use, manage, and dispose of equipment in accordance with State laws and procedures.

(b) *DoD implementation.* DoD implements 2 CFR 200.313(a) and (b) through award terms and conditions that govern States' use and disposition of equipment.

(c) *Award terms and conditions.* A DoD Component's general terms and conditions must use the wording appendix D to this part provides for Section B of PROP Article IV to specify the requirements for a State's use and disposition of equipment in which there is a Federal interest.

§ 1130.415 Use of equipment by an institution of higher education, nonprofit organization, local government, or Indian tribe.

(a) *OMB guidance.* OMB guidance in:

(1) 2 CFR 200.313(a) sets forth basic conditions for use of equipment acquired under a grant or cooperative agreement that apply when title to the equipment is vested in a recipient conditionally, because the awarding agency either does not have statutory authority to vest title in the equipment unconditionally or elects not to do so.

(2) 2 CFR 200.313(c) provides the parameters for use of equipment by an institution of higher education, nonprofit organization, local government, or Indian tribe.

(3) 2 CFR 200.313(d)(5) calls for use of sales procedures to ensure highest possible return when selling equipment.

(b) *DoD implementation.* For equipment in which there is a Federal interest under awards to institutions of higher education, nonprofit organizations, local governments, or Indian tribes, DoD implements through award terms and conditions the following portions of 2 CFR part 200 as they apply to use of equipment prior to the time of its disposition:

(1) 2 CFR 200.313(a) and (c); and

(2) 2 CFR 200.313(d)(5), as it applies to equipment sales prior to the time of disposition, to offset the acquisition cost of replacement equipment.

(c) *Award terms and conditions.* A DoD Component's general terms and conditions must use the wording appendix D to this part provides for Section C of PROP Article IV to specify the requirements for use of equipment described in paragraph (b) of this section.

§ 1130.420 Disposition of equipment by an institution of higher education, nonprofit organization, local government, or Indian tribe.

(a) *OMB guidance.* OMB guidance in 2 CFR 200.313(e) addresses disposition of original or replacement equipment acquired under a grant or cooperative agreement by an institution of higher education, nonprofit organization, local government, or Indian tribe.

(b) *DoD implementation.* DoD implements 2 CFR 200.313(e) through award terms and conditions that govern disposition of original or replacement equipment acquired under an award by an institution of higher education, nonprofit organization, local government, or Indian tribe when there is a Federal interest in the equipment.

(c) *Award terms and conditions.* A DoD Component's general terms and conditions must use the wording appendix D to this part provides for Section D of PROP Article IV to specify the requirements for disposition of equipment described in paragraph (b) of this section.

§ 1130.425 Use and disposition of supplies.

(a) *OMB guidance.* OMB guidance in 2 CFR 200.314 sets forth requirements for use and disposition of supplies acquired under a grant or cooperative agreement.

(b) *DoD implementation.* DoD implements 2 CFR 200.314 through award terms and conditions that govern use and disposition of supplies acquired under awards either by purchase or by donation as cost sharing or matching.

(c) *Award terms and conditions.* A DoD Component's general terms and conditions must use the wording appendix D to this part provides for Section E of PROP Article IV to specify the requirements for use and disposition of acquired supplies.

Subpart E—Use and Disposition of Federally Owned Property (PROP Article V)

§ 1130.500 Purpose of PROP Article V.

PROP Article V specifies requirements for recipients' use and disposition of federally owned property. It implements the portion of OMB guidance in 2 CFR 200.312(a) that applies to disposition of federally owned property.

§ 1130.505 Content of PROP Article V.

A DoD Component's general terms and conditions must either:

(a) Include the wording appendix E to this part provides for PROP Article V to specify requirements for use and disposition of federally owned property; or

(b) Reserve PROP Article V if there is no possibility of recipients or subrecipients being accountable for federally owned property under awards using those terms and conditions.

Subpart F—Intangible Property (PROP Article VI)

§ 1130.600 Purpose of PROP Article VI.

PROP Article VI sets forth the rights and responsibilities of recipients and the Federal Government with respect to intangible property. It thereby implements OMB guidance in 2 CFR 200.315.

§ 1130.605 Copyrights asserted in works developed or otherwise acquired under awards.

(a) *OMB guidance.* OMB guidance in 2 CFR 200.315(b) addresses recipients' and the Federal Government's rights related to works that recipients may copyright under grants and cooperative agreements.

(b) *DoD implementation.* DoD implements 2 CFR 200.315(b) through award terms and conditions that specify recipient and DoD rights with respect to copyrightable works.

(c) *Award terms and conditions.* A DoD Component's general terms and conditions must use the wording appendix F to this part provides for Section A of PROP Article VI to affirm the recipient's right to assert copyright in works it develops or otherwise acquires under an award, as well as DoD's right to use the works for Federal purposes.

§ 1130.610 Inventions developed under awards.

(a) *OMB guidance.* OMB guidance in 2 CFR 200.315(c) states that recipients of grants and cooperative agreements are subject to applicable regulations concerning patents and inventions, including Department of Commerce regulations at 37 CFR part 401.

(b) *DoD implementation.* In implementing 2 CFR 200.315(c) for awards for the performance of experimental, developmental, or research work, DoD:

(1) Extends to other entities the patent rights provisions of chapter 18 of Title 35 of the U.S. Code and 37 CFR part 401 that directly apply to small business firms and nonprofit organizations. This broadened applicability is in accordance with the February 18, 1983, Presidential memorandum on Government patent policy, referred to in Executive Order 12591, ''Facilitating Access to Science and Technology.''

(2) Establishes a requirement for recipients to provide final reports listing all subject inventions under their awards or stating there were none, a requirement that 37 CFR 401.5(f)(1) provides as an agency option.

(3) Incorporates the prohibition in 35 U.S.C. 212 on asserting Federal Government rights in inventions made by recipients of scholarships, fellowships, training grants, or other awards made primarily for educational purposes.

(c) *Award terms and conditions.* (1) *Awards for research, developmental, or experimental work.* A DoD Component's general terms and conditions for awards for the performance of experimental, developmental, or research work funded in whole or in part by the Federal Government must include the wording appendix F to this part provides for Section B of PROP Article VI, with one permitted exception. The exception is that a DoD Component may reserve or substitute alternative wording for paragraph B.2.b of Section B of PROP Article VI, as appropriate, if it elects to:

(i) Omit the requirement for final invention reports;

(ii) Substitute ''120 calendar days'' for ''90 calendar days'' to provide an additional 30 days for recipient's submissions of final reports after the end date of the period of performance; or

(iii) Include a requirement for recipients to submit information about each patent application they submit for a subject invention, interim listings of all subject inventions, or both, which the Department of Commerce regulations at 37 CFR 401.5(f)(2) and (3) permit agencies to require.

(2) *Awards for primarily educational purposes.* A DoD Component's general terms and conditions for awards to support scholarships or fellowships, training grants, or other awards for primarily educational purposes must replace the wording appendix F to this part provides for Section B of PROP Article VI with an alternative award provision stating that the Federal Government will have no rights to inventions made by recipients.

(3) A*wards for other purposes.* A DoD Component developing general terms and conditions for awards other than those described in paragraphs (c)(1) and (2) of this section should:

(i) Consult its intellectual property counsel if it anticipates that recipients may develop patentable inventions under its awards, to identify any applicable statutes or regulations and determine an appropriate substitute for the wording appendix F to this part provides for Section B of PROP Article VI; or

(ii) Reserve Section B of PROP Article VI if it does not expect development of any patentable inventions under those awards.

§ 1130.615 Data produced under awards.

(a) *OMB guidance.* OMB guidance in 2 CFR 200.315(d) and (e) addresses rights in data under grants and cooperative agreements.

(b) *DoD implementation.* DoD implements 2 CFR 200.315(d) and (e) through award terms and conditions.

(c) *Award terms and conditions*—(1) *General.* A DoD Component's general terms and conditions must include the wording appendix F to this part provides for Section C of PROP Article VI.

(2) *Exception.* A DoD Component may reserve paragraph C.2 of Section C of PROP Article VI in its general terms and conditions if:

(i) Those terms and conditions will not be used for research awards; and

(ii) The DoD Component determines that no research data as defined in 2 CFR 200.315 will be generated under the awards using those terms and conditions.

§ 1130.620 Intangible property acquired, but not developed or produced, under awards.

(a) *OMB guidance.* OMB guidance in 2 CFR 200.315(a) addresses use and disposition of intangible property that is acquired under grants and cooperative agreements (in addition to vesting of title, which is implemented in § 1130.105 and appendix A to this part).

(b) *DoD implementation.* DoD implements 2 CFR 200.315(a) through award terms and conditions that govern use and disposition of intangible property that is acquired, but not developed or produced, under awards.

(c) *Award terms and conditions.* A DoD Component's general terms and conditions must include the wording appendix F to this part provides for Section D of PROP Article VI.

Appendix A to Part 1130—Terms and Conditions for PROP Article I, ''Title to Property''

Unless a DoD Component inserts or adds wording or reserves sections of the article, as provided in §§ 1130.105 through 1130.125, a DoD Component's general terms and conditions must use the following wording for PROP Article I.

PROP Article I. Title to Property. (December 2014)

Section A. Title to property acquired under this award.

1. *General.* Other than any property identified in paragraph A.2 of this section as exempt property:

a. Title to real property, equipment, and supplies that you acquire (whether by purchase, construction or fabrication, development, or otherwise) and charge as direct project costs under this award vests in you, the recipient. Title to intangible property that you acquire (other than by developing or producing it) under this award also vests in you.

b. That title is a conditional title, subject to the terms and conditions in PROP Articles II–IV, Section D of PROP Article VI, and REP Article III of this award.

c. There is a Federal interest in the property, other than intangible property that you develop or produce under the award. For real property, equipment, and intangible property, we retain this Federal interest until final disposition of the property under PROP Article III (for real property), PROP Article IV (for equipment and supplies), or Section D of PROP Article VI (for intangible property that is acquired, other than by developing or producing it), a period that in some cases may extend beyond closeout of this award.

2. *Exempt property.* [Reserved].

Section B. Property trust relationship.

1. *Basic requirement.* Other than intangible property that you develop or produce under the award, you hold any real property, equipment, or intangible property that you acquire or improve under this award in trust for the beneficiaries of the project or program that you are carrying out under the award.

2. *Notices of record.* [Reserved].

Section C. Federally owned property. Title to any federally owned property that we provide to you under this award (or for which accountability is transferred to this award from another Federal award) remains with the Federal Government.

Section D. Federal interest in donated real property or equipment. If real property or equipment is acquired under this award through your donation of the property to the project or program (*i.e.,* counting the value of the remaining life of the property recorded in your accounting records or the fair market

value as permitted under FMS Article VI of this award as part of your share of project costs to meet any cost sharing or matching requirements, rather than charging depreciation):

1. The Federal Government acquires through that donation an interest in the real property or equipment, the value of which at any given time is the product of:

a. The Federal share of the project costs under this award; and

b. The current fair market value of the property at that time.

2. The real property or equipment is subject to Section B of this article and the terms and conditions of PROP Articles II–IV and REP Article III that are applicable to property acquired under the award.

3. The Federal interest in the real property or equipment must be addressed at the time of property disposition.

Section E. Federal interest in property improved under the award.

1. The Federal Government has an interest in improvements (as distinct from ordinary repairs and maintenance) you make to an item of real property or equipment if you charge the costs of the improvements as direct costs to this award.

2. We thereby acquire an interest in the property if the Government did not previously have one. If the Government already had an interest in the property, the value of that Federal interest in the property increases by the amount of the Federal interest in the improvements.

3. The property is subject to Section B of this article and the terms and conditions of PROP Articles II–IV and REP Article III that are applicable to real property or equipment acquired under the award.

4. The Federal interest must be addressed at the time of property disposition.

Appendix B to Part 1130—Terms and Conditions for PROP Article II, ''Property Management System''

Unless a DoD Component reserves sections of the article, as provided in §§ 1130.205 through 1130.215, a DoD Component's general terms and conditions must use the following wording for PROP Article II.

PROP Article II. Property Management System. (December 2014)

Section A. Insurance coverage for real property and equipment. You must, at a minimum, provide the equivalent insurance coverage for real property and equipment acquired or improved under this award as you provide for real property and equipment that you own.

Section B. Other property management system standards for a State.

1. *Equipment.* Your property management system for equipment acquired or improved in whole or in part under this award must be in accordance with your State laws and procedures.

2. *Federally owned property.* You may use your own property management system for any federally owned property for which you are accountable, as long as it meets the following minimum standards:

a. *Records.* Your records must include for each item of federally owned property:

i. A description of the item.

ii. The location of the item.

iii. The serial or other identification number.

iv. Which Federal agency holds title.

v. The date you received the item.

vi. Any data on the ultimate disposition of the item, such as the date of disposal.

vii. The Federal award identification number of the award under which you are accountable for the item.

b. *Inventory.* You must take a physical inventory of federally owned property annually.

c. *Control system.* You must:

i. Maintain an internal property control system with adequate safeguards to prevent loss, damage, or theft of federally owned property.

ii. Investigate any loss, damage, or theft of federally owned property and promptly notify the award administration office.

d. *Maintenance.* You must maintain the property in good condition.

Section C. Other property management system standards for an institution of higher education, nonprofit organization, local government, or Indian tribe. Your procedures for managing equipment (including replacement equipment) acquired or improved in whole or in part under this award and any federally owned property for which you are accountable under this award must, as a minimum, meet the requirements in this section.

1. *Records.* You must maintain records that include for each item of equipment or federally owned property:

a. A description of the item.

b. The serial or other identification number.

c. Who holds title (*e.g.,* you or the Federal Government and, if the latter, which Federal agency).

d. The source of funding for the equipment, including the Federal award identification number, or the source of the federally owned property, including the award number of the award under which you are accountable for the property.

e. The acquisition date and cost of the equipment (or improvement to the equipment) or the date you received the federally owned property.

f. The location, use, and condition of the equipment or federally owned property.

g. Information from which one can calculate the amount of the Federal interest in the acquisition or improvement of the item (this amount is zero after you compensate us for the Federal interest in the item or improvement).

h. Any data on the ultimate disposition of the item including the date of disposal and sale price.

2. *Labelling.* You must ensure that property owned by the Federal Government is labeled to identify it as federally owned property.

3. *Inventory.*

a. You must take a physical inventory of equipment in which there is a Federal interest and reconcile the results with your records at least once every 2 years.

b. You must take an annual inventory of any federally owned property for which you are accountable under this award.

4. *Control system.* You must:

a. Maintain an internal property control system with adequate safeguards to prevent loss, damage, or theft of equipment and federally owned property.

b. Investigate any loss, damage, or theft and notify the award administration office if it involved equipment in which there is a Federal interest under the award or federally owned property.

5. *Maintenance.* You must maintain equipment acquired or improved in whole or in part under the award and federally owned property in good condition.

Appendix C to Part 1130—Terms and Conditions for PROP Article III, ''Use and Disposition of Real Property''

Unless a DoD Component substitutes wording in Section A, as provided in § 1130.305, a DoD Component's general terms and conditions must use the following wording for PROP Article III.

PROP Article III. Use and Disposition of Real Property. (December 2014)

Section A. Use of real property.

1. You must use real property acquired or improved under this award for the originally authorized purpose as long as needed for that purpose. During that time, you may not:

a. Dispose of the property except, with the approval of the award administration office, to acquire replacement property under this award, in which case you must use the proceeds from the disposition as an offset to the cost of the replacement property; or

b. Encumber the title or other interests in the property without the approval of the award administration office identified in this award.

2. During the time that the real property is used for the originally authorized purpose, you may make the property available for use on other projects or programs, but only if that use will not interfere with the property's use as needed for its originally authorized purpose.

a. First preference must be given to other projects or programs supported by DoD Components and second preference to those supported by other Federal agencies.

b. Third preference is for other projects or programs not currently supported by the Federal Government. You should charge user fees for use of the property in those cases, if it is at all practicable.

3. When the real property is no longer needed for the originally authorized purpose, with the written approval of the award administration office, you may delay final disposition of the property to use it on other federally sponsored projects or programs. A condition for the award administration office's approval is that the other projects or programs have purposes consistent with those authorized for support by the DoD Component that made the award under which the property was acquired or improved.

Section B. Disposition of real property. When you no longer need real property for the originally authorized purpose, you must obtain disposition instructions from the award administration office, except as provided in paragraph A.3 of this article.

Those instructions will provide for one of the following three alternatives, which are that you:

1. Retain title after compensating us for the Federal interest in the property, which is to be computed as specified in the definition of ''Federal interest.''

2. Sell the property and compensate us for the Federal interest in the property, as described in 2 CFR 200.311(c)(2).

3. Transfer title to us or a third party we designate, as described in 2 CFR 200.311(c)(3).

Appendix D to Part 1130—Terms and Conditions for PROP Article IV, ''Use and Disposition of Equipment and Supplies''

As specified in §§ 1130.405 through 1130.425, a DoD Component's general terms and conditions must use the following wording for PROP Article IV.

PROP Article IV. Use and Disposition of Equipment and Supplies. (December 2014)

Section A. Property subject to this article. This article specifies requirements for use and disposition of equipment and supplies. If a provision of PROP Article I identifies any type of equipment or supplies as exempt property, requirements of this Article apply to that exempt property only to the extent specified in that provision of PROP Article I or an award-specific term or condition. The types of non-exempt property to which this article applies are:

1. Supplies that you acquire either by purchase or by donation as cost sharing or matching under this award; and

2. Equipment for which title is vested conditionally in you. That includes equipment with a conditional title resulting from your having, either under this award or under a previous award from which you transferred accountability for the equipment to this award:

a. Directly charged as project costs, in whole or in part, the acquisition (by purchase, construction or fabrication, or development) of equipment;

b. Donated the equipment to the project or program by counting the value of the remaining life of the property recorded in your accounting records or the fair market value toward any cost sharing or matching requirements under the award, rather than charging depreciation (see PROP Article I, Section D); or

c. Directly charged as project costs improvements to the equipment that meet the criteria given in paragraph E.1 of PROP Article I.

Section B. Requirements for a State's use and disposition of equipment. You:

1. Must use the equipment for the authorized purposes of the project or program during the period of performance, or until the property is no longer needed for those purposes.

2. May not encumber the property without the prior written approval of the award administration office.

3. Must use and dispose of the equipment in accordance with your State laws and procedures.

Section C. Use of equipment by an institution of higher education, nonprofit organization, local government, or Indian tribe. You:

1. Must use the equipment for the authorized purposes of the project or program under this award until the equipment is no longer needed for those purposes, whether or not the project or program continues to be supported by this award.

2. May not encumber the equipment without the prior written approval of the award administration office.

3. During the time that the equipment is used for the project or program under this award:

a. You must make the equipment available for use on other projects or programs but only if that use will not interfere with the equipment's use as needed for the project or program supported by this award.

i. First preference must be given to other projects or programs supported or previously supported by DoD Components

ii. Second preference to projects or programs supported or previously supported by other Federal agencies.

iii. Third preference is for other projects or programs not supported by the Federal Government. You should charge user fees for use of the equipment in those cases, if it is at all practicable.

b. You may use the equipment, if you need to acquire replacement equipment, as a trade-in or sell it (using sales procedures designed to ensure the highest possible return) and use the proceeds from the sale to offset the cost of the replacement equipment.

4. When the equipment is no longer needed for the project or program under this award, you may defer final disposition of the equipment and continue to use it on other federally sponsored projects or programs. You must give first priority to other projects or programs supported by DoD Components.

5. Notwithstanding the encouragement in FMS Article VII to earn program income, you may not use equipment in which there currently is a Federal interest—whether you acquired it under this award or are otherwise accountable for it under this award—to provide services for a fee that is less than private companies charge for equivalent services.

Section D. Disposition of equipment by an institution of higher education, nonprofit organization, local government, or Indian tribe. You must request disposition instructions from the award administration office when either original or replacement equipment acquired under this award with a current fair market value that exceeds $5,000 is no longer needed for the original project or program or for other federally sponsored activities as described in paragraph C.4 of this article. For each item of equipment with a current fair market value of $5,000 or less, you may retain, sell, or otherwise dispose of the item with no further obligation to the Federal Government.

1. We may issue disposition instructions that:

a. Allow you to retain or sell any item of equipment after compensating us for the Federal interest in the property, which is to be computed as specified in the definition of ''Federal interest;'' or

b. Require you to transfer title to the equipment to a Federal agency or a third party, in which case you are entitled to compensation from us for the non-Federal interest in the equipment, plus any reasonable shipping or interim storage costs incurred.

2. If we fail to provide disposition instructions for any item of equipment within 120 calendar days of receiving your request, you may retain or sell the equipment, but you must compensate us for the amount of the Federal interest in the equipment.

3. If you sell the equipment:

a. You must use sales procedures designed to ensure the highest possible return; and

b. You may deduct and retain for selling and handling expenses either $500 or ten percent of the proceeds, whichever is less.

Section E. Use and disposition of supplies acquired under this award.

1. *Use.* As long as we retain a Federal interest in supplies acquired under this award either by purchase or by donation as cost sharing or matching, you may not use the supplies to provide services to other organizations for a fee that is less than private companies charge for equivalent services, notwithstanding the encouragement in FMS Article VII to earn program income.

2. *Disposition.* If you have a residual inventory of unused supplies with aggregate value exceeding $5,000 at the end of the period of performance under this award, and the supplies are not needed for any other Federal award, you must retain the supplies or sell them but must in either case compensate us for the amount of the Federal interest in the supplies. You may deduct and retain for selling and handling expenses either $500 or ten percent of the proceeds, whichever is less.

Appendix E to Part 1130—Terms and Conditions for PROP Article V, ''Use and Disposition of Federally Owned Property''

Unless a DoD Component reserves the article, as specified in § 1130.505, a DoD Component's general terms and conditions must use the following wording for PROP Article V.

PROP Article V. Use and Disposition of Federally Owned Property. (December 2014)

Section A. Use. During the time that federally owned property for which you are accountable under this award is used for the project or program supported by the award, you:

1. Also may make the property available for use on other federally supported projects or programs, but only if that use will not interfere with the property's use for the project or program supported by this award. You must give first priority to other projects or programs supported by DoD Components.

2. May use the property for purposes other than federally supported projects or programs only with the prior approval of the awarding office or, if you request approval after the award is made, the award administration office.

Section B. Disposition. You must request disposition instructions from the award administration office for any federally owned property under this award, including any property for which a subrecipient is accountable under a subaward you make under this award, either:

1. At any time during the period of performance if the property is no longer needed for the project or program supported by this award; or

2. At the end of the period of performance.

Appendix F to Part 1130—Terms and Conditions for PROP Article VI, ''Intangible Property''

Except for Section B, whose language must be tailored or reserved based on the type of award as specified in § 1130.610, and Section D if reserved as provided in § 1130.615, a DoD Component's general terms and conditions must use the following wording for PROP Article VI.

PROP Article VI. Intangible Property. (December 2014)

Section A. Assertion of copyright.

1. You may assert copyright in any work that is eligible for copyright protection if you acquire ownership of it under this award, either by developing it or otherwise.

2. With respect to any work, you developed or otherwise acquired under this award, DoD reserves a royalty-free, nonexclusive and irrevocable license to:

a. Reproduce, publish, or otherwise use the work for Federal Government purposes; and

b. Authorize others to reproduce, publish, or otherwise use the work for Federal Government purposes.

Section B. Inventions developed under the award.

1. Applicability of Governmentwide clause for research awards. You must comply with the Governmentwide patent rights award clause published at 37 CFR 401.14, with the modifications described in paragraph B.2 of this section. DoD adopts that Governmentwide clause for the following entities, thereby broadening the applicability beyond types of entities included in the definition of ''contractor'' in 37 CFR part 401:

a. Any governmental or nonprofit entity (the types of entities subject to these general terms and conditions) receiving a DoD award for the performance of experimental, research, or developmental work;

b. Any governmental, nonprofit, or for-profit entity receiving a subaward to perform experimental, research, or developmental work under an award described in paragraph B.1.a of this section.

2. Modifications to the wording of the Governmentwide clause. DoD adopts the Governmentwide clause at 37 CFR 401.14, as described in paragraph B.1 of this section, with the following modifications:

a. *Terminology.* Throughout the Governmentwide clause:

i. Insert the terms ''recipient'' and ''subrecipient (or contractor to the recipient or to a subrecipient)'' to replace the terms ''contractor'' and ''subcontractor,'' respectively.

ii. Insert the terms ''award'' and ''subaward (or contract under either the award or a subaward)'' to replace the terms ''contract'' and ''subcontract,'' respectively.

b. *Final report.* Add a new subparagraph (f)(5) to read, ''The recipient must submit a final report listing all subject inventions made under the award or stating that there were none. The final report is due 90 calendar days after the end date of the period of performance unless you request, and we grant, an extension of the due date.''

c. *Broadening applicability to all entities.* Delete paragraphs (g)(2) and (3) of the Governmentwide clause, redesignate paragraph (g)(1) as paragraph (g) and delete the phrase ''to be performed by a small business firm or domestic nonprofit organization'' from paragraph (g) as redesignated.

Section C. Data produced under the award.

1. *Data in general.* The Federal Government has the right to:

a. Obtain, reproduce, publish, or otherwise use the data produced under this award; and

b. Authorize others to receive, reproduce, publish, or otherwise use the data produced under this award for Federal Government purposes.

2. *Research data requested under the Freedom of Information Act (FOIA).*

a. If we receive a request under the FOIA for ''research data'' that are related to ''published research findings'' produced under this award and that were ''used by the Federal Government in developing an agency action that has the force and effect of law,'' you must provide the data to us within a reasonable time after we request it from you, so that the data can be made available to the public through procedures established under the FOIA.

b. For purposes of the requirement in paragraph C.2.a of this section, 2 CFR 200.315(e) provides definitions of the phrases ''published research findings,'' ''used by the Federal Government in developing an agency action that has the force and effect of law,'' and ''research data.''

Section D. Use and disposition of intangible property acquired, but not developed or produced, under the award.

1. *Applicability.* This section applies to a patent, patent application, copyright, or other intangible property acquired, but not developed or produced, under this award.

2. *Use.* You:

a. Must use the intangible property for the authorized purpose under this award until the intangible property is no longer needed for that purpose, whether or not that purpose is still being supported by this award.

b. May not encumber the intangible property without the prior written approval of the award administration office.

3. *Disposition.* When the intangible property is no longer needed for the originally authorized purpose, you must contact the award administration office to arrange for disposition in accordance with the procedures specified for disposition of equipment in either section B or D of PROP Article IV, as applicable.

PART 1132—RECIPIENT PROCUREMENT PROCEDURES: GENERAL AWARD TERMS AND CONDITIONS

Sec.

1132.1 Purpose of this part.
1132.2 Applicability of this part.
1132.3 Exceptions from requirements of this part.
1132.4 Organization of this part.

Subpart A—Procurement Standards for States (PROC Article I)

1132.100 Purpose of PROC Article I.
1132.105 Content of PROC Article I.

Subpart B—Procurement Standards for Institutions of Higher Education, Nonprofit Organizations, Local Governments, and Indian Tribes (PROC Article II)

1132.200 Purpose of PROC Article II.
1132.205 Procurement procedures.
1132.210 Procurement of recovered materials.
1132.215 Review of recipient procurement documents.
1132.220 Bonding requirements.

Subpart C—Contract Provisions for Recipient Procurements (PROC Article III)

1132.300 Purpose of PROC Article III.
1132.305 Administrative requirements.
1132.310 National policy requirements.
Appendix A to Part 1132—Terms and conditions for PROC Article I, ''Procurement standards for States''
Appendix B to Part 1132—Terms and conditions for PROC Article II, ''Procurement standards for institutions of higher education, nonprofit organizations, local governments, and Indian tribes''
Appendix C to Part 1132—Terms and conditions for PROC Article III, ''Contract provisions for recipient procurements''

Authority: 5 U.S.C. 301 and 10 U.S.C. 113.

§ 1132.1 Purpose of this part.

(a) This part specifies standard wording of general terms and conditions concerning recipients' purchases of property (supplies, equipment, and real property) and services.

(b) It thereby implements OMB guidance in 2 CFR 200.317 through 200.326, and appendix II to 2 CFR part 200, as those portions of 2 CFR part 200 apply to general terms and conditions of grants and cooperative agreements. It also partially implements 2 CFR 200.205(d), 200.213, and 200.517.

§ 1132.2 Applicability of this part.

The types of awards and entities to which this part and other parts in this subchapter apply are described in the subchapter overview at 2 CFR 1126.2.

§ 1132.3 Exceptions from requirements of this part.

Exceptions are permitted from the administrative requirements in this part only as follows:

(a) As described in 2 CFR 1126.3, and

(b) Based on any language in 2 CFR 200.110(a) regarding the applicability of the procurement standards in 2 CFR part 200.

§ 1132.4 Organization of this part.

(a) The content of this part is organized into subparts and associated appendices.

(1) Each subpart provides direction to DoD Components on how to construct one article of general terms and conditions for grants and cooperative agreements.

(2) For each subpart, there is a corresponding appendix with standard wording for terms and conditions of the article addressed by the subpart. Terms and conditions address rights and responsibilities of the Federal Government and recipients.

(b) A DoD Component must use the wording provided in each appendix in accordance with the direction in the corresponding subpart. That direction may permit DoD Components to vary from the standard wording in some situations.

(c) Table 1 shows which article of general terms and conditions may be found in each of appendices A through C to this part (with the associated direction to DoD Components in Subparts A through C, respectively):

TABLE 1 TO PARAGRAPH (c)

In . . .	You will find terms and conditions specifying recipients' rights and responsibilities related to . . .	That would appear in an award within PROC Article . . .
Appendix A	Procurement standards for States	I.
Appendix B	Procurement standards for institutions of higher education, nonprofit organizations, local governments, and Indian tribes.	II.
Appendix C	Contract provisions for recipient procurements	III.

Subpart A–Procurement Standards for States (PROC Article I)

§ 1132.100 Purpose of PROC Article I.

PROC Article I of the general terms and conditions specifies requirements for a State's procurement of property and services under grants or cooperative agreements. It thereby implements OMB guidance in 2 CFR 200.317 and partially implements the guidance in 2 CFR 200.205(d) and 200.213.

§ 1132.105 Content of PROC Article I.

(a) *Requirement.* A DoD Component's general terms and conditions must address requirements for States' procurement systems.

(b) *Award terms and conditions*—(1) *General.* Except as provided in paragraph (b)(2) of this section, a DoD Component's general terms and conditions must use the wording appendix A to this part provides for PROC Article I.

(2) *Exception.* A DoD Component's general terms and conditions may instead reserve PROC Article I if the DoD Component determines that it is not possible that any States will receive:

(i) DoD Component awards using those general terms and conditions; or

(ii) Subawards from recipients of DoD Component awards using those general terms and conditions.

Subpart B—Procurement Standards for Institutions of Higher Education, Nonprofit Organizations, Local Governments, and Indian Tribes (PROC Article II)

§ 1132.200 Purpose of PROC Article II.

PROC Article II of the general terms and conditions specifies procurement procedures for a recipient of a grant or cooperative agreement other than a State or for-profit entity. It thereby:

(a) Implements OMB guidance in 2 CFR 200.318 through 200.323, 200.324(a) and (b), and 200.325;

(b) Partially implements 2 CFR 200.205(d) and 200.213; and

(c) Implements, in conjunction with PROC Article III, 2 CFR 200.326.

§ 1132.205 Procurement procedures.

(a) *Requirement.* A DoD Component's general terms and conditions must address requirements for procurement systems of institutions of higher education, nonprofit organizations, local governments, and Indian tribes.

(b) *Award terms and conditions.* In order to implement the requirement described in paragraph (a) of this section, a DoD Component's general terms and conditions must use the wording that appendix B provides for Sections A through F of PROC Article II.

§ 1132.210 Procurement of recovered materials.

(a) *Requirement.* A DoD Component's general terms and conditions must address requirements for procurement of recovered materials if State agencies or agencies of a political subdivision of a State may receive awards using those terms and conditions or be subrecipients under those awards.

(b) *Award terms and conditions.* A DoD Component's general terms and conditions must either:

(1) Use the wording that appendix B provides for Section G of PROC Article II, to specify requirements for a local government or other political subdivision of a State to comply with Resource Conservation and Recovery Act requirements; or

(2) Reserve Section G if the DoD Component determines that it is not possible that a political subdivision of a State will receive either:

(i) An award using those terms and conditions; or

(ii) A subaward under an award using those terms and conditions.

§ 1132.215 Review of recipient procurement documents.

(a) *Requirements.* A DoD Component's general terms and conditions must:

(1) Include a requirement for recipients to make technical specifications for proposed procurements available upon the DoD Component's request, as described in 2 CFR 200.324(a).

(2) Reserve the DoD Component's right to review a recipient's pre-procurement documents when any of the conditions described in 2 CFR 200.324(b)(1) through (5) apply and the recipient is not exempted from the requirement in accordance with 2 CFR 200.324(c).

(b) *Award terms and conditions.* To implement the requirements described in paragraph (a) of this section, a DoD

Component's general terms and conditions must use the wording that appendix B to this part provides for Section H of PROC Article II.

§ 1132.220 Bonding requirements.

(a) *Requirements.* A DoD Component's general terms and conditions must require each recipient to meet minimum bonding requirements if it awards any construction or facility improvement contract with a value in excess of the simplified acquisition threshold. A recipient would instead use its own bonding requirements if the DoD Component determined that the recipient's bonding policy and requirements are adequate to protect Federal interests.

(b) *Award terms and conditions*—(1) *General.* To implement the requirements in paragraph (a) of this section, a DoD Component's general terms and conditions must use the wording that appendix B to this part provides for Section I of PROC Article II. The DoD Component may include a provision in the award-specific terms and conditions to override Section I of PROC Article II in each award to a recipient for which it made the determination about the recipient's bonding policy and requirements, as described in paragraph (a) of this section.

(2) *Exceptions.* A DoD Component's general terms and conditions may reserve Section I if the DoD Component determines that there will be no construction or facility improvement contracts with values in excess of the simplified acquisition threshold under awards using its general terms and conditions.

Subpart C—Contract Provisions for Recipient Procurements (PROC Article III)

§ 1132.300 Purpose of PROC Article III.

PROC Article III of the general terms and conditions specifies provisions that recipients must include in contracts under their awards, as applicable. It thereby:

(a) Implements, in conjunction with PROC Articles I and II, OMB guidance concerning recipients' contract provisions under grants and cooperative agreements in 2 CFR 200.317 and 200.326;

(b) Partially implements the OMB guidance in 2 CFR 200.205(d) and 200.213 concerning suspension and debarment requirements; and

(c) Partially implements the OMB guidance in 2 CFR 200.517 concerning retention and access of auditors' records.

§ 1132.305 Administrative requirements.

(a) *Requirement.* A DoD Component's general terms and conditions must require recipients to include in their contracts standard administrative requirements related to remedies, termination, allowable costs, rights in copyrights and data, records access and retention, and reporting.

(b) *Award terms and conditions.* To implement the requirement described in paragraph (a) of this section, a DoD Component's general terms and conditions must use the wording that appendix C to this part provides for Section A of PROC Article III.

§ 1132.310 National policy requirements.

(a) *Requirement.* A DoD Component's general terms and conditions must require recipients to include provisions in their contracts that require the contractors to comply with applicable national policy requirements.

(b) *Award terms and conditions*—(1) *General.* To implement the requirement in paragraph (a) of this section, a DoD Component's general terms and conditions must use the wording that appendix C to this part provides for Section B of PROC Article III.

(2) *Exceptions.* (i) The Wage Rate Requirements (Construction) statute (40 U.S.C. 3141–44, 3146, and 3147) does not apply to a program carried out through grants or cooperative agreements unless another statute makes it apply to that program. A DoD Component's general terms and conditions therefore may not include the provision that appendix C to this part includes as paragraph B.2 of PROC Article III unless another statute makes the Wage Rate Requirements statute apply to the program using those general terms and conditions.

(ii) If a DoD Component determines that any of the other national policy requirements in Section B will not apply to any of the awards subject to its general terms and conditions, the DoD Component may reserve the paragraphs of Section B addressing those requirements. Should a future need arise to include the requirements in a given award, the DoD Component may include them as award-specific terms and conditions.

Appendix A to Part 1132—Terms and Conditions for PROC Article I, ''Procurement Standards for States''

Unless a DoD Component reserves the article, as specified in § 1132.105, a DoD Component's general terms and conditions must use the following wording for PROC Article I.

PROC Article I. Procurement Standards for States. (December 2014)

Section A. Use of State procurement system. Subject only to the conditions in Sections B through D of this article, you must use the same policies and procedures to procure supplies, equipment, real property, and services under this award that you use when you procure those items for State purposes using non-Federal funds.

Section B. Procurement of recovered materials. You must comply with the Resource Conservation and Recovery Act requirements described in OMB guidance in 2 CFR 200.322.

Section C. Debarment and suspension. You must comply with restrictions on awarding procurement transactions to excluded or disqualified parties and other requirements specified by OMB guidelines on nonprocurement debarment and suspension at 2 CFR part 180, as implemented by DoD at 2 CFR part 1125.

Section D. Contract provisions. You must include provisions in your procurement transactions under this award to require the contractors' compliance with the requirements specified in PROC Article III, as applicable.

Appendix B to Part 1132—Terms and Conditions for PROC Article II, ''Procurement Standards for Institutions of Higher Education, Nonprofit Organizations, Local Governments, and Indian Tribes''

With the exception of Sections G and I, which may be reserved as specified in §§ 1132.210 and 1132.220, a DoD Component's general terms and conditions must use the following wording for PROC Article II.

PROC Article II. Procurement Standards for Institutions of Higher Education, Nonprofit Organizations, Local Governments, and Indian Tribes. (December 2014)

Section A. General procurement standards.

1. For procurement under this award, you must comply with the following paragraphs of OMB guidance in 2 CFR 200.318:

a. 200.318(a) concerning documented procurement procedures;

b. 200.318(b) concerning oversight of contractors;

c. 200.318(c) concerning standards of conduct and conflicts of interest;

d. 2 CFR 200.318(d) concerning purchases of unnecessary or duplicative items;

e. 200.318(e) concerning intergovernmental or inter-entity agreements;

f. 200.318(g) concerning value engineering;

g. 200.318(i) concerning procurement records;

h. 200.318(j) concerning time and material type contracts; and

i. 200.318(k) concerning settlement of issues arising out of procurements.

2. You must do business only with responsible contractors who are able to perform, as described in OMB guidance in 2 CFR 200.318(h). Related to that, you must comply with restrictions on awarding procurement transactions to excluded or disqualified parties and other requirements

specified by OMB guidelines on nonprocurement debarment and suspension at 2 CFR part 180, as implemented by DoD at 2 CFR part 1125.

Section B. Competition. You must award procurement transactions under this DoD award in accordance with the competition requirements described in OMB guidance in 2 CFR 200.319.

Section C. Procurement methods. You must award procurement transactions under this award using methods described in OMB guidance in 2 CFR 200.320.

Section D. Contracting with small and minority businesses, women's business enterprises, and labor surplus area firms. You must take the affirmative steps described in OMB guidance in 2 CFR 200.321 when awarding procurement transactions under this award.

Section E. Contract cost and price. When awarding a contract under this award, you must follow the procedures related to costs and price that are described in OMB guidance in 2 CFR 200.323, using the applicable cost principles specified in FMS Article III.

Section F. Contract provisions. You must include provisions in your procurement transactions under this award to require the contractors' compliance with the requirements of PROC Article III, as applicable.

Section G. Procurement of recovered materials. If you are a political subdivision of a State, you must comply with the Resource Conservation and Recovery Act requirements described in OMB guidance in 2 CFR 200.322.

Section H. Review of procurement documents. Upon our request, you must make available:

1. Technical specifications on proposed procurements, as described in 2 CFR 200.324(a).

2. Pre-procurement documents for our review, as described in 2 CFR 200.324(b) unless you are exempt from that requirement under 2 CFR 200.324(c).

Section I. Bonding requirements. If you award a construction or facility improvement contract under this award with a value in excess of the simplified acquisition threshold, you must comply with at least the minimum requirements for bidders' bid guarantees and contractors' performance and payment bonds described in 2 CFR 200.325(a) through (c), unless a provision in the award-specific terms and conditions of this award excepts you from the requirement based on our determination that your bonding policy and requirements are adequate to protect Federal interests.

Appendix C to Part 1132—Terms and Conditions for PROC Article III, ''Contract Provisions for Recipient Procurements''

Unless a DoD Component reserves one or more paragraphs of Section B, as specified in § 1132.310, a DoD Component's general terms and conditions must use the following wording for PROC Article III.

PROC Article III. Contract Provisions for Recipient Procurements. (December 2014)

Section A. Contract provisions for administrative requirements.

1. *Remedies.* In any contract under this award for an amount in excess of the simplified acquisition threshold, you must provide for administrative, contractual, or legal remedies, including any appropriate sanctions and penalties, when the contractor violates or breaches the contract terms.

2. *Termination.* In any contract for an amount in excess of $10,000, you must specify conditions under which you may terminate the contract for cause or convenience; the procedures for termination; and the basis to be used for settlement.

3. *Allowable costs under cost-type contracts.* In any cost-type contract with an entity, you must include a clause to permit the entity to charge to the contract only costs that are allowable under the cost principles that FMS Article III identifies as applicable to that type of entity, as supplemented by any award-specific terms and conditions related to allowability of costs that are included in this award. Your contract clause may permit the contractor to use its own cost principles in determining the allowability of its costs charged to the contract, as long as its cost principles comply with those Federal cost principles supplemented by any award-specific terms and conditions of this award.

4. *Rights in copyright and data.* You must include in each contract under this award a provision requiring that the contractor:

a. Grant the Federal Government a royalty-free, nonexclusive and irrevocable right to:

i. Reproduce, publish, or otherwise use for Federal purposes any work that is subject to copyright and that the contractor develops, or acquires ownership of, under this award;

ii. Authorize others to reproduce, publish, or otherwise use such work for Federal purposes; and

b. Grant the Federal Government the right to:

i. Obtain, reproduce, publish, or otherwise use data produced under this award;

ii. Authorize others to receive, reproduce, publish, or otherwise use such data for Federal purposes; and

c. Include the Federal Government rights described in subparagraphs 4.a. and 4.b. of this section in any subcontracts.

5. *Access to records.*

a. In any negotiated, cost-type or time and materials contract for an amount in excess of the simplified acquisition threshold, you must provide for access to any of the contractor's books, documents, papers, and records that are directly pertinent to that contract to enable and support audits, examinations, excerpts, and transcriptions. The contract provision must provide access to those records for all of the following and their duly authorized representatives:

i. You;

ii. Us as the Federal awarding agency, including our Inspector General; and

iii. The Comptroller General of the United States.

b. In any audit services contract for performance of an audit required by the Single Audit Act, as implemented by OMB in Subpart F of 2 CFR part 200, you must provide for the access to audit documentation described in 2 CFR 200.517(b).

6. *Records retention.*

a. In any negotiated, cost-type or time and materials contract for an amount in excess of the simplified acquisition threshold, you must provide for retention of all records that are directly pertinent to that contract for 3 years after you make final payment and all pending matters are closed.

b. In any audit services contract for performance of an audit required by the Single Audit Act, as implemented by OMB in Subpart F of 2 CFR part 200, you must provide for the retention of audit documentation described in 2 CFR 200.517(a).

7. *Reporting.* In any contract awarded under this award, you must include any provision for the contractor's reporting to you that may be needed in order for you to meet your requirements under this award to report to us.

Section B. Contract provisions for national policy requirements.

1. *Equal employment opportunity.* You must include the clause provided in 41 CFR 60–1.4(b) in any ''federally assisted construction contract'' (as defined in 41 CFR 60–1.3) under this award, unless provisions of 41 CFR part 60–1 exempt the contract from the requirement.

2. *Wage Rate Requirements (Construction),* formerly the Davis-Bacon Act. With respect to each construction contract for more than $2,000 to be awarded using funding provided under this award, you must:

a. Place in the solicitation under which the contract will be awarded a copy of the current prevailing wage determination issued by the Department of Labor;

b. Condition the decision to award the contract upon the contractor's acceptance of that prevailing wage determination;

c. Include in the contract the clauses specified at 29 CFR 5.5(a) in Department of Labor regulations at 29 CFR part 5, ''Labor Standards Provisions Applicable to Contracts Governing Federally Financed and Assisted Construction,'' to require the contractor's compliance with the Wage Rate Requirements (Construction), as amended (40 U.S.C. 3141–44, 3146, and 3147); and

d. Report all suspected or reported violations to the award administration office identified in this award.

3. *Copeland Act prohibition on kickbacks.* In each contract under this award that is subject to the Wage Rate requirements in paragraph 2 of these provisions, you must:

a. Include a provision requiring the contractor to comply with the anti-kickback provisions of the Copeland Act (18 U.S.C. 874 and 40 U.S.C. 3145), as supplemented by Department of Labor regulations at 29 CFR part 3, ''Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States.''

b. Report all suspected or reported violations to the award administration office identified in the award notice cover sheet of this award.

4. *Contract Work Hours and Safety Standards Act for work involving mechanics*

or laborers. In each contract for an amount greater than $100,000 that involves the employment of mechanics or laborers and is not a type of contract excepted under 40 U.S.C. 3701, you must include the clauses specified in Department of Labor (DoL) regulations at 29 CFR 5.5(b) to require use of wage standards that comply with the Contract Work Hours and Safety Standards Act (40 CFR, Subtitle II, Part A, Chapter 37), as implemented by DoL at 29 CFR part 5, ''Labor Standards Provisions Applicable to Contracts Governing Federally Financed and Assisted Construction.''

5. *Patents and inventions.* If you procure the services of a nonprofit organization, small business firm, or other entity for the performance of experimental, developmental or research work, you must include in the contract the clause prescribed in Section B of PROP Article VI to establish contractual requirements regarding subject inventions resulting from the contract and provide for Federal Government rights in those inventions.

6. *Clean air and water requirements.* You must:

a. In each contract for an amount greater than $150,000 under this award, include a clause requiring the contractor to comply with applicable provisions of the Clean Air Act (42 U.S.C. 7401–7671q), Federal Water Pollution Control Act (33 U.S.C. 1251–1387), and standards, orders, or regulations issued under those acts; and

b. Report any violations of the Acts, standards, orders, or regulations to both the award administration office identified in this award and the appropriate regional office of the Environmental Protection Agency.

7. *Nonprocurement suspension and debarment.* Unless you have an alternate method for requiring the contractor's compliance, you must include a clause in each contract for an amount equal to or greater than $25,000 for other than federally required audit services and in each contract for federally required audit services regardless of dollar value to require the contractor to comply with OMB guidance on nonprocurement suspension and debarment in 2 CFR part 180, as implemented by DoD regulations at 2 CFR part 1125.

8. *Byrd Amendment anti-lobbying requirements.* In each contract for an amount exceeding $100,000, you must include a clause requiring the contractor to submit to you the certification and any disclosure forms regarding lobbying that are required under 31 U.S.C. 3152, as implemented by the DoD at 32 CFR part 28.

9. *Purchase of recovered materials by States or political subdivisions of States.* In each contract under which the contractor may purchase items designated in Environmental Protection Agency (EPA) regulations in 40 CFR part 247, subpart B, you must include a clause requiring the contractor to comply with applicable requirements in those EPA regulations, which implement Section 6002 of the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. 6962).

10. *Fly America requirements.* In each contract under which funds provided under this award might be used for international air travel for the transportation of people or property, you must include a clause requiring the contractor to:

a. Comply with the International Air Transportation Fair Competitive Practices Act of 1974 (49 U.S.C. 40118, also known as the ''Fly America'' Act), as implemented at 41 CFR 301–10.131 through 301–10.143. The statute and regulations provide that U.S. Government-financed international air travel of passengers and transportation of personal effects or property must use a U.S. Flag air carrier or be performed under a cost-sharing arrangement with a U.S. carrier, if such service is available; and

b. Include the requirements of the Fly America Act in all subcontracts that might involve international air transportation.

11. *Cargo preference for United States flag vessels.* In each contract under which equipment, material, or commodities may be shipped by oceangoing vessels, you must include the clause specified in Department of Transportation regulations at 46 CFR 381.7(b) to require that at least 50 percent of equipment, materials or commodities purchased or otherwise obtained with Federal funds under this award, and transported by ocean vessel, be transported on privately owned U.S.-flag commercial vessels, if available.

PART 1134—FINANCIAL, PROGRAMMATIC, AND PROPERTY REPORTING: GENERAL AWARD TERMS AND CONDITIONS

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Appendix E to Part 1134—Terms and conditions for REP Article V, ''Other reporting''

Authority: 5 U.S.C. 301 and 10 U.S.C. 113.

§ 1134.1 Purpose of this part.

(a) This part specifies standard wording of general terms and conditions concerning recipients' reporting requirements.

(b) It thereby implements OMB guidance on reporting in 2 CFR part 170 and the following portions of 2 CFR part 200, as they relate to general terms and conditions of grants and cooperative agreements:

(1) 2 CFR 200.301 and 200.327 through 200.329; and

(2) 2 CFR 200.300(b) as it relates to subaward reporting, 200.312(a) as it relates to inventories of federally owned property, and 200.343(a) as it relates to financial and performance reporting.

§ 1134.2 Applicability of this part.

The types of awards and entities to which this part and other parts in this subchapter apply are described in the subchapter overview at 2 CFR 1126.2.

§ 1134.3 Exceptions from requirements of this part.

Exceptions are permitted from the administrative requirements in this part only as described at 2 CFR 1126.3.

§ 1134.4 Organization of this part.

(a) The content of this part is organized into subparts and associated appendices.

(1) Each subpart provides direction to DoD Components on how to construct one article of general terms and conditions for grants and cooperative agreements.

(2) For each subpart, there is a corresponding appendix with standard wording for terms and conditions of the article addressed by the subpart. Terms and conditions address rights and responsibilities of the Federal Government and recipients.

(b) A DoD Component must use the wording provided in each appendix in accordance with the direction in the corresponding subpart. That direction may permit DoD Components to vary from the standard wording in some situations.

(c) Table 1 shows which article of general terms and conditions may be found in each of appendices A through D to this part (with the associated direction to DoD Components in Subparts A through D, respectively):

TABLE 1 TO PARAGRAPH (c)

In . . .	You will find terms and conditions specifying recipients' rights and responsibilities related to . . .	That would appear in an award within REP Article . . .
Appendix A	Performance management, monitoring, and reporting	I.
Appendix B	Financial reporting	II.
Appendix C	Reporting on property	III.
Appendix D	Reporting on subawards and executive compensation	IV.
Appendix E	Other reporting	V.

Subpart A—Performance Management, Monitoring, and Reporting (REP Article I)

§ 1134.100 Purpose of REP Article I.

REP Article I of the general terms and conditions specifies requirements related to recipient reporting on program performance. It thereby implements OMB guidance for grants and cooperative agreements in:

(a) 2 CFR 200.328; and

(b) Portions of 2 CFR 200.301 and 200.343(a) that relate to performance reporting.

§ 1134.105 Performance reporting for construction awards.

(a) *OMB guidance.* OMB guidance in 2 CFR 200.328(c) notes that agencies rely heavily on onsite technical inspections and certified percentage of completion data to monitor progress under construction grants and cooperative agreements and states that agencies may require additional performance reports only when considered necessary.

(b) *DoD implementation.* DoD Components may require performance reports under construction awards only when necessary and, to reduce recipient burdens, should coordinate the performance reporting with financial reporting to the maximum extent practicable.

(c) *Award terms and conditions.* (1) If a DoD Component has general terms and conditions specifically for construction awards and does not need performance reports for those awards, it:

(i) Should reserve Sections A through D of REP Article I in those terms and conditions;

(ii) Must follow the specifications in §§ 1134.135 and 1134.145 to include the wording appendix A to this part provides for Sections E and G of REP Article I in those terms and conditions, in order to require recipients to promptly report significant developments and reserve the DoD Component's right to make site visits.

(iii) Must follow the specifications in § 1134.140 to insert wording in Section F of REP Article I in those terms and conditions, to tell recipients where and how to submit any reports of significant developments.

(2) If a DoD Component has general terms and conditions specifically for construction awards and determines that it needs performance reports for those awards:

(i) It may tailor the template and content that appendix A to this part provides for Sections A through D of REP Article I in those terms and conditions, as needed to specify the reporting requirements or, as appropriate, instead integrate those requirements into REP Article II on financial reporting. The form, format, or data elements that the DoD Component specifies for any of those performance reports must comply with requirements of the Paperwork Reduction Act of 1995, as implemented by OMB at 5 CFR part 1320, to use OMB-approved information collections if more than 9 recipients will be subject to the reporting requirement.

(ii) It must follow the specifications in §§ 1134.135 through 1134.145 concerning Sections E through G of REP Article I in those terms and conditions, as described in paragraphs (c)(1)(ii) and (iii) of this section.

§ 1134.110 Performance reporting for non-construction awards.

(a) *OMB guidance.* OMB guidance in 2 CFR 200.328(f) states that an agency may waive any performance report that it does not need.

(b) *DoD implementation*—(1) *Interim reports.* DoD Components should waive requirements for interim performance reports under non-construction awards, including research awards, only when program managers have an alternative source for the information that the reports provide in support of the need for technical program oversight during the period of performance.

(2) *Final reports*—(i) *Research.* DoD Components may not waive requirements for final performance reports under research awards, even when program managers have other sources of the information they contain. A primary purpose of a final report under a research award is to document the overall project or program well enough to serve as a long-term reference from which others may understand the purpose, scope, approach, results or outcomes, and conclusions or recommendations of the research.

(ii) *Non-construction awards other than research.* DoD Components should consider the long-term value of final performance reports for documenting program outcomes, as well as any near-term value, before waiving requirements for final reports under other non-construction awards.

(c) *Award terms and conditions.* Appendix A to this part provides a template for REP Article I of the general terms and conditions of research awards or other non-construction awards under which performance reports are required. A DoD Component must either use the wording that appendix A provides or insert wording into the template, in accordance with §§ 1134.115 through 1134.145, to:

(1) Specify the content and form, format, or data elements recipients must

use for interim and final performance reporting (see § 1134.115);

(2) Specify the reporting frequency, reporting periods, and due dates for interim performance reports (see § 1134.120);

(3) Specify the due dates and reporting periods for final performance reports (see § 1134.125);

(4) Specify that recipients may request extensions of due dates for performance reports (see § 1134.130);

(5) Require recipients to report significant developments (see § 1134.135);

(6) Specify reporting procedures (see § 1134.140); and

(7) Reserve the DoD Component's right to make site visits (see § 1134.145).

§ 1134.115 Content and forms, formats, or data elements for interim and final performance reporting under non-construction awards.

(a) *OMB guidance.* OMB guidance in:

(1) 2 CFR 200.301 and 200.328(b)(2) state that Federal awarding agencies must require recipients to use standard OMB-approved information collections for reporting performance information.

(2) 2 CFR 200.328(b)(2)(i) through (iii) list types of information that performance reports under non-construction grants and cooperative agreements will contain, as appropriate, unless other collections are approved by OMB.

(b) *DoD implementation.* (1) The content of the information collections that a DoD Component's general terms and conditions specify for non-construction awards must include the elements listed in 2 CFR 200.328(b)(2)(i) through (iii) that are appropriate to the projects or programs subject to those general terms and conditions.

(2) Forms, formats, and data elements that a DoD Component's general terms and conditions specify for performance reporting under non-construction awards must comply with requirements of the Paperwork Reduction Act of 1995 to use OMB-approved information collections, as implemented by OMB at 5 CFR part 1320.

(3) To the maximum extent practicable, a DoD Component's general terms and conditions for non-construction awards must specify that recipients use Governmentwide standard forms, formats, and data elements that also are used by other Federal agencies for similar programs, recipients, and types of awards (*e.g.,* the Research Performance Progress Report format or any successor to it that OMB clears for interim performance progress reports under research awards to institutions of higher education and nonprofit organizations).

(c) *Award terms and conditions.* To implement the provisions of paragraphs (a) and (b) of this section, a DoD Component must insert wording in lieu of the reserved Section A of REP Article I of its general terms and conditions for non-construction awards to specify the form, format, or data elements that recipients must use for interim and final performance reports. Section A of REP Article I may specify a different requirement for final performance reports than interim reports.

§ 1134.120 Frequency, reporting periods, and due dates for interim performance reporting under non-construction awards.

(a) *OMB guidance.* OMB guidance in 2 CFR 200.328(b)(1) addresses performance reporting frequency under grants and cooperative agreements and due dates.

(1) *Reporting frequency.* The OMB guidance states that interim performance reports should be no less frequent than annually, nor more frequent than quarterly except in unusual circumstances (*e.g.,* when more frequent reporting is necessary for effective program monitoring).

(2) *Due dates.* The OMB guidance states that due dates for interim performance reports must be:

(i) 30 calendar days after the end of the reporting period if interim reports are required quarterly or semiannually; and

(ii) 90 calendar days after the end of the reporting period if interim reports are required annually, unless the agency elects to require the annual reports before the anniversary dates of multiyear awards.

(b) *DoD implementation.* DoD implements the OMB guidance in 2 CFR 200.328(b)(1) concerning frequency and due dates of interim performance reports through award terms and conditions, with the following clarifications and added specifications concerning reporting periods:

(1) *Reporting frequency.* DoD Components rarely, if ever, should require recipients to submit interim performance reports more often than annually for basic research awards. Before requiring interim performance reports more frequently than annually for other research awards, DoD Components should carefully consider whether the benefits of more frequent reporting are sufficient to offset the potential for slowing the rate of research progress, due to diversion of researchers' time from research performance to report preparation.

(2) *Reporting periods.* For research awards, a DoD Component should not require any recipient to submit interim performance reports on a cumulative basis—*i.e.,* the second and any subsequent performance report should address only the most recent reporting period and not also address previous reporting periods covered by earlier interim performance reports.

(3) *Due dates.* If a DoD Component requires an interim report more frequently than quarterly due to unusual circumstances, as described in 2 CFR 200.328(a)(1) and paragraph (a)(1) of this section, the DoD Component must specify that the due date for the report is 30 days after the end of the reporting period. For all other interim reports, DoD Components must specify due dates in accordance with paragraph (a)(2) of this section.

(c) *Award terms and conditions.* A DoD Component must insert wording in lieu of the reserved Section B of REP Article I of its general terms and conditions for non-construction awards to specify:

(1) The frequency with which recipients must submit interim performance reports;

(2) The reporting period each interim performance report must cover; and

(3) The due date for each interim performance report, stated as the number of calendar days after the end of the reporting period.

§ 1134.125 Due dates and reporting periods for final performance reports under non-construction awards.

(a) *OMB guidance.* OMB guidance in 2 CFR 200.328(b)(1) states that each final performance report will be due 90 calendar days after the end date of the period of performance. It also states that an agency may extend the due date if a recipient submits a justified request.

(b) *DoD implementation*—(1) *Due dates.* Consistent with 2 CFR 200.328(b)(1):

(i) *General.* A DoD Component's general terms and conditions must specify that the due date for each recipient's submission of its final performance report is:

(A) 90 calendar days after the end of the period of performance for non-construction awards other than research.

(B) 120 calendar days after the end of the period of performance for research awards.

(ii) *Exception.* A DoD Component may pre-approve a 30-day extension to the due date in its general terms and conditions for non-construction awards other than research by specifying that each recipient's final performance report is due 120 calendar days after the end of the period of performance. Doing so would be especially helpful to

recipients that have subawards and need time to assimilate subrecipient inputs into the final report for the project or program as a whole.

(2) *Reporting periods*—(i) *Non-construction awards other than research.* A DoD Component's general terms and conditions for non-construction awards other than research may require each recipient to submit a final report that is cumulative and covers the entire period of performance, as that may more effectively document the project or program for future reference.

(ii) *Research.* Final reports for research awards must be cumulative (*i.e.,* each final report must cover the entire period of performance under the award and not just the period since the previous interim performance report) because a primary purpose of a final report for a research award is to document the overall project or program, as described in § 1134.110(b)(2).

(c) *Award terms and conditions.* To implement the provisions of paragraphs (a) and (b) of this section, a DoD Component in its general terms and conditions for non-construction awards:

(1) Must either:

(i) Specify that the due date for final performance reports is either 90 or 120 calendar days after the end of the period of performance, as indicated in paragraph (b)(1)(i), by including the wording that appendix A to this part provides for paragraph C.1 of REP Article I and modifying the bracketed language in that wording by removing the brackets and showing only the number of days (*i.e.,* 90 or 120 calendar days) appropriate for the type of awards; or

(ii) Pre-approve a 30-day extension to the 90 calendar day due date, as described in paragraph (b)(1)(ii) of this section for non-construction awards other than research, by including the wording that appendix A to this part provides for paragraph C.1 of REP Article I and modifying the bracketed language in that wording by removing the brackets and showing only ''120 calendar days'' in lieu of ''90 calendar days.''

(2) Must insert wording in lieu of the reserved paragraph C.2 of REP Article I, to specify the reporting period for final reports (*e.g.,* that research awards require cumulative final reports).

§ 1134.130 Requesting extensions of due dates for performance reports.

(a) *OMB guidance.* OMB guidance in 2 CFR 200.328(b)(1) states that, if a recipient submits a justified request for an extension in the due date for any interim or final performance report under a grant or cooperative agreement, an agency may extend the due date.

(b) *DoD implementation.* A DoD Component's general terms and conditions for non-construction awards must specify that a recipient may request an extension of the due date for interim or final performance reports. DoD Components should grant requests that provide adequate justification. For a DoD Component that pre-approves a 30-day extension of due dates for final performance reports in its general terms and conditions, as described in § 1134.125(b)(1)(ii) and (c)(1)(ii), any award-specific extensions would be beyond the pre-approved 30-day extension.

(c) *Award terms and conditions.* To implement the provisions of paragraphs (a) and (b) of this section, a DoD Component's general terms and conditions for non-construction awards must include the wording that appendix A to this part provides for Section D of REP Article I on extensions of performance reporting due dates.

§ 1134.135 Reporting significant developments.

(a) *OMB guidance.* OMB guidance in 2 CFR 200.328(d) states that a recipient must promptly notify the awarding agency about significant developments under grants and cooperative agreements.

(b) *DoD implementation.* A DoD Component's general terms and conditions must require recipients to report significant developments, as described in 2 CFR 200.328(d).

(c) *Award terms and conditions.* A DoD Component's general terms and conditions must include the wording that appendix A to this part provides for Section E of REP Article I on reporting of significant developments.

§ 1134.140 Performance reporting procedures.

(a) *Requirement.* A DoD Component's general terms and conditions must inform recipients about performance reporting procedures.

(b) *Award terms and conditions.* To implement the requirement of paragraph (a) of this section, a DoD Component in its general terms and conditions must insert wording in Section F of REP Article I (which is reserved in the template for REP Article I that appendix A to this part provides), to specify:

(1) The office or offices to which a recipient must submit its interim and final performance reports, any requests in due dates for those reports, and any reports of significant developments; and

(2) How the recipient is to submit those reports and requests (*e.g.,* email or other electronic submission method).

(3) For research awards, component must assure that the recipient final report complies with the distribution and marking requirements of DoD Manual 3200.14, Volume 1. This includes the requirement that all significant scientific or technological findings, recommendations, and results derived from DoD endeavors—which shall include the final performance report at a minimum—are recorded and provided to Defense Technical Information Center (DTIC). Follow guidance in (b)(1) to inform recipients as the submission and distribution requirements (*i.e.* Component may choose to receive the report and submit to DTIC themselves or provide instructions to recipient on submission to DTIC).

(4) Access to Research Results

(i) For purposes of this term and condition, the following definition applies:

Final Peer-Reviewed Manuscript: The final version of a peer-reviewed article for a professional journal publication disclosing the results of scientific research which is authored or co-authored by the recipient or funded, in whole or in part, with funds from a DoD award, that includes all modifications from the publishing peer review process, and all graphics and supplemental material associated with the article.

(ii) The recipient shall ensure that any Final Peer-Reviewed Manuscript is submitted to the Defense Technical Information Center (DTIC) repository, currently at *www.dtic.mil.* Ensure that the Final Peer-Reviewed Manuscript is submitted when it is accepted for publication, and when the final title and date of publication are known.

§ 1134.145 Site visits.

(a) *OMB guidance.* OMB guidance in 2 CFR 200.328(e) states that a Federal awarding agency may make site visits as warranted by program needs.

(b) *DoD implementation.* A DoD Component's general terms and conditions must state that the Federal Government reserves the right to make site visits as warranted.

(c) *Award terms and conditions.* A DoD Component's general terms and conditions must include the wording that appendix A to this part provides for Section G of REP Article I concerning site visits.

Subpart B—Financial Reporting (REP Article II)

§ 1134.200 Purpose of REP Article II.

REP Article II of the general terms and conditions specifies requirements related to financial reporting. It thereby implements OMB guidance in 2 CFR 200.327 and the portions of 2 CFR 200.301 and 200.343(a) that are specific to financial reporting under grants and cooperative agreements.

§ 1134.205 Reporting forms, formats, or data elements.

(a) *OMB guidance.* OMB guidance in 2 CFR 200.327 states that Federal awarding agencies may require recipients to use only the standard OMB-approved Governmentwide data elements for collection of financial information, unless OMB approves other forms, formats, or data elements for financial information collection.

(b) *DoD implementation.* DoD Components must collect financial information from recipients using OMB-approved forms, formats, or data elements.

(1) Unless current approvals expire, approved financial information collections include the Federal Financial Report (SF–425) and Request for Advance or Reimbursement (SF–270). In the future, they would include any additional information collections that OMB approves.

(2) For all but the recipient's final financial report, a DoD Component may rely on financial information the recipient provides on the SF–270 or other OMB-approved payment request form, format, or data elements if that financial information is sufficient to meet the DoD Component's needs. For the final report, the DoD Component must require the recipient to use the SF–425 or other OMB-approved financial information collection.

(3) A DoD Component must obtain approval for any variations from OMB-approved forms or formats, including use of additional or substitute data elements or modification of the associated instructions for recipient entities submitting the information.

§ 1134.210 Content of REP Article II.

(a) *Requirement.* A DoD Component's general terms and conditions must specify what financial information recipients are required to report and how often, when, where, and how they must report.

(b) *Award terms and conditions*—(1) *General.* Appendix B to this part provides a template into which a DoD Component must insert wording to specify the form, format, or data elements recipients must use for financial reporting; the frequency, reporting periods, and due dates for their financial reports (stated as the number of days after the end of the reporting period); and where and how they must submit the information.

(2) *Required reporting form, format, or data elements for interim and final financial reports.* In Section A of REP Article II, which is reserved in appendix B to this part, a DoD Component must insert wording to specify the OMB-approved form, format, or data elements that recipients must use for financial reporting and the website where they can be found. The section may provide a different requirement for final financial reports than interim reports during the period of performance if the DoD Component needs less information on interim reports than is needed on the final report.

(3) *Interim financial reports: Frequency, reporting periods, and due dates.* In Section B of REP Article II, which is reserved in appendix B to this part, a DoD Component must insert wording to specify the frequency with which recipients must submit interim financial reports, as well as the reporting period each report must cover and when it is due. However, this section of the article may waive interim reporting requirements if the DoD Component relies on information already provided with payment requests (*e.g.,* on the SF–270).

(i) Consistent with OMB guidance in 2 CFR 200.327, the reporting frequency may be no less often than annually and no more frequently than quarterly except in unusual circumstances (*e.g.,* a need for more frequent reporting for monitoring program performance, in which case financial reporting should be coordinated with performance reporting).

(ii) The reporting frequency, reporting periods, and due dates must conform with any guidance on those aspects of financial reporting in the OMB-approved instructions accompanying the form, format, or data elements used.

(iii) When a DoD Component's general terms and conditions provide for advance payments based on predetermined schedules—which is very rarely if ever appropriate for research awards—the terms and conditions must provide for quarterly reporting. This will enable post-award administrators to closely monitor recipients' balances of cash on hand for compliance with Governmentwide cash management standards.

(4) *Final financial report.* Appendix B to this part provides wording for Section C of REP Article II to implement OMB guidance in 2 CFR 200.343(a) as it applies to final financial reports. Given that 2 CFR part 200 provides 90 days for subrecipients to liquidate subaward obligations and submit their final financial reports to recipients, the wording in appendix B gives recipients 120 days to submit final financial reports to DoD post-award administration offices. That provides a reasonable amount of time for recipients to incorporate any information they need from final subaward reports. A DoD Component may alter the wording or supplement it if the DoD Component has a basis to do so in a statute or a regulation published in the Code of Federal Regulations.

(5) *Extensions of due dates.* A DoD Component's general terms and conditions must include the wording for Section D of REP Article II that appendix B to this part provides to authorize recipients to request extensions of due dates for interim or final financial reports.

(6) *Where and how to submit financial reports.* In Section E of REP Article II, which is reserved in appendix B to this part, a DoD Component must insert wording to specify the DoD official or office to whom a recipient must submit its interim and final financial reports and the method it must use to do so (*e.g.,* email or other electronic submission method).

Subpart C—Reporting on Property (REP Article III)

§ 1134.300 Purposes of REP Article III.

REP Article III of the general terms and conditions provides a consolidated source that sets out required reports, notifications, requests, and accountings related to federally owned property and property that is acquired or improved under awards. The article is:

(a) The original source of requirements for recipients to:

(1) Submit periodic status reports and notifications of critical changes for real property (in paragraphs A.1 and A.2 of the article), which thereby implements OMB guidance in 2 CFR 200.329;

(2) Submit an annual inventory of federally owned property (in paragraph C.1 of the article), which thereby partially implements OMB guidance in 2 CFR 200.312(a);

(3) Provide information on request about copyrighted works and data produced under awards (in paragraph D.2 of the article).

(b) A secondary source provided for the convenience of recipients and DoD post-award administrators that lists and refers to the original sources of requirements for recipients to:

(1) Request disposition instructions and account at closeout for real property (in paragraphs A.3 and A.4 of the article), the original sources of which are in PROP Article III and OAR Article VI;

(2) Provide notifications of loss, damage, or theft and requests for disposition instructions for equipment (in paragraphs B.2 and B.3 of the article), the original sources of which are in PROP Articles II and IV, respectively;

(3) Account at closeout for equipment and supplies (in paragraph B.4 of the article), the original sources of which are in OAR Article VI and PROP Article IV;

(4) Provide notifications of loss, damage, or theft and requests for disposition instructions for federally owned property (in paragraphs C.2 and C.3 of the article), the original sources of which are in PROP Articles II and V, respectively;

(5) Disclose and report on inventions developed under awards (in paragraph D.1), the original source of which is in PROP Article VI; and

(6) Request disposition instructions for intangible property acquired, but not developed or produced, under awards (in paragraph D.3 of the article), the original source of which is in PROP Article VI.

§ 1134.305 Real property: reports, notifications, requests, and accounting.

(a) *Requirement.* A DoD Component's general terms and conditions must specify the real property reporting requirements described in § 1134.300(a)(1) and provide references to the related requirements described in § 1134.300(b)(1).

(b) *Award terms and conditions.* To implement the requirement described in paragraph (a) of this section, the wording of Section A of REP Article III of a DoD Component's general terms and conditions must comply with either paragraph (b)(1) or (b)(2) of this section.

(1) *General.* Unless a DoD Component determines that there will be no acquisition or improvement of real property under awards using its general terms and conditions, those general terms and conditions must include the wording appendix C to this part provides for Section A of REP Article III, to which the DoD Component:

(i) Must add wording in lieu of the reserved paragraph A.1.a to specify how often a recipient must submit periodic status reports and how long it is required to do so (which should be the duration of the Federal interest in the real property). The wording of paragraph A.1.a must be consistent with OMB guidance in 2 CFR 200.329, which provides different options for reporting frequency depending on the duration of the Federal interest in the real property.

(ii) Must add wording in lieu of the reserved paragraph A.1.b to specify the due date for each periodic status report in terms of the number of calendar days after the end of the period covered by the report (*e.g.,* a report on the status of the property as of September 30 might be due 30 calendar days after that date).

(iii) May provide wording in lieu of the reserved paragraph A.1.c if there are other instructions—*e.g.,* a form, format, or information elements that a recipient must use (which must be cleared by OMB under the Paperwork Reduction Act, as implemented by OMB at 5 CFR part 1320) or a particular office to which reports must be submitted, especially if reporting will continue beyond closeout of the award under which the real property was acquired or improved.

(2) *Exception.* A DoD Component may reserve Section A of REP Article III if it determines that there will be no acquisition or improvement of real property under awards using its general terms and conditions.

§ 1134.310 Equipment and supplies: reports, notifications, requests, and accounting.

(a) *Requirement.* REP Article III of a DoD Component's general terms and conditions must clarify that there is no requirement for routine periodic reporting about equipment acquired under an award and provide the references described in § 1134.300(b)(2) and (3) to requirements in other articles for notifications, requests, and accounting related to equipment and supplies.

(b) *Award terms and conditions.* To implement the requirement described in paragraph (a) of this section, a DoD Component's general terms and conditions must use the wording appendix C to this part provides for Section B of REP Article III.

§ 1134.315 Federally owned property: inventory, notifications, and requests.

(a) *Requirement.* REP Article III of a DoD Component's general terms and conditions must specify the reporting requirement described in § 1134.300(a)(2) and provide the references described in § 1134.300(b)(4) to requirements in other articles for notifications and requests related to federally owned property.

(b) *Policy.* (1) Except as provided by statute or in regulations adopted in the Code of Federal Regulations after opportunity for public comment, a DoD Component may not specify:

(i) Due dates for the annual inventories of federally owned property; or

(ii) Forms, formats, or specific data elements for the inventories, notifications, or requests for disposition instructions. Any form, format, or data elements that a DoD Component specifies must be cleared by OMB under the Paperwork Reduction Act, as implemented by OMB at 5 CFR part 1320.

(2) Not specifying due dates, forms, formats, or data elements provides flexibility for recipients and DoD post-award administrators to handle these requirements in ways that reduce burdens and costs. For example, a recipient may arrange with a post-award administration office to submit one consolidated inventory annually for federally owned property under all of the awards it receives that are administered by that office, using a format its property management system already generates.

(c) *Award terms and conditions*—(1) *General.* To implement the requirement described in paragraph (a) of this section, a DoD Component's general terms and conditions must use the wording appendix C to this part provides for Section C of REP Article III. The DoD Component may add wording on due dates or on forms, formats, or data elements only as provided in paragraph (b) of this section.

(2) *Exception.* A DoD Component may reserve Section C of REP Article III if it determines that no recipients of awards using its general terms and conditions, or subrecipients of subawards under those awards, will be accountable for federally owned property under those awards or subawards.

§ 1134.320 Intangible property: disclosures, reports, and requests.

(a) *Requirement.* REP Article III of a DoD Component's general terms and conditions must specify the requirement described in § 1134.300(a)(3) and provide the references described in § 1134.300(b)(5) and (6) to requirements in other articles for disclosures, reports, and requests related to intangible property.

(b) *Award terms and conditions*—(1) *General.* To implement the requirement described in paragraph (a) of this section, a DoD Component's general terms and conditions must use the wording appendix C to this part provides for Section D of REP Article III.

(2) *Exceptions.* A DoD Component may reserve:

(i) Section D of REP Article III if it determines that no recipients of awards using its general terms and conditions,

or subrecipients of subawards under those awards, will have any intangible property for which they will be accountable to the Federal Government; or

(ii) Any of paragraphs D.1 through D.3, if it determines that no recipients of awards using its general terms and conditions, or subrecipients of subawards under those awards, will be accountable to the Federal Government for the particular types of intangible property addressed by those paragraphs.

Subpart D—Reporting on Subawards and Executive Compensation (REP Article IV)

§ 1134.400 Purpose of REP Article IV.

REP Article IV of the general terms and conditions specifies requirements for recipients to report information about subawards and executive compensation.

§ 1134.405 Content of REP Article IV.

(a) *Source of the reporting requirements.* The requirements for recipients to report information about subawards and executive compensation originate in the Federal Funding Accountability and Transparency Act of 2006, as amended (31 U.S.C. 6101 note). OMB guidance at 2 CFR part 170 implements those statutory requirements and appendix A to that part provides standard Governmentwide wording of an award provision.

(b) *Award terms and conditions.* To implement the reporting requirements described in paragraph (a) of this section, a DoD Component's general terms and conditions must use the wording appendix E to this part provides as REP Article IV.

Subpart E—Other Reporting (REP Article V)

§ 1134.500 Purpose of REP Article V.

REP Article V of the general terms and conditions specifies requirements for recipients to provide any type of report not addressed in REP Articles I–IV.

§ 1134.505 Content of REP Article V.

(a) *Source of reporting requirement.* Any requirement in a DoD Component's general terms and conditions for recipients to provide a type of report not addressed in REP Articles I–IV must:

(1) Have a basis in a statute or regulation adopted in the **Federal Register** after an opportunity for public comment; and

(2) Use a form/format that has been approved by OMB under the PRA, as implemented by OMB in 5 CFR part 1320.

(b) *Award terms and conditions.* (1) To implement any reporting requirement described in paragraph (a) of this section, a DoD Component's general terms and conditions must include the following content in REP Article V, consistent with the PRA approval. Otherwise, REP Article V must be reserved.

(a) The name of the report and where a recipient can obtain it;

(b) For an interim report, the frequency with which it must be submitted and due date(s);

(c) For a final report, whether the report is due 90 days or, if the DoD Component has pre-approved a 30-day extension, 120 days after the end of the period of performance; and

(d) To what DoD office/official the report(s) must be submitted.

(2) If there is more than one such report, the DoD Component must show the information for each in separate sections of the article.

Appendix A to Part 1134—Terms and Conditions for REP Article I, ''Performance Management, Monitoring, and Reporting''

For the general terms and conditions of construction awards, unless a DoD Component reserves any sections or inserts or modifies wording, as specified in § 1134.105 for Sections A through D of the article, a DoD Component's general terms and conditions must use the following wording for REP Article I.

For the general terms and conditions of non-construction awards (§§ 1134.115 through 1134.145), a DoD Component must use the following wording for REP Article I and, as specified in §§ 1134.115 through 1134.125 and § 1134.140, insert or modify wording, depending on whether the terms and conditions are for research and/or other non-construction awards.

REP Article I. Performance Management, Monitoring, and Reporting. (DECEMBER 2014)

Section A. Required reporting form, format, or data elements for interim and final performance reports. [Reserved.]

Section B. Frequency, reporting periods, and due dates for interim performance reports. [Reserved.]

Section C. Due date and reporting period for final performance report.

1. *Due date.* You must submit the final performance report under this award no later than [90 calendar days for non-construction awards other than research or 120 calendar days for research awards] after the end date of the period of performance unless we approve an extension of that due date as described in Section D of this article.

2. *Reporting period.* [Reserved.]

Section D. Extensions of due dates. You may request extensions of the due dates that Sections B and C of this Article specify for interim and final reports, respectively. You must provide the reasons for your request and we will approve extensions that are adequately justified.

Section E. Reporting significant developments. You must report the following information to us as soon as you become aware of it:

1. Problems, delays, or adverse conditions that will materially impair your ability to meet the objectives of this award. This disclosure must include a statement of the action taken, or contemplated, and any assistance needed to resolve the situation.

2. Favorable developments which will enable you to meet schedules and objectives sooner or at less cost than anticipated or produce more or different beneficial results than originally planned.

Section F. Performance reporting procedures. [Reserved.]

Section G. Site visits. We reserve the right to make site visits as warranted to monitor program performance under this award.

Appendix B to Part 1134—Terms and Conditions for REP Article II, ''Financial Reporting''

A DoD Component must in its general terms and conditions complete the template provided in this appendix for Sections A, B, and E of REP Article II by inserting or modifying wording, as specified in § 1134.210, and use the following wording for Sections C (unless alternate wording is permitted by § 1134.210) and D of the article.

REP Article II. Financial Reporting. (DECEMBER 2014)

Section A. Required reporting form, format, or data elements for interim and final financial reports. [Reserved.]

Section B. Interim financial reports: Frequency, reporting periods, and due dates. [Reserved.]

Section C. Final financial report. You must submit the final financial report under this award no later than 120 calendar days after the end date of the period of performance.

Section D. Extensions of due dates. You may request extensions of the due dates that Sections B and C of this Article specify for interim and final reports, respectively. You must provide the reasons for your request, and we will approve extensions that are adequately justified.

Section E. Where and how to submit financial reports. [Reserved.]

Appendix C to Part 1134—Terms and Conditions for REP Article III, ''Reporting on Property''

Unless a DoD Component reserves REP Article III in its entirety as specified in § 1134.305, or reserves Sections C or D (or any paragraph in those sections) as specified in §§ 1134.315 and 1134.320, a DoD Component's general terms and conditions must include a completed Section A (as specified in § 1134.305) and use the following wording for the remainder of REP Article III.

REP Article III. Reporting on Property (DECEMBER 2014)

Section A. Real property. Paragraphs A.1 through A.4 apply to real property for which you are accountable under this award, for as

long as there is a Federal interest in the property (whether that interest is due to you or a subrecipient having acquired or improved the property under this award, or a transfer of the accountability for the property to this award from another award).

1. *Periodic status reports.* You must submit periodic status reports, as follows:

a. *Frequency and duration of reporting requirement.* [Reserved.]

b. *Due dates.* [Reserved.]

c. *Other submission instructions.* [Reserved.]

2. *Notifications of critical changes.* You must notify the award administration office of any critical change in the status of real property as soon as feasible after you become aware of it. A critical change is any event with a significant adverse impact on the condition or value of the property, such as damage due to fire; flood, hurricane, or other severe weather; earthquake; or accident.

3. *Requests for disposition instructions.* You must comply with applicable requirements in PROP Article III to request disposition instructions, either during the period of performance or at closeout.

4. *Closeout accounting.* You must account to the award administration office for real property at the time of closeout of the award, as required by Section D of OAR Article VI.

Section B. Equipment and supplies. Paragraphs B.1 through B.4 apply to equipment or supplies for which you are accountable under this award and in which there is a Federal interest (whether that interest is due to you or a subrecipient having acquired or improved the property under this award, or a transfer of the accountability for the property to this award from another award).

1. *Periodic status report.* There is no requirement for periodic reporting during the period of performance.

2. *Notifications of loss, damage, or theft.* You must comply with applicable requirements in PROP Article II governing your property management system to promptly notify the award administration office of any loss, damage, or theft of equipment.

3. *Requests for disposition instructions.* You must comply with applicable requirements in PROP Article IV to request disposition instructions for equipment, either during the period of performance or at closeout.

4. *Closeout accounting.*

a. *Equipment.* You must account to the award administration office for equipment at the time of closeout of this award, as required by Section D of OAR Article VI.

b. *Supplies.* If you have a residual inventory of unused supplies that meets the criteria specified in paragraph E.2 of PROP Article IV, you must as part of your closeout accounting arrange with the award administration office for the compensation that paragraph specifies for the Federal interest in the supplies.

Section C. Federally owned property. Paragraphs C.1 through C.3 apply to federally owned property for which you are accountable under this award.

1. *Annual inventory.* You must submit annually to the award administration office an inventory of federally owned property.

2. *Notifications of loss, damage, or theft.* As provided in PROP Article II governing your property management system, you must promptly notify the award administration office of any loss, damage, or theft of federally owned property.

3. *Requests for disposition instructions.* You must comply with requirements in Section B of PROP Article V to request disposition instructions, either during the period of performance or at closeout.

4. *Closeout accounting.* Your requests for disposition instructions for federally owned property, as described in paragraph C.3 of this section, satisfy the need to account for federally owned property at closeout (see Section D of OAR Article VI).

Section D. Intangible property. Paragraphs D.1 through D.3 apply to intangible property for which you are accountable under this award.

1. *Inventions developed under the award.* You must submit all reports on subject inventions developed under this award that are required by the modified Governmentwide patent rights award provision specified in Section B of PROP Article VI, which include a disclosure of each subject invention and a final report listing all such subject inventions.

2. *Copyrights and data.* You are not required to submit periodic reports about data produced under the award or about works for which you acquired ownership under this award, either by development or otherwise, and in which copyright was asserted. However, because of the DoD/Federal Government's rights in the works and data that Sections A and C of PROP Article VI specify, you must provide information about the works and data if we request it.

3. *Intangible property acquired, but not developed or produced, under the award.* You must comply with requirements in Section D of PROP Article VI to request disposition instructions for intangible property acquired, but not developed or produced, under the award.

Appendix D to Part 1134—Terms and Conditions for REP Article IV, ''Reporting on Subawards and Executive Compensation''

As specified in § 1134.405, a DoD Component's general terms and conditions must use the following wording for REP Article IV.

REP Article IV. Reporting on Subawards and Executive Compensation (DECEMBER 2014)

You must report information about subawards and executive compensation as specified in the award provision in appendix A to 2 CFR part 170, ''Reporting subaward and executive compensation information,'' modified as follows:

1. To accommodate any future designation of a different Governmentwide website for reporting subaward information, the website ''*http://www.fsrs.gov*'' cited in paragraphs a.2.i. and a.3 of the award provision is replaced by the phrase ''*http://www.fsrs.gov* or successor OMB-designated website for reporting subaward information'';

2. To accommodate any future designation of a different Governmentwide website for reporting executive compensation information, the website ''*http://www.sam.gov*'' cited in paragraph b.2.i. of the award provision is replaced by the phrase ''*https://www.sam.gov* or successor OMB-designated website for reporting information on total compensation''; and

3. The reference to ''Sec. __.210 of the attachment to OMB Circular A–133, 'Audits of States, Local Governments, and Non-Profit Organizations' '' in paragraph e.3.ii of the award provision is replaced by ''2 CFR 200.330, as implemented in SUB Article I of this award''.

Appendix E to Part 1134—Terms and Conditions for REP Article V, ''Other Reporting''

In accordance with § 1134.505 of this part, a DoD Component's general terms and conditions must either reserve REP Article V or provide the information required by that section for each applicable report.

REP Article V. Other Reporting. (Date)

[Reserved.]

PART 1136—OTHER ADMINISTRATIVE REQUIREMENTS: GENERAL AWARD TERMS AND CONDITIONS

Sec.
1136.1 Purpose of this part.
1136.2 Applicability of this part.
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Authority: 5 U.S.C. 301 and 10 U.S.C. 113.

§ 1136.1 Purpose of this part.

(a) This part specifies standard wording of general terms and conditions concerning submission and maintenance of recipient information; records retention and access; remedies for noncompliance and termination; claims, disputes, and appeals; collection of amounts due; closeout; and after-the-award requirements.

(b) It thereby implements OMB guidance for grants and cooperative agreements in multiple portions of 2 CFR part 200, as those portions apply to general terms and conditions. Specifically, this part implements:

(1) 2 CFR 200.113 and 200.210(b)(1)(iii);

(2) 2 CFR 200.300(b) as it refers to requirements in 2 CFR part 25; and

(3) 2 CFR 200.333 through 200.345.

§ 1136.2 Applicability of this part.

The types of awards and entities to which this part and other parts in this subchapter apply are described in the subchapter overview at 2 CFR 1126.2.

§ 1136.3 Exceptions from requirements of this part.

Exceptions are permitted from the administrative requirements in this part only as described at 2 CFR 1126.3.

§ 1136.4 Organization of this part.

(a) The content of this part is organized into subparts and associated appendices.

(1) Each subpart provides direction to DoD Components on how to construct one article of general terms and conditions for grants and cooperative agreements.

(2) For each subpart, there is a corresponding appendix with standard wording for terms and conditions of the article addressed by the subpart. Terms and conditions address rights and responsibilities of the Federal Government and recipients.

(b) A DoD Component must use the wording provided in each appendix in accordance with the direction in the corresponding subpart. That direction may permit DoD Components to vary from the standard wording in some situations.

(c) Table 1 shows which article of general terms and conditions may be found in each of appendices A through G to this part (with the associated direction to DoD Components in Subparts A through G, respectively):

TABLE 1 TO PARAGRAPH (c)

In . . .	You will find terms and conditions specifying recipients' rights and responsibilities related to . . .	That would appear in an award within OAR Article . . .
Appendix A	Submitting and maintaining recipient information	I.
Appendix B	Records retention and access	II.
Appendix C	Remedies and termination	III.
Appendix D	Claims, disputes, and appeals	IV.
Appendix E	Collection of amounts due	V.
Appendix F	Closeout	VI.
Appendix G	Post-closeout adjustments and continuing responsibilities	VII.

Subpart A—Submitting and Maintaining Recipient Information (OAR Article I)

§ 1136.100 Purpose of OAR Article I.

OAR Article I sets forth requirements for recipients to maintain current information about themselves in the data system the Federal Government specifies as the repository for standard information about its business partners, currently the System for Award Management. The article thereby implements OMB guidance in:

(a) 2 CFR 200.113 and 200.210(b)(1)(iii);

(b) 2 CFR part 25; and

(c) The portion of 2 CFR 200.300(b) that cites 2 CFR part 25 and the System for Award Management).

§ 1136.105 Content of OAR Article I.

To implement the requirement described in § 1136.100, a DoD Component's general terms and conditions must use the standard wording appendix A to this part provides as OAR Article I. A DoD Component may reserve Section B of the article in its general terms and conditions if it is certain that there will be no award using those general terms and conditions for which the Federal share of the award's total value will exceed $500,000.

Subpart B—Records Retention and Access (OAR Article II)

§ 1136.200 Purpose of OAR Article II.

OAR Article II addresses rights and responsibilities concerning retention of records related to awards; access to recipients' records; and collection, transmission, and storage of information. The article thereby implements OMB guidance in 2 CFR 200.333 through 200.337.

§ 1136.205 Records retention period.

(a) *OMB guidance.* OMB guidance in:

(1) The lead-in paragraph of 2 CFR 200.333 sets a standard retention period that is generally applicable to recipient records pertinent to grants and cooperative agreements.

(2) 2 CFR 200.333(c) and (f) provide different standard retention periods specifically for records that are related either to real property and equipment acquired with Federal funds or indirect cost rate proposals and cost allocation plans.

(b) *DoD implementation.* A DoD Component's general terms and conditions must specify the standard retention periods described in paragraph (a) of this section.

(c) *Award terms and conditions*—(1) *General.* A DoD Component's general terms and conditions must use the wording appendix B to this part

provides for Section A of OAR Article II.

(2) *Exception.* A DoD Component's general terms and conditions may substitute alternative wording for paragraph A.3 of OAR Article II if the awards using those terms and conditions will be renewed quarterly or annually. The alternative wording for awards that will be renewed quarterly or annually would replace the words ''final financial report'' in paragraph A.3 with ''quarterly financial report'' or ''annual financial report,'' respectively.

§ 1136.210 Extensions of retention period due to litigation, claim, or audit.

(a) *OMB guidance.* OMB guidance in:

(1) 2 CFR 200.333(a) provides for an extended retention period for records involved in a litigation, claim, or audit that begins before the end of the standard 3-year retention period.

(2) 2 CFR 200.333(b) provides that a recipient also is required to extend the retention period when a Federal awarding, cognizant, or oversight agency notifies it in writing to do so.

(b) *DoD implementation.* (1) A DoD Component's general terms and conditions must provide for extended retention periods for records involved in a litigation, claim, or audit that begins before the end of the standard 3-year retention period, as described in 2 CFR 200.333(a).

(2)(i) Other than the exception described in paragraph (b)(2)(ii) of this section, DoD Components may not require recipients to extend the records retention period as described in 2 CFR 200.333(b).

(ii) A DoD Component's general terms and conditions must extend the ''retention period,'' as that term is used in 2 CFR 200.344(a), to include the entire period during which recipients retain their records, even if that period extends beyond the standard 3-year retention period described in § 1136.205. That extension will enable disallowance of costs and recovery of funds based on an audit or other review of records a recipient elected to retain beyond the standard retention period, even if the audit or review began after the end of that retention period. Without that extension, the ability to disallow costs and recover funds would be limited by 2 CFR 200.344(a), which states that an agency must make any disallowance determination about a recipient's costs and notify the recipient within the record retention period.

(c) *Award terms and conditions.* A DoD Component's general terms and conditions must use the wording appendix B to this part provides for Section B of OAR Article II.

§ 1136.215 Records for program income earned after the end of the performance period.

(a) *OMB guidance.* OMB guidance in 2 CFR 200.333(e) provides the retention period for records related to program income earned under a grant or cooperative agreement after the end of the period of performance, if an agency establishes requirements governing the disposition of program income earned after that time.

(b) *DoD implementation.* A DoD Component's general terms and conditions should not establish retention requirements for records related to program income earned after the end of the period of performance. Retention requirements for those records in general terms and conditions would be inconsistent with the statement in 2 CFR 1128.725 that a DoD Component should rarely, if ever, establish a requirement for a recipient to be accountable for program income earned after the end of the period of performance. Section 1128.725 provides for use of general terms and conditions wording in FMS Article VII that establishes no such requirement. Section 1128.725 further states that exceptions for individual awards are properly addressed at the time of award in the award-specific terms and conditions.

(c) *Award terms and conditions.* A DoD Component's general terms and conditions must use the wording appendix B to this part provides for Section C of OAR Article II. If a DoD Component includes a requirement in the award-specific terms and conditions for the recipient to be accountable for program income earned after the end of the period of performance, it also may include a requirement in the award-specific terms and conditions for the recipient's retention of the associated records.

§ 1136.220 Records for joint or long-term use.

(a) *OMB guidance.* OMB guidance in:

(1) 2 CFR 200.334 states that a Federal awarding agency must request that a recipient transfer records to its custody if the agency determines that the records have value that warrants long-term retention. It also provides that the agency may instead arrange for the recipient to retain records that are continuously needed for joint use.

(2) 2 CFR 200.333(d) exempts records transferred to a Federal agency from the standard records retention requirement.

(b) *DoD implementation.* A DoD Component's general terms and conditions must inform recipients that they may be asked to transfer records, maintain them for joint use, or retain them for a longer period.

(c) *Award terms and conditions.* A DoD Component's general terms and conditions must use the wording appendix B to this part provides for Section D of OAR Article II.

§ 1136.225 Methods for collecting, transmitting, and storing information.

(a) *OMB guidance.* OMB guidance in 2 CFR 200.335 addresses the use of electronic and paper formats in the collection, transmission, and storage of information related to awards.

(b) *DoD implementation.* A DoD Component's general terms and conditions must include provisions consistent with the guidance in 2 CFR 200.335 for recipients' use of electronic and paper formats to collect, transmit, and store information.

(c) *Award terms and conditions.* A DoD Component's general terms and conditions must use the wording appendix B to this part provides for Section E of OAR Article II.

§ 1136.230 Access to records.

(a) *OMB guidance.* OMB guidance in 2 CFR 200.336 and 200.337 addresses Federal Government and public access to recipient records related to grants and cooperative agreements.

(b) *DoD implementation.* A DoD Component's general terms and conditions must provide for Federal Government access to records consistent with 2 CFR 200.336 and address public access to records to implement the guidance in 2 CFR 200.337.

(c) *Award terms and conditions.* A DoD Component's general terms and conditions must use the wording appendix B to this part provides for Section F of OAR Article II.

Subpart C—Remedies and Termination (OAR Article III)

§ 1136.300 Purpose of OAR Article III.

OAR Article III addresses remedies for noncompliance, including suspension and termination of awards. It thereby implements OMB guidance in 2 CFR 200.338 through 200.340 and 200.342.

§ 1136.305 Content of OAR Article III.

(a) *Requirement.* A DoD Component's general terms and conditions must specify remedies available for addressing noncompliance with award terms and conditions, policies and procedures related to termination of awards, and effects of suspension and termination on allowability of costs.

(b) *Award terms and conditions.* To implement the requirement in paragraph (a) of this section, a DoD Component's general terms and

conditions must use the wording appendix C to this part provides for OAR Article III.

Subpart D—Claims, Disputes, and Appeals (OAR Article IV)

§ 1136.400 Purpose of OAR Article IV.

OAR Article IV addresses claims, disputes, and appeals under awards. It thereby provides the award terms and conditions required by the DoDGARs at 32 CFR 22.815 and also implements OMB guidance in 2 CFR 200.341.

§ 1136.405 Content of OAR Article IV.

(a) *Requirement.* The DoDGARs at 32 CFR 22.815 require DoD Components' general terms and conditions to incorporate the procedures set forth in that section for processing claims and disputes and deciding appeals of grants officer's decisions.

(b) *Award terms and conditions*—(1) *General.* To implement the requirement in paragraph (a) of this section, a DoD Component's general terms and conditions must use the wording appendix D to this part provides for OAR Article IV, with wording inserted in lieu of the reserved paragraph A.2 to identify the Component's cognizant Grant Appeal Authority and provide his or her mailing or email address.

(2) *Exception.* A DoD Component may add one or more sections to the wording appendix D to this part provides for OAR Article IV to state a requirement that recipients must provide opportunities to subrecipients for hearings, appeals, or other administrative proceedings with respect to claims, disputes, remedies for noncompliance, or other matters if:

(i) That requirement is in a statute or regulation adopted in the Code of Federal Regulations after opportunity for public comment; and

(ii) The statutory or regulatory requirement applies to awards using the DoD Component's general terms and conditions.

Subpart E—Collection of Amounts Due (OAR Article V)

§ 1136.500 Purpose of OAR Article V.

OAR Article V addresses procedures for establishing, appealing, and collecting debts under DoD awards. It thereby:

(a) Provides requirements for recipients paralleling those for DoD Components in the DoDGARs at 32 CFR 22.820;

(b) Augments requirements of OAR Article IV in any case in which a claim leads to a determination that a recipient owes an amount to DoD; and

(c) Implements OMB guidance in 2 CFR 200.345.

§ 1136.505 Content of OAR Article V.

(a) *Requirement.* A DoD Component's general terms and conditions must specify how grants officers' decisions establish debts under awards, when debts become delinquent, how and when recipients may appeal, and how debts not paid in a timely manner are referred for debt collection.

(b) *Award terms and conditions.* To implement the requirement in paragraph (a) of this section, a DoD Component's general terms and conditions must use the wording appendix E to this part provides for OAR Article V.

Subpart F—Closeout (OAR Article VI)

§ 1136.600 Purpose of OAR Article VI.

OAR Article VI addresses recipients' responsibilities for closeout of awards and subawards under them. The article thereby implements OMB guidance in 2 CFR 200.343.

§ 1136.605 Content of OAR Article VI.

(a) *Requirement.* A DoD Component's general terms and conditions must specify requirements related to closeout of awards and subawards, including recipients' liquidations of obligations, refunds of unobligated balances, and submission of final reports.

(b) *Award terms and conditions*—(1) *General.* To implement the requirement in paragraph (a) of this section, a DoD Component's general terms and conditions must use the wording appendix F to this part provides for OAR Article VI.

(2) *Exception related to due dates for final reports other than performance, financial, and invention reports.* Consistent with OMB guidance in 2 CFR 200.343(a), a DoD Component may grant extensions to due dates for final reports.

(i) To pre-approve a 30-day extension for final reports other than performance, financial, and invention reports, a DoD Component may substitute ''120 calendar days'' for ''90 calendar days'' in the wording appendix F to this part provides for paragraph C.4 of OAR Article VI. These pre-approved 30-day extensions in the general terms and conditions are for all awards using those terms and conditions; they therefore are separate and distinct from any additional extensions a recipient may later request for an individual award.

(ii) The parallel authorities for pre-approved extensions of due dates for final performance and invention reports are elsewhere. DoDGARs provisions in:

(A) 2 CFR 1134.125 authorize a DoD Component to pre-approve a 30-day extension for due dates of performance reports by an appropriate substitution of wording in REP Article I of the general terms and conditions.

(B) 2 CFR 1130.610 authorize a DoD Component to pre-approve a 30-day extension for due dates of final reports listing subject inventions under awards by an appropriate substitution of wording in PROP Article VI of the general terms and conditions.

(C) 2 CFR 1134.505 authorize a DoD Component to pre-approve a 30-day extension for due dates of other types of final reports by inclusion of appropriate wording in REP Article V of the general terms and conditions.

Subpart G—Post-Closeout Adjustments and Continuing Responsibilities (OAR Article VII)

§ 1136.700 Purpose of OAR Article VII.

OAR Article VII addresses post-closeout funding adjustments and recipients' continuing responsibilities after award closeout. It thereby implements OMB guidance in 2 CFR 200.344.

§ 1136.705 Content of OAR Article VII.

(a) *Requirement.* A DoD Component's general terms and conditions must specify the rights and responsibilities of the Federal Government and recipients with respect to funding adjustments and recipients' continuing responsibilities after award closeout.

(b) *Award terms and conditions.* To implement the requirement in paragraph (a) of this section, a DoD Component's general terms and conditions must use the wording appendix G to this part provides for OAR Article VII.

Appendix A to Part 1136—Terms and Conditions for OAR Article I, ''Submitting and Maintaining Recipient Information''

Unless a DoD Component reserves Section B, as specified in § 1136.105, a DoD Component's general terms and conditions must use the following wording for OAR Article I.

OAR Article I. Submitting and Maintaining Recipient Information. (DECEMBER 2014)

Section A. System for Award Management.

1. Unless you are exempted from this requirement in accordance with OMB guidance in 2 CFR 25.110, you must maintain the currency of information about yourself in the system the Federal Government specifies as the repository for information about its business partners (currently the System for Award Management (SAM)).

2. You must maintain the information in that system until you submit the final financial report required under this award or receive the final payment, whichever is later.

3. You must review and update the information at least annually after your initial registration in the system (unless you are subject to the requirements in Section B) and more frequently if required by changes in your information.

Section B. Reporting of Performance and Integrity Information.

1. *General reporting requirement.* If the total value of your currently active grants, cooperative agreements, and procurement contracts from all Federal agencies exceeds $10,000,000 for any period of time during the period of performance of this award, then during that period of time you must maintain in SAM the currency of information required by paragraph B.2 of this section. Note that:

a. This reporting is required under section 872 of Public Law 110–417, as amended (41 U.S.C. 2313).

b. As required by section 3010 of Public Law 111–212, all performance and integrity information posted in the designated information system on or after April 15, 2011, except past performance reviews required for Federal procurement contracts, will be publicly available.

c. Recipient information is submitted to the OMB-designated integrity and performance system through the SAM, as described in paragraph B.3 of this section. The currently designated integrity and performance information system is the Federal Awardee Performance and Integrity Information System (FAPIIS).

2. *Proceedings about which you must report.* Submit the information that the designated information system requires about each proceeding that:

a. Is in connection with the award or performance of a grant, cooperative agreement, or procurement contract from the Federal Government;

b. Reached its final disposition during the most recent 5-year period; and

c. Is one of the following:

i. A criminal proceeding that resulted in a conviction, as defined in paragraph B.5. of this section;

ii. A civil proceeding that resulted in a finding of fault and liability and payment of a monetary fine, penalty, reimbursement, restitution, or damages of $5,000 or more;

iii. An administrative proceeding, as defined in paragraph B.5. of this section, that resulted in a finding of fault and liability and your payment of either monetary fine or penalty of $5,000 or more or a reimbursement, restitution, or damages in excess of $100,000; or

iv. Any other criminal, civil, or administrative proceeding if:

(A) It could have led to an outcome described in paragraph B.2.c.i, ii, or iii of this section;

(B) It had a different disposition arrived at by consent or compromise with an acknowledgment of fault on your part; and

(C) The requirement in this section to disclose information about the proceeding does not conflict with applicable laws and regulations.

3. *Reporting procedures.* Submit the information required in paragraph B.2 of this section to the Entity Management functional area of the SAM.

a. Current procedures are to submit the information as part of the maintenance of your information in the SAM that Section A of this article requires.

b. You do not need to submit the information again under this award if you already reported current information to the SAM under another Federal grant, cooperative agreement, or procurement contract.

4. *Reporting frequency.* During any period of time when you are subject to the requirement in paragraph B.1 of this section, you must report to SAM at least semiannually following your initial report of any information required in paragraph B.2 of this section, either to provide new information not reported previously or affirm that there is no new information to report.

5. *Definitions.* For purposes of this section:

a. *Administrative proceeding* means a non-judicial process that is adjudicatory in nature in order to make a determination of fault or liability (*e.g.,* Securities and Exchange Commission Administrative proceedings, Civilian Board of Contract Appeals proceedings, and Armed Services Board of Contract Appeals proceedings). This includes proceedings at the Federal and State level but only in connection with performance of a Federal contract, grant, or cooperative agreement. It does not include audits, site visits, corrective plans, or inspection of deliverables.

b. *Conviction* means a judgment or conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, and includes a conviction entered upon a plea of nolo contendere.

c. *Total value of currently active grants, cooperative agreements, and procurement contracts* includes:

i. Only the Federal share of the funding under any Federal agency award with a recipient cost share or match; and

ii. The value of all expected funding increments and options, even if not yet exercised, under each Federal agency award.

Section C. Disclosure of evidence of integrity-related issues.

1. *Disclosure requirement.* At any time during the period of performance of this award, if you have evidence that a covered person committed a covered action (see paragraphs C.2 and C.3 of this section) that may affect this award, you must disclose the evidence in writing to the Office of the Inspector General, DoD, with a copy to the grants officer identified in the award cover pages.

2. *Covered person.* As the term is used in this section, ''covered person'' means a principal, employee, or agent of either you or a subrecipient under this award, where:

a. ''Principal'' means:

i. An officer, director, owner, partner, principal investigator, or other person with management or supervisory responsibilities that relate to this award; or

ii. A consultant or other person, whether or not employed by you or a subrecipient or paid with funds under this award, who:

(A) Is in a position to handle funds under this award;

(B) Is in a position to influence or control the use of those funds; or

(C) Occupies a technical or professional position capable of substantially influencing the development or outcome of an activity required to perform the project or program under this award.

b. ''Agent'' means any individual who acts on behalf of, or who is authorized to commit you or the subrecipient, whether or not employed by you or the subrecipient.

3. *Covered action.* As the term is used in this section, ''covered action'' means a violation of Federal criminal law in Title 18 of the United States Code involving fraud, bribery, or a gratuity violation.

4. *Safeguarding of the information.*

a. To the extent permitted by law and regulation, we will:

i. Safeguard and treat information you disclose to us as confidential if you mark the information as ''confidential'' or ''proprietary.''

ii. Not release the information to the public in response to a Freedom of Information Act (5 U.S.C. 552) request without notifying you in advance.

b. We may transfer documents you provide to us to any other department or agency within the Executive Branch of the Federal Government if the information relates to matters within that organization's jurisdiction.

Appendix B to Part 1136—Terms and Conditions for OAR Article II, ''Records Retention and Access''

Unless a DoD Component substitutes alternate wording in paragraph A.3, a DoD Component's general terms and conditions must use the following wording for OAR Article II, as specified in §§ 1136.205 through 1136.230.

OAR Article II. Records Retention and Access. (DECEMBER 2014)

Section A. Records retention period. Except as provided in Sections B through D of this article:

1. You must keep records related to any real property and equipment acquired, in whole or in part, using Federal funds under the award for 3 years after final disposition of the property. For any item of exempt property with a current fair market value greater than $5,000, and for which final disposition was not a condition of the title vesting, you must keep whatever records you need for as long as necessary to ensure that you can deduct the Federal share if you later use the property in contributions for cost sharing or matching purposes under any Federal award.

2. You must keep records related to rate proposals for indirect or facilities and administrative costs, cost allocation plans, and supporting records such as indirect cost rate computations and any similar accounting computations of the rate at which a particular group of costs is chargeable (such as computer usage chargeback or composite fringe benefit rates) as follows:

a. If you are required to submit a proposal, plan, or other computations to your Federal cognizant agency for indirect costs, as the basis for negotiation of a rate, you must keep the submissions and all supporting records for 3 years from the date on which you were required to make the submissions.

b. If you are not required to submit a proposal, plan, or other computation as the basis for negotiation, you must keep the proposal, plan, other computation, and supporting records for 3 years from the end of the fiscal year or other accounting period covered by the proposal, plan, or other computation.

3. You must keep other financial records, supporting documents, statistical records, and other records pertinent to this award for a period of 3 years from the date you submit your final financial report under the award.

Section B. Extensions of retention period due to litigation, claim, or audit.

1. If any litigation, claim, or audit begins before the end of the 3-year retention period specified in Section A of this article and the final action related to the litigation, claim, or audit is not taken before the end of that 3-year period, you must retain all records related to this award that may be involved in the litigation, claim, or audit until all findings involving the records have been resolved and final action taken.

2. We may disallow costs and recover funds under this award based on an audit or other review of records you elected to retain beyond the retention period required by this article, even if the audit or review begins after the end of the 3-year retention period specified in Section A of this article. Thus, the ''retention period,'' as that term is used in OMB guidance in 2 CFR 200.344(a)(1), is extended, as described in 2 CFR 200.333(b), to include the entire period during which we and our authorized representatives continue to have access to those records under paragraph F.2 of this article.

Section C. Records for program income earned after the end of the performance period. In accordance with Section F of FMS Article VII, there are no requirements under this award applicable to program income you earn after the end of the period of performance and therefore no associated records retention requirements.

Section D. Records for joint or long-term use.

1. *Joint use.* To avoid duplicate recordkeeping for records that you and we both need to use on a continuous basis, we may ask you to make special arrangements with us, by mutual agreement, to make records available for joint and continuous use.

2. *Long-term use.* If we determine that some records will be needed longer than the 3-year period specified in Section A of this article, we may request that you either:

a. Retain the records for a longer period of time; or

b. Transfer the records to our custody for long-term retention.

3. *Retention requirements for transferred records.* For any records transferred to our custody, you are not subject to the records retention requirements in Section A of this article.

Section E. Methods for collecting, transmitting, and storing information.

1. You should, whenever practicable, collect, transmit, and store information related to this award in open and machine-readable formats rather than in closed formats or on paper. However, if you request it, we will:

a. Provide award related-information to you on paper; and

b. Accept award related-information from you on paper. In that case, we will not require more than an original and two copies.

2. When your original records are in an electronic form that cannot be altered, you do not need to create and retain paper copies of those records.

3. When your original records are on paper, you may substitute electronic versions produced through duplication or using other forms of electronic media, provided that:

a. You conduct periodic quality control reviews of the records;

b. You provide reasonable safeguards against alteration of the records; and

c. The records remain readable.

Section F. Access to records.

1. *Scope of Federal Government access rights.*

a. We as the awarding agency, the Federal Government Inspectors General, the Comptroller General of the United States, and any of our authorized representatives have the right of access to any documents, papers, or other records you have that are pertinent to this award, in order to make audits, examinations, excerpts, and transcripts.

b. This right also includes timely and reasonable access to your personnel for the purposes of interview and discussion related to the records.

c. As described in OMB guidance at 2 CFR 200.336(b), the access to records described in this section will include access to the true name of a victim of a crime only under extraordinary and rare circumstances.

i. You are required to provide that access only in response to a court order or subpoena pursuant to a bona fide confidential investigation, or in response to a request duly authorized by the head of the DoD Component or his or her designee; and

ii. You must take appropriate steps to protect this sensitive information.

2. *Duration of Federal Government access rights.* We have the access rights described in paragraph F.1 of this section as long as you retain the records.

3. *Public access.*

a. You must comply with requirements to protect information that Federal statute, Executive order, or regulation requires to be protected (*e.g.,* personally identifiable or export controlled information), to include both information generated under this award and information provided to you and identified as being subject to protection. Other than those limitations on dissemination of information, we place no restrictions on you that limit public access to your records pertinent to this award.

b. We do not place any requirements on you to permit public access to your records separate from any Federal, State, local, or tribal statute that may require you to do so.

c. The Freedom of Information Act (FOIA, 5 U.S.C. 552) does not apply to records in your possession but records you provide to us generally will be subject to FOIA, with the applicable exemptions.

Appendix C to Part 1136—Terms and Conditions for OAR Article III, ''Remedies and Termination''

As required by § 1136.305, a DoD Component's general terms and conditions must use the following wording for OAR Article III.

OAR Article III. Remedies and Termination. (DECEMBER 2014)

Section A. Non-compliance with award terms and conditions. If you fail to comply with a term or condition of this award or an applicable Federal statute or regulation, we may amend this award to impose award-specific conditions, as described in OMB guidance in 2 CFR 200.207. If imposing award-specific conditions, we will notify you before modifying the award and, once you have corrected the non-compliance, promptly remove the award-specific conditions. If we determine that the imposition of award-specific conditions is insufficient to correct the non-compliance or the non-compliance remains uncorrected despite the use of award-specific conditions, we may consider taking one or more of the remedies specified in Section B of this article.

Section B. Remedies for noncompliance.

1. If you fail to comply with a term or condition of this award or an applicable Federal statute or regulation, we may take one or more of the following actions that we deem appropriate to the circumstances:

a. Temporarily withhold cash payments pending:

i. Your correction of the deficiency; or

ii. Our taking more severe enforcement action.

b. Disallow (that is, deny both use of funds and any applicable cost-sharing or matching credit for) all or part of the cost of the activity or action not in compliance;

c. Suspend or, in accordance with paragraph C.1.a.i of this article, terminate this award, in whole or in part (suspension of an award is a separate and distinct action from suspension of a person under 2 CFR parts 180 and 1125, as noted in paragraph B.3 of this article);

d. Withhold further awards to you for the project or program that is not in compliance;

e. Take any other action legally available to us under the circumstances.

2. You may raise an objection to our taking any remedy we take under paragraph B.1 of this section and will be given an opportunity to provide information and documentation challenging the action. The procedures are those specified in OAR Article IV for claims and disputes.

3. Our use of any remedy under paragraph B.1 of this section, including suspension or termination of the award, does not preclude our referring the noncompliance to a suspension and debarment official and asking that official to consider initiating a suspension or debarment action under 2 CFR part 1125, the DoD implementation of OMB guidance at 2 CFR part 180.

Section C. Termination.

1. This award may be terminated in whole or in part as follows:

a. *Unilaterally by the Federal Government.* We will provide a notice of termination if we

unilaterally terminate this award in whole or in part, which we may do for either of the following reasons:

i. Your material failure to comply with the award terms and conditions. If we terminate the award for that reason, we will report the termination to the OMB-designated integrity and performance system (currently FAPIIS). In accordance with 41 U.S.C. 2313, each Federal awarding official must review and consider the information in the OMB-designated integrity and performance system with regard to any proposal or offer before awarding a grant or contract.

ii. The program office does not have funding for an upcoming increment if this award is incrementally funded. In that case, the Federal Government's financial obligation does not exceed the amount currently obligated under the award.

b. *By mutual agreement.* With your consent, we may terminate this award, in whole or in part, for any reason. In that case, you and we must agree to:

i. The termination conditions, including the effective date; and

ii. In the case of a partial termination, the portion to be terminated.

c. *Unilaterally by the recipient.* You may unilaterally terminate this award, in whole or in part, by sending us written notification that states:

i. The reasons for the termination;

ii. The effective date; and

iii. In the case of partial termination, the portion to be terminated. In that case, however, we may terminate the award in its entirety if we determine that the remaining portion of the award will not accomplish the purposes for which we made the award.

2. If this award is terminated in its entirety before the end of the performance period, you must complete the closeout actions for which you are responsible under OAR Article VI. The due date for each action is to be measured relative to the date of termination.

3. If this award is only partially terminated before the end of the performance period, with a reduced or modified portion of the award continuing through the end of the performance period, then closeout actions will occur at the end of the performance period as specified in OAR Article VI.

4. You will continue to have all of the post-closeout responsibilities that OAR Article VII specifies for you if this award is wholly or partially terminated before the end of the performance period.

Section D. Effects of suspension or termination of the award on allowability of costs. If we suspend or terminate this award prior to the end of the period of performance, costs resulting from obligations that you incurred:

1. Before the effective date of the suspension or termination are allowable if:

a. You properly incurred those obligations;

b. You did not incur the obligations in anticipation of the suspension or termination;

c. In the case of termination, the costs resulted from obligations that were noncancellable after the termination; and

d. The costs would have been allowable if we had not suspended or terminated the award and it had expired normally at the end of the period of performance.

2. During the suspension or after the termination are not allowable unless we expressly authorize them, either in the notice of suspension or termination or subsequently.

Appendix D to Part 1136—Terms and Conditions for OAR Article IV, ''Claims, Disputes, and Appeals''

As specified in § 1136.405, a DoD Component's general terms and conditions must use the following wording for OAR Article IV, with the required insertion in paragraph A.2 of the article, along with any additional wording permitted by that section.

OAR Article IV. Claims, Disputes, and Appeals. (DECEMBER 2014)

Section A. Definitions.

1. *Claim.* The definition of the term ''claim,'' as it is used in this article, is in the definitions section of the preamble to these general terms and conditions.

2. *Grant Appeal Authority.* [Reserved.]

Section B. Submission of claims.

1. *Your claims.* To submit a claim arising out of this award, you must submit it in writing to the grants officer for decision, specify the nature and basis for the relief you are requesting, and include all data that supports your claim.

2. *Federal Government claims.* You will receive a written grants officer's decision if a DoD claim arises out of this award.

Section C. Alternative dispute resolution.

1. We encourage resolution of all issues related to this award by mutual agreement between you and the grants officer.

2. If you and the grants officer are unable to resolve an issue through unassisted negotiations, we encourage use of Alternative Dispute Resolution (ADR) procedures to try to do so. ADR procedures are any voluntary means, such as mini-trials or mediation, used to resolve issues in controversy. ADR procedures may be used prior to submission of a claim or at any other time prior to the Grant Appeal Authority's decision on any appeal you submit.

Section D. Grants officer decisions for claims you submit.

1. Within 60 calendar days of receiving your claim, the grants officer will either:

a. Transmit a written decision that:

i. Identifies data on which the decision is based; and

ii. Identifies and provides the mailing address for the Grant Appeal Authority to whom you would submit an appeal of the decision if you elect to do so; or

b. If more time is required to render a written decision, notify you of a specific date when he or she will render the decision and inform you of the reason for delaying it.

2. The grants officer's decision will be final unless you decide to appeal, in which case we encourage use of ADR procedures as noted in Section C of this article.

Section E. Formal administrative appeals.

1. *Right to appeal.* You have the right to appeal a grants officer's decision to the Grant Appeal Authority identified in Section A of this article.

2. *Notice of appeal.* You may appeal a grants officer's decision within 90 calendar days of receiving the decision by submitting a written notice of appeal to the Grant Appeal Authority and grants officer. If you elect to use ADR procedures, you are allowed an additional 60 calendar days to submit the written notice of appeal.

3. *Appeal file.* Within 30 calendar days of the grants officer's receipt of your notice of appeal, you should receive the appeal file with copies of all documents relevant to the appeal. You may supplement the file with other documents you deem relevant and with a memorandum in support of your position for the Grant Appeal Authority's consideration. The Grant Appeal Authority may request additional information from you.

4. *Decision.* Unless the Grant Appeal Authority decides to conduct fact-finding procedures or an oral hearing on the appeal, the appeal will be decided solely on the basis of the written record. Any fact-finding or hearing will be conducted using procedures that the Grant Appeal Authority deems appropriate.

Section F. Representation. You may be represented by counsel or any other designated representative in any claim, appeal, or ADR proceeding, as long as the representative is not otherwise prohibited by law or regulation from appearing before the DoD Component concerned.

Section G. Effect of Grant Appeal Authority's decision. The Grant Appeal Authority's decision is the final administrative decision of DoD and cannot be further appealed within DoD.

Section H. Non-exclusivity of remedies. Nothing in this article is intended to limit your right to any remedy under the law.

Appendix E to Part 1136—Terms and Conditions for OAR Article V, ''Collection of Amounts Due''

As required by § 1136.505, a DoD Component's general terms and conditions must use the following wording for OAR Article V.

OAR Article V. Collection of Amounts Due. (DECEMBER 2014)

Section A. Establishing a debt.

1. Any amount paid to you in excess of the amount to which you are determined to be entitled under the terms and conditions of this award constitutes a debt to the Federal Government.

2. A grants officer will attempt to resolve any claim of your indebtedness arising out of this award by mutual agreement.

3. If the grants officer fails to resolve the claim in that manner, you will receive a written notice of the grants officer's decision formally determining the debt, as described in paragraph B.2 of OAR Article IV. The notice will describe the debt, including the amount, name and address of the official who determined the debt, and a copy of that official's determination.

Section B. Debt delinquency and appeals.

1. Within 30 calendar days of the grants officer's decision, you must either pay the amount owed to the address provided in the written notice or inform the grants officer that you intend to appeal the decision. Appeal procedures are described in OAR Article IV.

2. If you elect not to appeal, any amounts not paid within 30 calendar days of the grants officer's decision will be a delinquent debt.

3. If you elect to appeal the grants officer's decision, you will have 90 calendar days after receipt of the grants officer's decision to file your appeal unless Alternative Dispute Resolution (ADR) procedures are used, as described in section C of OAR Article IV, in which case you will have 150 calendar days.

Section C. Demand letter, interest, and debt collection.

1. If within 30 calendar days of the grants officer's decision, you neither pay the amount due nor provide notice of your intent to appeal the grants officer's decision, the grants officer will send you a demand letter identifying a payment office that will be responsible for any further debt collection activity.

2. If you do not pay by the due date specified in the written demand letter, the Federal Government may collect part or all of the debt by:

a. Making an administrative offset against your requests for reimbursements under Federal awards;

b. Withholding advance payments otherwise due to you; and

c. Any other action permitted by Federal statute.

3. The debt will bear interest, and may include penalties and other administrative costs, in accordance with applicable provisions of the DoD Financial Management Regulation (DoD 7000.14–R), which implements the Federal Claims Collection Standards. The date from which interest is computed is not extended by litigation or the filing of any form of appeal.

Appendix F to Part 1136—Terms and Conditions for OAR Article VI, ''Closeout''

As required by § 1136.605, a DoD Component's general terms and conditions must use the following wording for OAR Article VI but may make a substitution in paragraph C.4 of the article as provided in that section.

OAR Article VI. Closeout. (DECEMBER 2014)

Section A. Liquidation of obligations. Unless the award administration office authorizes an extension of the due date, you must liquidate all obligations that you incurred under this award not later than 120 calendar days after the end date of the period of performance.

Section B. Refunds of unobligated balances. You must promptly refund to the award administration office any balances of unobligated cash that we have advanced or paid to you and not authorized you to use on other projects or programs.

Section C. Final reports. You must submit the:

1. Final performance report under this award no later than the date specified in Section C of REP Article I, subject to any extensions granted under Section D of that article;

2. Final financial report under this award no later than the date specified in Section C of REP Article II, subject to any extensions granted under Section D of that article;

3. Final report listing subject inventions made under the award no later than the date specified in Section B of PROP Article VI; and

4. Other final reports that are required under this award no later than 90 calendar days after the end date of the period of performance, unless you request an extension of the due date and the award administration office approves the request.

Section D. Accounting for property. You must account for any real property, equipment, supplies, and intangible property that you and any subrecipients acquired or improved under the award, in accordance with PROP Articles I through IV and VI. Your requests for disposition instructions for any federally owned property, as required by PROP Article V, meet the need described in OMB guidance at 2 CFR 200.343(f) to account for that property at closeout.

Appendix G to Part 1136—Terms and Conditions for OAR Article VII, ''Post-Closeout Adjustments and Continuing Responsibilities''

As required by § 1136.705, a DoD Component's general terms and conditions must use the following wording for OAR Article VII.

OAR Article VII. Post-Closeout Adjustments and Continuing responsibilities. (DECEMBER 2014)

Section A. Adjustments. The closeout of this award does not affect:

1. Our right to disallow costs and recover funds on the basis of a later audit or other review, as long as we make the determination that the costs are disallowed and notify you about that determination within the extended records retention period specified in paragraph B.2 of OAR Article II of these terms and conditions.

2. Your obligation to return any funds due to the Federal Government as a result of later refunds, corrections, or other transactions (to include any adjustments in final indirect cost rates).

Section B. Continuing responsibilities. After closeout of this award, you must continue to comply with terms and conditions of this award that have applicability beyond closeout, including requirements concerning:

1. Audits, as specified in FMS Article V that cover periods of time during which you expended funds under this award.

2. Management, use, and disposition of any real property or equipment acquired or improved under this award in which we continue to have a Federal interest after closeout, as specified in PROP Articles I through IV.

3. Retention of, and access to, records related to this award, as specified in OAR Article II.

PART 1138—REQUIREMENTS RELATED TO SUBAWARDS: GENERAL AWARD TERMS AND CONDITIONS

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Appendix L to Part 1138—Terms and conditions for SUB Article XII, ''Fixed-amount subawards''

Authority: 5 U.S.C. 301 and 10 U.S.C. 113.

§ 1138.1 Purpose of this part.

(a) This part specifies standard wording of general terms and conditions concerning recipients' award and administration of subawards under DoD grants and cooperative agreements.

(b) It thereby implements OMB guidance in Subparts A through F of 2 CFR part 200 and 2 CFR parts 25, 170, and 180, as they apply to subawards.

§ 1138.2 Applicability of this part.

The types of awards and entities to which this part and other parts in this subchapter apply are described in the subchapter overview at 2 CFR 1126.2.

§ 1138.3 Exceptions from requirements of this part.

Exceptions are permitted from the administrative requirements in this part only as described at 2 CFR 1126.3.

§ 1138.4 Organization of this part.

(a) The content of this part is organized into subparts and associated appendices.

(1) Each subpart provides direction to DoD Components on how to construct one article of general terms and conditions for grants and cooperative agreements.

(2) For each subpart, there is a corresponding appendix with standard wording for terms and conditions of the article addressed by the subpart. Terms and conditions address rights and responsibilities of the Federal Government and recipients.

(b) A DoD Component must use the wording provided in each appendix in accordance with the direction in the corresponding subpart and the authorization in § 1138.5, which permit a DoD Component to vary from the standard wording in some situations.

(c) Table 1 shows which article of general terms and conditions may be found in each of appendices A through L to this part (with the associated direction to DoD Components in Subparts A through L, respectively, as supplemented by the authorization in § 1138.5):

TABLE 1 TO PARAGRAPH (c)

In . . .	You will find terms and conditions specifying recipients' rights and responsibilities related to . . .	That would appear in an award within SUB Article . . .
Appendix A	Distinguishing subawards and procurements	I.
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Appendix C	Informational content of subawards	III.
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Appendix E	Property requirements for subawards	V.
Appendix F	Procurement procedures to include in subawards	VI.
Appendix G	Financial, programmatic, and property reporting requirements for subawards	VII.
Appendix H	Other administrative requirements for subawards	VIII.
Appendix I	National policy requirements for subawards	IX.
Appendix J	Subrecipient monitoring and other post-award administration	X.
Appendix K	Requirements concerning subrecipients' lower-tier subawards	XI.
Appendix L	Fixed-amount subawards	XII.

§ 1138.5 Authority to omit or reserve portions of SUB Articles I through XII.

A DoD Component's general terms and conditions may:

(a) Omit SUB Articles II through XII that are the subject of this part if the DoD Component does not allow recipients to make subawards under awards using those terms and conditions. The DoD Component also may amend SUB Article I in that case, to state the prohibition on making subawards and limit the recipient's responsibility to ensuring that any transaction it awards at the next tier is a procurement transaction.

(b) Reserve portions of SUB Articles I through XII that do not apply to the DoD Component's awards using those terms and conditions. For example, the DoD Component may reserve paragraphs in SUB Articles IV through IX specifying administrative requirements that flow down solely to subawards to States if it determines that there is no possibility of a subaward to a State under any of the awards using its general terms and conditions. Similarly, it may reserve SUB Article XII if it does not permit any fixed-amount subawards under its awards.

Subpart A–Distinguishing Subawards and Procurements (SUB Article I)

§ 1138.100 Purpose of SUB Article I.

SUB Article I specifies requirements for a recipient to determine whether each transaction it makes at the next tier below a DoD grant or cooperative agreement is a subaward or a procurement transaction. It thereby

implements OMB guidance in 2 CFR 200.201(a) and 200.330.

§ 1138.105 Content of SUB Article I.

(a) *Requirement.* A DoD Component's general terms and conditions must:

(1) Require the recipient to determine the nature of transactions it makes under its award; and

(2) Inform the recipient about the effect of that determination on the procedures for awarding the transaction and the transaction's terms and conditions.

(b) *Award terms and conditions.* A DoD Component's general terms and conditions must use the wording appendix A to this part provides for SUB Article I.

Subpart B–Pre-Award and Time of Award Responsibilities (SUB Article II)

§ 1138.200 Purpose of SUB Article II.

SUB Article II specifies requirements concerning subrecipients' unique entity identifiers and pre-award risk assessments. It also references requirements in REP Article IV to report on subawards and subrecipients' executive compensation. It thereby partially implements OMB guidance in:

(a) 2 CFR parts 25 and 170;

(b) 2 CFR 200.207; 200.300(b), as it applies to subaward reporting; and 200.331(b); and

(c) Subpart C of 2 CFR part 180, as implemented by DoD at 2 CFR part 1125.

§ 1138.205 Content of SUB Article II.

(a) *Requirement.* A DoD Component's general terms and conditions must require the recipient to:

(1) Obtain an entity's unique entity identifier before making a subaward to the entity;

(2) Notify potential subrecipients in advance about that requirement; and

(3) Conduct a pre-award risk assessment of an entity before making a subaward to the entity and adjust subaward terms and conditions if warranted by the results of the assessment.

(b) *Award terms and conditions.* A DoD Component's general terms and conditions must use the wording appendix B to this part provides for SUB Article II.

Subpart C–Informational Content of Subawards (SUB Article III)

§ 1138.300 Purpose of SUB Article III.

SUB Article III specifies information that recipients must include in subawards they make under DoD grants and cooperative agreements. It thereby implements OMB guidance in 2 CFR 200.331(a)(1).

§ 1138.305 Content of SUB Article III.

(a) *Requirement.* A DoD Component's general terms and conditions must require recipients to include certain information items in each subaward they make.

(b) *Award terms and conditions.* A DoD Component's general terms and conditions must use the wording appendix C to this part provides for SUB Article III.

Subpart D–Financial and Program Management Requirements for Subawards (SUB Article IV)

§ 1138.400 Purpose of SUB Article IV.

SUB Article IV specifies the financial and program management requirements that recipients must include in subawards they make under DoD grants and cooperative agreements. It thereby implements OMB guidance in the following portions of 2 CFR part 200, as they apply to subawards:

(a) Sections 200.209 and 200.302 through 200.309; and (b) Subparts E and F.

§ 1138.405 Content of SUB Article IV.

(a) *Requirement.* A DoD Component's general terms and conditions must require recipients to include pertinent requirements concerning financial and program management in each subaward they make.

(b) *Award terms and conditions.* A DoD Component's general terms and conditions must use the wording appendix D to this part provides for SUB Article IV.

Subpart E–Property Requirements for Subawards (SUB Article V)

§ 1138.500 Purposes of SUB Article V in relation to other articles.

(a) *Purposes.* SUB Article V specifies requirements concerning equipment, supplies, and real, intangible, and federally owned property that recipients must include in subawards they make under DoD grants and cooperative agreements. It thereby:

(1) Specifies which of the requirements in PROP Articles I through VI of the award flow down to subawards; and

(2) Implements OMB guidance in 2 CFR 200.310 through 200.316, as those sections apply to subawards.

(b) *Award terms and conditions.* A DoD Component's general terms and conditions must use the wording appendix E to this part provides as Section A of SUB Article V to inform recipients about the relationship between requirements for the recipient in PROP Articles I through VI and requirements for subawards in SUB Article V.

§ 1138.505 Title to property under subawards.

(a) *Requirement.* A DoD Component's general terms and conditions must specify requirements related to title to property under subawards.

(b) *Award terms and conditions*—(1) *General.* A DoD Component's general terms and conditions must use the wording appendix E to this part provides as Section B of SUB Article V to specify the requirements concerning title to property that recipients must include in their subawards.

(2) *Exception.* If a DoD Component has the necessary statutory authority to do so and includes provisions in paragraph A.2 of PROP Article I to identify any property acquired under the award as exempt property, as described in 2 CFR 1130.105, the DoD Component may at its option insert wording in paragraph B.1.b of SUB Article V to allow recipients to pass through those provisions to subrecipients.

(i) It is critical, however, that the DoD Component ensures that the wording of paragraph B.1.b is consistent with the statutory authority.

(ii) For example, if the statutory authority is 31 U.S.C. 6306—as described in 2 CFR 1130.105(b)(2)(i)—the wording of paragraph B.1.b of SUB Article V may permit a recipient to flow down the substance of the exempt property provision in paragraph A.2 of PROP Article I only to a subrecipient that is a nonprofit institution of higher education or nonprofit organization whose primary purpose is conducting scientific research.

§ 1138.510 Property management system requirements for subawards.

(a) *Requirement.* A DoD Component's general terms and conditions must address the standards for property management systems that apply to subawards.

(b) *Award terms and conditions.* To specify the property management system standards that recipients must include in their subawards, a DoD Component's general terms and conditions must use the wording appendix E to this part provides as Section C of SUB Article V.

§ 1138.515 Use and disposition of real property, equipment, supplies, and federally owned property under subawards.

(a) *Requirement.* A DoD Component's general terms and conditions must specify the requirements concerning use and disposition of real property, equipment, supplies, and federally

owned property that recipients must include in subawards.

(b) *Award terms and conditions.* A DoD Component's general terms and conditions must use the wording appendix E to this part provides for Sections D through F of SUB Article V.

§ 1138.520 Intangible property under subawards.

(a) *Requirement.* A DoD Component's general terms and conditions must address the provisions concerning intangible property that recipients must include in subawards.

(b) *Award terms and conditions*—(1) *General.* To specify the intangible property provisions that recipients must include in their subawards, a DoD Component's general terms and conditions must use the wording appendix E to this part provides as Section G of SUB Article V.

(2) *Exception.* A DoD Component's general terms and conditions may delete the reference to ''Section B of PROP Article VI'' in the wording appendix E to this part provides for paragraph G.2 of SUB Article V and provide alternative wording if:

(i) Those general terms and conditions will be used in awards for purposes other than research or education, as described in 2 CFR 1130.610(c)(3); and

(ii) The DoD Component wants to specify that nonprofit and governmental recipients include either:

(A) No provisions concerning inventions in subawards to for-profit entities; or

(B) Provisions in subawards to for-profit entities that differ from those the DoD Component's general terms and conditions specify for nonprofit and governmental recipients.

Subpart F–Procurement Procedures to Include in Subawards (SUB Article VI)

§ 1138.600 Purpose of SUB Article VI.

SUB Article VI of the general terms and conditions specifies procurement provisions recipients must include in their subaward terms and conditions. It thereby:

(a) Specifies which of the requirements in PROC Articles I through III of the award flow down to subawards; and

(b) Implements OMB guidance in 2 CFR 200.317 through 200.326 and appendix II to 2 CFR part 200, as those portions of 2 CFR part 200 apply to subawards; and

(c) Partially implements OMB guidance in 2 CFR 200.205(d), 200.213, and 200.517, as those sections of 2 CFR part 200 apply to subawards.

§ 1138.605 Content of SUB Article VI.

(a) *Requirement.* A DoD Component's general terms and conditions must specify that recipients' subawards include requirements for subrecipients' procurement procedures.

(b) *Award terms and conditions.* To specify the requirements for procurement procedures that a recipient must include in its subawards, a DoD Component's general terms and conditions must use the wording appendix F to this part provides for SUB Article VI.

Subpart G—Financial, Programmatic, and Property Reporting Requirements for Subawards (SUB Article VII)

§ 1138.700 Purposes of SUB Article VII in relation to other articles.

(a) *Purposes.* SUB Article VII of the general terms and conditions specifies provisions concerning reporting that recipients must include in their subaward terms and conditions, as applicable. It thereby implements OMB guidance in the following sections of 2 CFR part 200, as they apply to subawards:

(1) 2 CFR 200.301 and 200.327 through 200.329; and

(2) 2 CFR 200.315(c), as it relates to invention reporting; and

(3) 2 CFR 200.343(a), as it relates to financial and performance reporting.

(b) *Award terms and conditions.* A DoD Component's general terms and conditions must use the wording appendix G to this part provides as Section A of SUB Article VII to inform recipients about the relationship between requirements for the recipient in REP Articles I through III and requirements for subawards in SUB Article VII.

§ 1138.705 Performance reporting requirements for subawards.

(a) *Requirement.* A DoD Component's general terms and conditions must specify performance reporting requirements for subawards.

(b) *Award terms and conditions.* A DoD Component's general terms and conditions must use the wording appendix G to this part provides as Section B of SUB Article VII to specify the performance reporting requirements that recipients must include in their subawards.

§ 1138.710 Financial reporting requirements for subawards.

(a) *Requirement.* A DoD Component's general terms and conditions must specify financial reporting requirements for subawards.

(b) *Award terms and conditions.* A DoD Component's general terms and conditions must use the wording appendix G to this part provides for Section C of SUB Article VII to specify the financial reporting requirements that recipients must include in their subawards.

§ 1138.715 Reporting on property under subawards.

(a) *Requirement.* A DoD Component's general terms and conditions must specify the requirements for reporting on property that recipients must include in their subawards.

(b) *Award terms and conditions.* To implement the requirement described in paragraph (a) of this section, a DoD Component's general terms and conditions must use the wording appendix G to this part provides as Section D of SUB Article VII.

§ 1138.720 Other reporting under subawards.

(a) *Requirement.* A DoD Component's general terms and conditions must specify any requirements for other reporting that recipients must include in their subawards.

(b) *Award terms and conditions.* To implement the requirement described in paragraph (a) of this section, a DoD Component's general terms and conditions must:

(1) Include in Section E of SUB Article VII any reporting requirement included in REP Article V that may flow down to subrecipients, and

(2) Indicate whether the recipient must require the subrecipient to provide any specific information or can comply by ensuring that the recipient meets its responsibilities to DoD.

Subpart H—Other Administrative Requirements for Subawards (SUB Article VIII)

§ 1138.800 Purpose of SUB Article VIII.

SUB Article VIII of the general terms and conditions:

(a) Specifies provisions that a recipient must include in its subaward terms and conditions concerning submission and maintenance of subrecipient information; records retention and access; remedies and termination; disputes, hearings, and appeals; collection of amounts due; closeout; and post-closeout adjustments and continuing responsibilities.

(b) It thereby implements OMB guidance in 2 CFR 200.113 and 200.333 through 200.345, as those sections apply to subawards.

§ 1138.805 Content of SUB Article VIII.

(a) *Requirement.* A DoD Component's general terms and conditions must specify the administrative requirements

that a recipient must include in its subaward terms and conditions in areas covered by OAR Articles I through VII of the recipient's prime award.

(b) *Award terms and conditions*—(1) *General.* To implement the requirement in paragraph (a) of this section, a DoD Component's general terms and conditions must use the wording appendix H to this part provides for SUB Article VIII.

(2) *Exception.* A DoD Component's general terms and conditions may add one or more sections to the wording that appendix H to this part provides for SUB Article VIII if the DoD Component added requirements to OAR Article IV of its general terms and conditions, in accordance with paragraph 2 CFR 1136.405(b)(2), because a statute or regulation requires recipients to provide opportunities to subrecipients for hearings, appeals, or other administrative proceedings with respect to claims, disputes, remedies for noncompliance, or other matters. The additional wording in SUB Article VIII would address the flow down to subrecipients of the added requirements in OAR Article IV.

Subpart I—National Policy Requirements for Subawards (SUB Article IX)

§ 1138.900 Purpose of SUB Article IX.

SUB Article IX addresses national policy requirements that recipients must include in their subaward terms and conditions. It thereby partially implements OMB guidance in 2 CFR 200.331(a)(2).

§ 1138.905 Content of SUB Article IX.

(a) *Requirement.* A DoD Component's general terms and conditions must specify which of the national policy requirements in NP Articles I through IV of the award flow down to subawards.

(b) *Award terms and conditions.* A DoD Component's general terms and conditions:

(1) Must use the wording appendix B to this part provides for SUB Article IX if the DoD Component did not add, delete, or otherwise modify any of the wording that appendices A through D of 2 CFR part 1122 provided for NP Articles I through IV of the award (as permitted in accordance with DoDGARs provisions at 2 CFR 1122.115 and 1122.120).

(2) May make corresponding alterations to the wording appendix I to this part provides for SUB Article IX if the DoD Component did modify the wording of NP Articles I through IV, in order to conform the national policy requirements in SUB Article IX to the requirements in those modified articles.

Subpart J—Subrecipient Monitoring and Other Post-Award Administration (SUB Article X)

§ 1138.1000 Purpose of SUB Article X.

SUB Article X specifies the requirements for recipients' monitoring of subrecipients and related post-award administration of subawards they make under DoD grants and cooperative agreements. It thereby implements OMB guidance in 2 CFR 200.331(d) through (h) and 2 CFR 200.340(a).

§ 1138.1005 Content of SUB Article X.

(a) *Requirement.* A DoD Component's general terms and conditions must specify requirements for recipients' monitoring of subrecipients and related post-award administration of subawards.

(b) *Award terms and conditions.* A DoD Component's general terms and conditions must use the wording appendix J to this part provides for SUB Article X of its general terms and conditions.

Subpart K—Requirements Concerning Subrecipients' Lower-Tier Subawards (SUB Article XI)

§ 1138.1100 Purpose of SUB Article XI.

SUB Article XI specifies requirements that a recipient must include in any subaward under which it judges that the subrecipient may make lower-tier subawards. It thereby implements OMB guidance in 2 CFR 200.331(a) through (c) and other portions of 2 CFR part 200 as they apply to lower-tier subawards.

§ 1138.1105 Content of SUB Article XI.

(a) *Requirement.* A DoD Component's general terms and conditions must address requirements that recipients must include in subawards to entities that may make lower-tier subawards.

(b) *Award terms and conditions.* A DoD Component's general terms and conditions must use the wording appendix K to this part provides for SUB Article XI.

Subpart L—Fixed-Amount Subawards (SUB Article XII)

§ 1138.1200 Purpose of SUB Article XII.

SUB Article XII specifies policy and procedures concerning recipients' use of fixed-amount subawards under DoD grants and cooperative agreements. It thereby implements OMB guidance in 2 CFR 200.201(b) and 200.332 and other portions of 2 CFR part 200 as they apply to fixed-amount subawards.

§ 1138.1205 Content of SUB Article XII.

(a) *Requirement.* A DoD Component's general terms and conditions must address how a recipient may use a fixed-amount type of subaward, when it requires the Component's prior approval to do so, and what requirements the recipient must include in those subawards.

(b) *Award terms and conditions* — (1) *General.* A DoD Component's general terms and conditions must use the wording appendix L to this part provides for SUB Article XII.

(2) *Exceptions.*

(i) In addition to the authorities provided in § 1138.5 to omit or reserve all or portions of the wording appendix L to this part provides for SUB Article XII, a DoD Component's general terms and conditions may add wording to Section B of the article to authorize recipients to use fixed-amount subawards without obtaining the Component's prior approval in other situations for which it would be appropriate to do so, given the nature of the program or programs that use its general terms and conditions.

(ii) However, a DoD Component's general terms and conditions should never authorize recipients' use of fixed-amount subawards for basic or applied research, for the reason given in paragraph B.2.a.ii of the wording appendix L provides for SUB Article XII. It is unrealistic to have a subrecipient commit in advance to accomplishing specific, well-defined, and observable research outcomes. Doing so subjects the subrecipient to undue risk of not being reimbursed for research costs it incurred if it fails to fully accomplish the outcomes.

Appendix A to Part 1138—Terms and Conditions for SUB Article I, ''Distinguishing Subawards and Procurements''

Unless modified as provided in § 1138.5, a DoD Component's general terms and conditions must use the following wording for SUB Article I.

SUB Article I. Distinguishing Subawards and Procurements. (DECEMBER 2014)

Section A. Required recipient determination. For each transaction into which you enter with another entity at the next tier below this award, you must determine whether the transaction is a subaward or a procurement.

Section B. Considerations in making the determination.

1. The primary purpose of the transaction between you and the other entity is the key factor you must use to determine whether the transaction is a subaward or a procurement.

a. The transaction is a subaward and the other entity therefore a subrecipient if the transaction's primary purpose is for you to

transfer—for performance by the other entity—a portion of the substantive program for which we are providing financial assistance to you through this award. You will continue to be accountable to us for performance of the project or program under the award, including portions performed by any subrecipients.

b. The transaction is a procurement and the other entity therefore your contractor if the transaction's primary purpose is for you to purchase goods or services that you need to perform the substantive program supported by this award. The distinction from a subaward is the contractor is not performing a portion of the substantive program as a result of the transaction.

2. What you call the transaction is not a factor in distinguishing a subaward from a procurement. If the transaction meets the criterion in paragraph B.1.a of this article, it is a subaward for purposes of the requirements of this award even if you call and consider the transaction a ''contract.''

Section C. Effect of the determination on the next-tier transaction.

1. *Process for awarding the transaction.* One important consequence of your determining whether a next-tier transaction is a subaward or a procurement is that there are different requirements governing the pre-award and time of award processes that you use to award the transaction.

a. SUB Article II of this award specifies pre-award and time of award responsibilities for subawards.

b. PROC Articles I and II of this award govern pre-award and time of award processes for awarding procurement transactions.

2. *Transaction terms and conditions.* A second important consequence of your determining whether a next-tier transaction is a subaward or a procurement is that the terms and conditions you include in a subaward differ from those you include in a procurement transaction.

a. Section C of SUB Article II of this award addresses requirements you must include in subaward terms and conditions. Those requirements generally are either identical or directly related to requirements in the general terms and conditions of this award. They include national policy requirements as well as administrative requirements in areas such as financial and programmatic management, property administration, procurement, and reporting.

b. PROC Article III of this award lists requirements you must include in a procurement transaction when applicable to the procurement.

Appendix B to Part 1138—Terms and Conditions for SUB Article II, ''Pre-Award and Time of Award Responsibilities''

Unless modified as provided in § 1138.5, a DoD Component's general terms and conditions must use the following wording for SUB Article II.

SUB Article II. Pre-Award and Time of Award Responsibilities. (DECEMBER 2014)

Section A. Requirements for unique entity identifiers.

1. *Definition of ''entity.''* For purposes of the unique entity identifier requirements in paragraphs A.2 and 3 of this section, ''entity'' has the meaning given in paragraph C.3 of appendix A to OMB guidance in 2 CFR part 25.

2. *Pre-notification of potential subrecipients.* You must notify potential subrecipients that no entity may receive a subaward from you under this award unless it has provided its unique entity identifier to you.

3. *Restriction on making subawards.*

a. *General.* You may not make a subaward to an entity unless the entity has provided its unique entity identifier to you.

b. *Exception.* You may make a subaward to an entity that has not provided its unique entity identifier to you in rare cases in which you requested, and we approved, an exemption from the requirement for the entity to provide a unique entity identifier, based on the criteria in OMB guidance in 2 CFR part 25.110(d).

Section B. Pre-award risk assessment.

1. Before making a subaward to an entity, you must perform a risk assessment of the prospective subrecipient, as described in 2 CFR 200.331(b). OMB guidance in 2 CFR 200.205(c) provides examples of factors you may consider in evaluating risk.

2. As part of the risk assessment under paragraph B.1 of this article, you must:

a. Verify that neither the prospective subrecipient nor its principals under the subaward are excluded or disqualified from participating in the transaction, in accordance with requirements in Subpart C of OMB guidance in 2 CFR part 180, as implemented by DoD at 2 CFR part 1125; and

b. If warranted by risks you identify, determine whether to impose award-specific terms and conditions in the subaward to mitigate the risks.

i. These award-specific terms and conditions may be in addition to, or differ from, the terms and conditions that SUB Articles IV through IX of this award require you to include in subawards.

ii. They may include items such as those listed in OMB guidance in 2 CFR 200.207(b)(1) through (6).

iii. Your procedures for imposing and removing the additional or different requirements must comply with the procedural guidance in 2 CFR 200.207(c) and (d).

Section C. Subaward content.

1. *Cost-type subawards.*

a. SUB Article III of this award specifies informational content that you must include in each cost-type subaward.

b. SUB Articles IV through VIII specify administrative requirements that you must include:

i. As applicable, in each cost-type subaward to:

(A) A domestic U.S. entity (*i.e.,* an entity other than a foreign public entity or a foreign organization); or

(B) An organizational unit of a foreign organization if that unit has a place of business in the United States; and

ii. To the maximum extent practicable in each cost-type subaward to either a foreign public entity or an organizational unit of a foreign organization that does not have a place of business in the United States (regardless of whether another organizational unit of that foreign organization has one). However, absent our prior approval, you may not allow that foreign entity or organization to acquire real property or equipment under a subaward.

c. SUB Article IX of this award specifies national policy requirements that you must include, as applicable, in each cost-type subaward.

2. *Fixed-amount type subawards.*

a. Sections A through F of SUB Article III of this award specify informational content that you must include in each fixed-amount subaward.

b. SUB Article IX of this award specifies national policy requirements that you must include, as applicable, in each fixed-amount subaward.

c. Section D of SUB Article XII of this award specifies administrative requirements that you must include, as applicable, in any fixed-amount subaward to:

i. A domestic U.S. entity (*i.e.,* an entity other than a foreign public entity or a foreign organization); or

ii. An organizational unit of a foreign organization if that unit has a place of business in the United States; and

iii. To the maximum extent practicable to either a foreign public entity or an organizational unit of a foreign organization that does not have a place of business in the United States (regardless of whether another organizational unit of that foreign organization has one). However, absent our prior approval, you may not allow that foreign entity or organization to acquire real property or equipment under a subaward.

3. *Additional subaward terms and conditions.* You may include other requirements in your subawards that you need in order to meet your responsibilities under this award for performance of the project or program (including portions performed by subrecipients) and compliance with applicable administrative and national policy requirements.

Section D. Subaward and executive compensation reporting. You must report subaward obligating actions and information on subrecipients' executive compensation as required by REP Article IV of this award.

Appendix C to Part 1138—Terms and Conditions for SUB Article III, ''Informational Content of Subawards''

Unless modified as provided in § 1138.5, a DoD Component's general terms and conditions must use the following wording for SUB Article III.

SUB Article III. Informational Content of Subawards. (DECEMBER 2014)

Section A. Informational content in general. You must include in each subaward (and each subsequent amendment to a subaward that alters the amount of the subaward) the information specified in OMB guidance in 2 CFR 200.331(a)(1), ''Federal Award Identification,'' with the clarifications provided in Sections B through G of this article.

Section B. Federal award identification number and award date. The ''Federal

Award Identification Number'' and ''Federal Award Date'' described in 2 CFR 200.331(a)(1)(iii) and (iv), respectively, are the award number and award date for this award to you. You must provide the information in a way that makes it clear that the subaward is under this DoD award.

Section C. Amount of Federal funds obligated.

1. The ''Amount of Federal Funds Obligated by this action by the pass-through entity to the subrecipient'' that is described in 2 CFR 200.331(a)(1)(vi) is either:

a. The amount of your obligation to the subrecipient, if the terms and conditions of this award do not require you to provide any cost sharing or matching for the project or program the award supports; or

b. The amount of the Federal share of your subaward obligation if this award does require cost sharing or matching, which in that case is the product of:

i. The Federal share of total project costs under this DoD award to you, as a percentage of those total project costs; and

ii. The total amount of project costs obligated for the subaward action.

2. Note that the total project costs of the award and subaward, as used in paragraphs C.1.b.i and ii of this section, include any cost sharing or matching that you or the subrecipient provides if you are counting it toward the cost sharing or matching required under this award.

Section D. Total amount obligated to the subrecipient. The ''Total Amount of Federal Funds Obligated to the Subrecipient by the pass-through entity including the current obligation,'' as described in 2 CFR 200.331(a)(1)(vii), is the cumulative amount to date of the amounts described in Section C of this article.

Section E. Total Amount of the Federal Award. The ''Total Amount of the Federal Award committed to the subrecipient by the pass-through entity,'' as described in 2 CFR 200.331(a)(1)(viii), is the total amount through the end of the subaward that you and the subrecipient mutually agreed upon, to include: Funding obligated to date, any future anticipated funding increments, and any options you may exercise in the future.

Section F. Federal awarding agency, pass-through entity, and awarding official. The ''Name of Federal awarding agency'' and ''pass-through entity,'' as those terms are used in 2 CFR 200.331(a)(1)(x) are the DoD and the business name associated with your registration in SAM. In that same paragraph of 2 CFR part 200, the ''awarding official'' is the individual in your organization who made the subaward.

Section G. Indirect cost rate. With respect to the requirement in 2 CFR 200.331(a)(1)(xiii) for the subaward to include the ''Indirect cost rate for the Federal award:''

1. This requirement applies to cost-type subawards only.

2. The rate the subaward must include is the subrecipient's rate, whether it is a rate set by negotiation with a Federal agency or you or is the de minimis rate described in 2 CFR 200.414(f).

3. You are required to include the indirect cost rate only if the subrecipient is willing to share that information with you and assents that information about its rate is not proprietary. If a subrecipient is not willing to share information about its indirect cost rate with you, consult the grants officer for this award to explore alternative ways to assess the reasonableness of costs of the subaward.

Appendix D to Part 1138—Terms and Conditions for SUB Article IV, ''Financial and Program Management Requirements for Subawards''

Unless modified as provided in § 1138.5, a DoD Component's general terms and conditions must use the following wording for SUB Article IV.

SUB Article IV. Financial and Program Management Requirements for Subawards. (DECEMBER 2014)

Section A. Purposes of this article in relation to other articles.

1. This article specifies administrative requirements concerning financial and program management that you must include in the terms and conditions of each cost-type subaward that you make under this award to a domestic entity.

2. It thereby addresses the flow down to subrecipients of requirements with which you must comply under FMS Articles I through VII of this award.

3. SUB Article XII of this award addresses which of these administrative requirements you must include in any fixed-amount subaward that you make, if you are authorized to make fixed-amount subawards under this award.

Section B. Financial management system standards. You must include in any subaward you make under this award the requirements of:

1. Sections A through C of FMS Article I of this award if the subrecipient is a State;

2. Sections B and C of FMS Article I if the subrecipient is an institution of higher education, nonprofit organization, local government, or Indian tribe; or

3. 32 CFR 34.11 if the subrecipient is a for-profit entity.

Section C. Payments.

1. *Subawards to States.* You must include the provisions of Section A of FMS Article II of this award in each subaward you make to a State;

2. *Subawards to institutions of higher education, nonprofit organizations, local governments, and Indian tribes.* The following paragraphs specify requirements you must include in subawards to institutions of higher education, nonprofit organizations, local governments, and Indian tribes.

a. *Payment method.*

i. If you are authorized to request advance payments under this award, you must authorize a subrecipient to request advance payments unless:

(A) The subrecipient does not maintain, or demonstrate the willingness to maintain, written procedures that minimize the time elapsing between its receipt of each payment and its disbursement of the funds for project or program purposes;

(B) You impose a requirement for the subrecipient to be paid by reimbursement as a result of your risk evaluation of the subrecipient under SUB Article II of this award.

(C) The subaward is for construction.

ii. If you do not authorize advance payments for one of the reasons given in paragraph C.2.a.i of this article, you must specify either reimbursement or working capital advances as the payment method in accordance with OMB guidance in 2 CFR 200.305(b)(3) and (4).

b. *Payment timing and amount.*

i. *Advances.* You must limit advance payments to the minimum amounts needed and time the payments to be in accordance with the subrecipient's actual, immediate cash requirements in carrying out the project or program under the subaward. The timing and amount of your advance payments to the subrecipient must be as close as is administratively feasible to the subrecipient's actual disbursements for direct project costs and the proportionate share of any allowable indirect costs. Your subawards also must include the requirements of paragraphs B.2.b and c of FMS Article II to specify costs subrecipients must exclude from amounts of their advance payment requests.

ii. *Reimbursements or working capital advances.* You must follow OMB guidance in 2 CFR 200.305(b)(3) and (4) concerning timing and amount of reimbursements or working capital advances.

c. *Frequency of requests.* You must allow the subrecipient to request advance payments or reimbursements, including those associated with the working capital advance payment method, as often as it wishes if you pay using electronic funds transfers and at least monthly otherwise.

d. *Other requirements.*

i. In any subaward that was subject to our consent, you must include the requirements of paragraph B.5 of FMS Article II of this award concerning withholding of payments.

ii. You must include the provisions of paragraph B.6 of FMS Article II concerning depositories in each subaward that authorizes the subrecipient to request advance payments.

3. *Subawards to for-profit entities.* The provision concerning payments in each subaward you make to a for-profit entity must conform to the requirements in 32 CFR 34.12.

Section D. Allowable costs, period of availability of funds, and fee and profit.

1. You must include in each cost-type subaward a requirement that the allowability of costs under the subaward (and any lower-tier subawards or procurement transactions into which the subrecipient enters) must be determined in accordance with the applicable cost principles identified in Section A of FMS Article III of this award, as well as the clarification in Section B of that article if it applies to those cost principles.

2. You must specify in each subaward the period of availability of funds for any project or program purpose so that the period neither begins before nor ends after the period during which you may use funds available to you under this award for that same project or program purpose.

3. You must include in each subaward the provisions concerning fee or profit that are in Section D of FMS Article III of this award.

Section E. Revision of budget and program plans. You must include in each subaward provisions requiring the subrecipient to request your approval for any change in the subaward budget or program that would cause a budget or program change under this award for which Section B of FMS Article IV requires you to first obtain our prior approval. You may not approve any budget or program revision that is inconsistent with the purpose or terms and conditions of this award.

Section F. Non-Federal audits. You must include a provision in each subaward that you make under this award to require the subrecipient entity to comply with the audit requirements applicable to that entity, as specified in either Section A or Section B of FMS Article V.

Section G. Cost sharing or matching requirements. If you make a subaward under which the subrecipient may provide contributions or donations of cash or third-party in-kind contributions to be counted toward any cost sharing or matching that is required under this award, you must include provisions in that subaward to specify:

1. The criteria governing the allowability as cost sharing or matching of the types of cash or third-party in-kind contributions that the subrecipient may contribute or donate. Those criteria are specified in:

a. Sections B through D of FMS Article VI of this award if the subaward is to a State, institution of higher education, nonprofit organization, local government, or Indian tribe.

b. The provisions of 32 CFR 34.13(a) if the subaward is to a for-profit entity.

2. The methods for determining and documenting the values of those contributions or donations to be counted as cost sharing or matching. Those methods are specified in:

a. Sections E and F of FMS Article VI of this award if the subaward is to a State, institution of higher education, nonprofit organization, local government, or Indian tribe.

b. The provisions of 32 CFR 34.13(b) if the subaward is to a for-profit entity.

Section H. Program income. You must include requirements concerning program income in subawards, as follows:

1. In each subaward to a State, institution of higher education, nonprofit organization, local government, or Indian tribe:

a. You must require the subrecipient to account to you when it earns any program income under the subaward or uses it, so that you can prepare reports you are required to submit to us. If the award-specific terms and conditions of this award require you to account for program income earned after the period of performance, you must include a corresponding requirement in your subawards.

b. You must include the provisions of Sections A through D of FMS Article VII of this award.

c. You may specify the deduction, addition, or cost-sharing or matching alternative—described in 2 CFR 1128.720(b)—or a combination of those alternatives, for the subrecipient's use of any program income it earns. However, you still must comply with the alternative specified in Section E of FMS Article VII and any applicable award-specific terms and conditions for the total amount of program income earned, which includes amounts earned by you and your subrecipients. For example, if we require you to use the deduction alternative, you may authorize a subrecipient to use the addition alternative if you reduce the funding allocated for portions of the project or program that you or other subrecipients perform to make the required reduction in the total award amount.

2. In each subaward to a for-profit entity, you must include the provisions of 32 CFR 34.14, with the appropriate method specified for disposition of program income.

Appendix E to Part 1138—Terms and Conditions for SUB Article V, ''Property Requirements for Subawards''

Unless modified as provided in § 1138.5 or either or both of the exceptions in § 1138.505 and § 1138.520 are applied, a DoD Component's general terms and conditions must use the following wording for SUB Article V (as specified in §§ 1138.500 through 1138.520).

SUB Article V. Property Requirements for Subawards. (DECEMBER 2014)

Section A. Purposes of this article in relation to other articles.

1. This article specifies administrative requirements concerning property that you must include in the terms and conditions of each cost-type subaward that you make under this award.

2. It thereby addresses the flow down to subrecipients of requirements with which you must comply under PROP Articles I through VI of this award.

3. SUB Article XII of this award addresses which of these administrative requirements you must include in any fixed-amount subaward that you make, if you are authorized to make fixed-amount subawards under this award.

Section B. Title to property.

1. *Subawards to institutions of higher education, nonprofit organizations, States, local governments, or Indian tribes.*

a. *General.* You must include terms and conditions in each subaward to flow down to the subrecipient the provisions of:

i. Paragraph A.1 of PROP Article I concerning vesting of title to property acquired under the subaward unless paragraph B.1.b of this section provides otherwise.

ii. Sections B through E of PROP Article I that are applicable to types of property that the subrecipient may acquire, improve, donate, or for which it may otherwise be accountable under the subaward.

b. *Exceptions.* [Reserved.]

2. *Subawards to for-profit entities.*

a. *Real property and equipment.* You must obtain the prior approval of the grants officer before permitting any for-profit subrecipient to acquire or improve real property or equipment under the award.

i. If the grants officer does not grant the approval, you must include a subaward provision that prohibits the for-profit entity from acquiring or improving real property or equipment under the subaward.

ii. If the approval is granted, you must include a subaward provision specifying that title vesting and Federal interest are governed by provisions of 32 CFR 34.21(b) and (c).

b. *Supplies.* You must include a subaward provision specifying that vesting of title to supplies is governed by provisions of 32 CFR 34.24(a), subject to the use and disposition requirements of 32 CFR 34.24(b).

c. *Federally owned property.* You must include a provision in any subaward to a for-profit entity under which the entity may be accountable for federally owned property, to state that title to such property will remain vested in the Federal Government.

Section C. Property management system. If you make a subaward under which the subrecipient either may acquire or improve equipment, or may be accountable for federally owned property, you must include in the subaward:

1. If the subrecipient is a State, applicable provisions of:

a. Section A of PROP Article II concerning insurance for real property and equipment.

b. Section B of PROP Article II concerning other property management system standards.

2. If the subrecipient is an institution of higher education, nonprofit organization, local government, or Indian tribe, applicable provisions of:

a. Section A of PROP Article II concerning insurance for real property and equipment.

b. Section C of PROP Article II concerning other property management system standards.

3. If the subrecipient is a for-profit entity, applicable provisions of 32 CFR 34.22(a) and 34.23 and:

a. The for-profit entity may be accountable under the subaward for federally owned property; or

b. You obtained the grants officer's prior approval for the for-profit entity's acquisition of equipment under the subaward.

Section D. Use and disposition of real property. If the subrecipient of a subaward you make under this award may acquire or improve real property, then you must include in the subaward:

1. *Use.* The requirements concerning use of real property:

a. In Section A of PROP Article III if the subaward is to an institution of higher education, nonprofit organization, State, local government, or Indian tribe, unless the award-specific terms and conditions of this award provide otherwise; and

b. In 32 CFR 34.21(d) if the subaward is to a for-profit entity and you obtained the grants officer's prior approval for the entity's acquisition of real property under the subaward.

2. *Disposition.* Provisions to require the subrecipient to request disposition instructions through you when the property is no longer needed for its originally authorized purpose, so that you can meet your responsibilities to us under Section B of PROP Article III to address the Federal interest in the property.

Section E. Use and disposition of equipment and supplies. If you make a

subaward under which the subrecipient may acquire or improve equipment, or acquire supplies, you must include in the subaward, as applicable:

1. If the subaward is to a State:

a. The requirements in Sections B and E of PROP Article IV concerning use and disposition of equipment and supplies; and

b. Provisions such as those in Section A of PROP Article IV that make clear the applicability of those requirements.

2. If the subaward is to an institution of higher education, nonprofit organization, local government, or Indian tribe:

a. The requirements in Sections C and E of PROP Article IV concerning use of equipment and use and disposition of supplies;

b. Provisions such as those in Section A of PROP Article IV that make clear the applicability of those requirements; and

c. Provisions to require the subrecipient to request disposition instructions from you when equipment is no longer needed for its originally authorized purpose, so that you can meet your responsibilities to us under Section D of PROP Article IV to address the Federal interest in the equipment.

3. If the subaward is to a for-profit entity:

a. The requirements concerning use and disposition of supplies in 32 CFR 34.24(b);

b. And you obtained the grants officer's prior approval for the for-profit entity's acquisition of equipment under the subaward:

i. The requirements concerning use of equipment in 32 CFR 34.21(d); and

ii. Provisions such as those in Section A of PROP Article IV that make clear the applicability of those requirements; and

iii. Provisions to require the subrecipient to request disposition instructions from you when equipment is no longer needed for its originally authorized purpose, so that you can meet your responsibilities to us under Section B or D of PROP Article IV to address the Federal interest in the equipment.

Section F. Use and disposition of federally owned property. If you make a subaward under which the subrecipient may be accountable for federally owned property, you must include subaward provisions specifying that the subrecipient:

1. May use the property for purposes specified in paragraph A.1 of PROP Article V;

2. Must submit requests through you for the award administration office's approval to use the property for other purposes, as described in paragraph A.2 of PROP Article V;

3. Must request the award administration office's disposition instructions through you when the property is no longer needed for subaward purposes or the subaward ends.

Section G. Intangible property. You must include in a subaward provisions specifying the requirements of:

1. Sections A through D of PROP Article VI if the subaward is to an institution of higher education, nonprofit organization, State, local government, or Indian tribe.

2. Section A of PROP Article VI as it applies to works developed under the subaward, Section B of PROP Article VI, and paragraph C.1 of Section C of PROP Article VI, if the subaward is to a for-profit entity.

Appendix F to Part 1138—Terms and Conditions for SUB Article VI, ''Procurement Procedures to Include in Subawards''

Unless modified as provided in § 1138.5, a DoD Component's general terms and conditions must use the following wording for SUB Article VI.

SUB Article VI. Procurement Procedures To Include in Subawards. (DECEMBER 2014)

Section A. Purposes of this article in relation to other articles.

1. This article specifies administrative requirements concerning procurement procedures that you must include in the terms and conditions of each cost-type subaward that you make under this award.

2. It thereby addresses the flow down to subrecipients of requirements with which you must comply under PROC Articles I through III of this award.

3. SUB Article XII of this award addresses which of these administrative requirements you must include in any fixed-amount subaward that you make, if you are authorized to make fixed-amount subawards under this award.

Section B. Subaward to a State. In any subaward that you make to a State, you must include the requirements of PROC Article I and applicable sections of PROC Article III of this award.

Section C. Subaward to an institution of higher education, nonprofit organization, local government, or Indian tribe. In any subaward that you make to an institution of higher education, nonprofit organization, local government, or Indian tribe:

1. You must include the requirements of Sections A through G of PROC Article II and applicable sections of PROC Article III of this award.

2. You must include the requirement for the subrecipient to make available to you, upon request:

a. Technical specifications of proposed procurements, under the conditions described in OMB guidance at 2 CFR 200.324(a); and

b. Other procurement documents for pre-procurement review, under the conditions described in OMB guidance at 2 CFR 200.324(b).

3. If it is possible that, under a subaward you make, the subrecipient may award a construction or facility improvement contract with a value in excess of the simplified acquisition threshold, you must include provisions in the subaward to require the subrecipient to comply with at least the minimum requirements for bidders' bid guarantees and contractors' performance and payment bonds described in 2 CFR 200.325(a) through (c), unless you determine that the subrecipient's bonding policy and requirements are adequate to protect Federal interests.

Section D. Subaward to a for-profit entity. In any subaward you make to a for-profit entity, you must include the requirements in 32 CFR 34.31.

Appendix G to Part 1138—Terms and Conditions for SUB Article VII, ''Financial, Programmatic, and Property Reporting Requirements for Subawards''

Unless modified as provided in § 1138.5, a DoD Component's general terms and conditions must use the following wording for SUB Article VII (as specified in §§ 1138.700 through 1138.715).

SUB Article VII. Financial, Programmatic, and Property Reporting Requirements for Subawards. (DECEMBER 2014)

Section A. Purposes of this article in relation to other articles.

1. This article specifies administrative requirements concerning reporting that you must include in the terms and conditions of each cost-type subaward that you make under this award.

2. It thereby addresses the flow down to subrecipients of requirements with which you must comply under REP Articles I through III of this award.

3. SUB Article XII of this award addresses which of these administrative requirements you must include in any fixed-amount subaward that you make, if you are authorized to make fixed-amount subawards under this award.

Section B. Performance reporting.

1. You must include terms and conditions in each subaward to require the subrecipient to provide any performance information you need, by the time you need it, to comply with the performance reporting requirements in REP Article I and other terms and conditions of this award.

2. You may specify a form, format, or data elements for use by the subrecipient to provide the information to you (you need not require the subrecipient to use the same form, format, or data elements that REP Article I specifies for your reporting to us).

Section C. Financial reporting.

1. You must include terms and conditions in each subaward to require the subrecipient to provide any financial information you need, by the time you need it, to comply with the financial reporting requirements in REP Article II and other terms and conditions of this award.

2. You may specify a form, format, or data elements for use by the subrecipient to provide the information to you (you need not require the subrecipient to use the same form, format, or data elements that REP Article II specifies for your reporting to us).

Section D. Reporting on property.

1. Each subaward you make under this award must include provisions concerning property reporting as described in paragraph D.2 of this section if the subrecipient may, under the subaward:

a. Acquire or improve real property or equipment;

b. Acquire supplies or intangible property; or

c. Be accountable for federally owned property.

2. The subaward provisions must require the subrecipient to give you the information you need about the property in order to meet your responsibilities to us under Sections A

through D of REP Article III and PROP Articles II through VI.

Section E. Other reporting

[Reserved].

Appendix H to Part 1138—Terms and Conditions for SUB Article VIII, ''Other Administrative Requirements for Subawards''

Unless modified as provided in § 1138.5, a DoD Component's general terms and conditions must use the following wording for SUB Article VIII, as specified in § 1138.805, but may add a section(s), as appropriate.

SUB Article VIII. Other Administrative Requirements for Subawards. (DECEMBER 2014)

Section A. Purposes of this article in relation to other articles.

1. This article specifies other administrative requirements that you either must or should include in the terms and conditions of each cost-type subaward that you make under this award.

2. It thereby addresses the flow down to subrecipients of requirements with which you must comply under OAR Articles I through VII of this award.

3. SUB Article XII of this award addresses which of these administrative requirements you must include in any fixed-amount subaward that you make, if you are authorized to make fixed-amount subawards under this award.

Section B. Submission and maintenance of subrecipient information. You must include the substance of the provision in Section C of OAR Article I in any subaward you make under this award. The provision must require the subrecipient's disclosure of any evidence directly to the Inspector General, DoD.

Section C. Records retention and access. In each subaward you make under this award:

1. If the subaward is to an institution of higher education, nonprofit organization, State, local government, or Indian tribe:

a. You must include the requirements of Section A of OAR Article II with the additional condition that, for any subrecipient under this award that does not have a federally approved rate for indirect or facilities and administrative costs and that does not use the de minimis rate described in 2 CFR 200.414(f), you must:

i. Require the subrecipient to keep records that support its indirect or facilities and administrative costs charged to the subaward for 3 years from the end of the fiscal year (or other accounting period) to which the costs apply; and

ii. Keep any plan or computation the subrecipient submits to you to serve as a basis for your determining the reasonableness and allowability of indirect or facilities and administrative costs of the subaward, for 3 years from the end of the fiscal year (or other accounting period) to which the proposal, plan, or computation applies.

b. You must include the requirements of Sections B, C, and F of OAR Article II.

c. You must include provisions that enable you to comply with the requirements of Section D of OAR Article II concerning records for joint or long-term use.

d. You must include provisions that establish the same rights and responsibilities for the subrecipient under the subaward that Section E of OAR Article II establishes for you under this award.

e. You may not impose any other record retention or access requirements on the subrecipient.

2. If the subaward is to a for-profit entity, you must include the records retention and access provisions of 32 CFR 34.42.

Section D. Remedies and termination. The terms and conditions of each subaward you make under this award should specify your rights and responsibilities and those of the subrecipient if you take a remedial action to address a subrecipient's noncompliance with an applicable Federal statute or regulation or the terms and conditions of your subaward. Each subaward's terms and conditions should:

1. Identify remedial actions you may take to address the subrecipient's noncompliance. Available remedies are described in:

a. OMB guidance in 2 CFR 200.338 for a subaward to an institution of higher education, nonprofit organization, State, local government, or Indian tribe; and

b. 32 CFR 34.52 for a subaward to a for-profit entity.

2. With respect to termination specifically:

a. Identify conditions under which you, the subrecipient, or both (by mutual agreement) may terminate the subaward, in whole or in part, as described in:

i. OMB guidance in 2 CFR 200.339(a) for a subaward to an institution of higher education, nonprofit organization, State, local government, or Indian tribe; and

ii. 32 CFR 34.51 for a subaward to a for-profit entity.

b. Inform the subrecipient that you will provide it with a notice of termination if you unilaterally terminate the award.

c. Specify that you and the subrecipient remain responsible for applicable requirements addressed in Sections G and H of this article concerning closeout, post-closeout adjustments, and continuing responsibilities.

3. With respect to either suspension or termination of the subaward, inform the subrecipient about the criteria that you will use to either allow or disallow subaward costs, which are in:

a. Section D of OAR Article III for a subaward to an institution of higher education, nonprofit organization, State, local government, or Indian tribe; and

b. 32 CFR 34.52(c) for a subaward to a for-profit entity.

Section E. Disputes, hearings, and appeals. Each subaward's terms and conditions should specify any rights the subrecipient has to a hearing, appeal, or other administrative proceeding if it disputes a decision you render in administering its subaward. You must comply with any statute or regulation that affords the subrecipient an opportunity for a hearing, appeal, or other administrative proceeding and is applicable to the dispute.

Section F. Collection of amounts due. Although your subaward terms and conditions do not need to include any of the requirements of OAR Article V because those requirements do not flow down to subrecipients, you should consider including provisions to specify what you would need from the subrecipient if you owed a debt to the Federal Government under this award that is related to its subaward.

Section G. Closeout.

1. In each subaward that you make to an institution of higher education, nonprofit organization, State, local government, or Indian tribe, you must include provisions to require the subrecipient to:

a. Liquidate all obligations that it incurred under the subaward not later than 90 calendar days after the end date of the period of performance of either the subaward or this award, whichever is earlier, unless you grant an extension.

b. Promptly refund to you any balances of unobligated cash that you advanced or paid to the subrecipient, unless you received authorization from the DoD award administration office for the subrecipient's use of those funds on other projects or programs.

c. Submit to you:

i. Any information you need from the subrecipient to meet your responsibilities to us for an accounting of property, under Section D of OAR Article VI; and

ii. Not later than 90 calendar days after the end date of the period of performance of this award, unless you grant the subrecipient an extension, any information you need to meet your responsibilities to us for final reports, under Section C of OAR Article VI.

2. In each subaward that you make to a for-profit entity, you must include the terms and conditions that you deem necessary for you to be able to comply with the requirements in OAR Article VI.

Section H. Post-closeout adjustments and continuing responsibilities.

You must include provisions in each subaward to require the subrecipient to provide what you need in order to comply with the requirements of OAR Article VII.

Appendix I to Part 1138—Terms and Conditions for SUB Article IX, ''National Policy Requirements for Subawards''

Unless modified as provided in § 1138.5, a DoD Component's general terms and conditions must use the following wording for SUB Article IX, as specified in § 1138.905, or may modify the wording of the article, consistent with the Component's treatment of NP Articles I through IV in those terms and conditions.

SUB Article IX. National Policy Requirements for Subawards. (DECEMBER 2014)

Section A. General.

1. You must include provisions in the terms and conditions of each subaward you make, whether cost-type or fixed-amount type, to require the subrecipient entity's compliance with each of the national policy requirements in Sections B through E of this article that you determine is applicable, given the type of entity receiving the subaward and activities it will be carrying out under the subaward.

2. If an entity to which you are about to make a subaward will not accept an award provision requiring its compliance with a national policy requirement that you determine to be applicable, you must alert the award administration office immediately. You may not omit an applicable national policy requirement in order to make the subaward.

3. If at any time during the performance of a subaward, you learn that—or receive a credible allegation that—the subrecipient is not complying with an applicable national policy requirement, you must alert the award administration office immediately.

Section B. Nondiscrimination national policy requirements. You must include provisions in each subaward to require the subrecipient's compliance with the nondiscrimination national policy requirements specified in paragraphs A.1 through A.5 of NP Article I, as applicable.

Section C. Environmental national policy requirements. You must include provisions in each subaward to require that:

1. The subrecipient comply with all applicable Federal environmental laws and regulations, including those specified in paragraphs A.2, A.3, A.5, and A.6 of NP Article II, as applicable.

2. Provide any information you need, when you need it, in order to comply with the requirement to immediately notify us of potential environmental impacts specified in paragraphs A.4, A.5, and A.6 of NP Article II, as applicable, due to activities under the award (which includes subaward activities).

Section D. National policy requirements concerning live organisms. You must include provisions in each subaward to require the subrecipient's compliance with the national policy requirements concerning human subjects and animals that are specified in paragraphs A.1 and A.2 of NP Article III, as applicable.

Section E. Other national policy requirements. You must include provisions in each subaward to require the subrecipient's compliance with the national policy requirements in the following portions of NP Article IV of this award, as applicable:

1. Paragraph A.1.
2. Paragraphs A.3.a and b.
3. Paragraphs A.4 through A.17.

Appendix J to Part 1138—Terms and Conditions for SUB Article X, ''Subrecipient Monitoring and Other Post-Award Administration''

Unless modified as provided in § 1138.5, a DoD Component's general terms and conditions must use the following wording for SUB Article X.

SUB Article X. Subrecipient Monitoring and Other Post-Award Administration. (DECEMBER 2014)

Section A. General requirement for subrecipient monitoring. You must do the post-award monitoring of the subrecipient's activities under each subaward that is needed in order for you to ensure that:

1. The subrecipient carries out the portion of the substantive project or program under this award.

2. The subrecipient is using funds under the subaward (including any cost sharing or matching the subrecipient provides that is counted as project costs in the approved budget of this award) for authorized purposes.

3. The subrecipient's performance under the subaward is in compliance with applicable Federal statutes and regulations, and the terms and conditions of your subaward.

Section B. Subrecipient monitoring actions.

1. *Required monitoring actions under cost-type subawards.* You must, as part of your post-award monitoring of each subrecipient:

a. Review the financial and programmatic information that your subaward terms and conditions require the subrecipient to provide, in accordance with Sections B and C of SUB Article VII of this award.

b. Follow up and ensure that the subrecipient takes timely and appropriate action to remedy deficiencies detected through any means, including audits and on-site reviews.

c. With respect to audits of subrecipients that are required under FMS Article V of this award:

i. Verify that the subrecipient is audited in accordance with those requirements, as applicable (note that Section F of SUB Article IV requires you to include those audit requirements for the subrecipient in the subaward's terms and conditions).

ii. Resolve and issue a management decision for audit findings that pertain to your subaward. Doing so is a requirement under either Section A or B of FMS Article V of this award (Section B requires that explicitly and Section A does so by implementing OMB guidance in 2 CFR 200.521, as well as other portions of Subpart F of that part).

iii. Consider whether you need to adjust your own records related to this award based on results of audits, on-site reviews or other monitoring of the subrecipient and, as applicable, notify the award administration office.

2. *Other monitoring actions.* OMB guidance in 2 CFR 200.331(e)(1) through (3) describes other actions that may be useful as part of your subrecipient monitoring program, depending on the outcomes of the pre-award risk assessment you conducted in accordance with Section B of SUB Article II.

Section C. Remedies and subaward suspension or termination. With respect to any subaward under this award, you must:

1. Consider whether you need to take any remedial action if you determine that the subrecipient is noncompliant with an applicable Federal statute or regulation or the terms and conditions of your subaward, as described in Section D of SUB Article VIII.

2. Provide a notice of termination to the subrecipient if you terminate its subaward unilaterally for any reason prior to the end of the period of performance.

3. In the case of suspension or termination of a subaward prior to the end of the period of performance, allow or disallow subaward costs in accordance with Section D of OAR Article III.

Section D. Subaward closeout.

1. You will close out each subaward when you either:

a. Determine that the subrecipient has completed its programmatic performance under the subaward and all applicable administrative actions; or

b. Terminate the subaward, if you do so prior to the end of the subaward's period of performance.

2. With respect to the closeout of each subaward:

a. You must pay the subrecipient promptly for allowable and reimbursable costs.

b. Consistent with the terms and conditions of the subaward, you must make a settlement for any upward or downward adjustments to the Federal share of costs after you receive the information you need from the subrecipient to close out the subaward.

c. You should complete the closeout of the subaward no later than one year after you receive and accept the final reports and other information from the subrecipient that you need to close out the subaward.

Appendix K to Part 1138—Terms and Conditions for SUB Article XI, ''Requirements Concerning Subrecipients' Lower-Tier Subawards''

Unless modified as provided in § 1138.5, a DoD Component's general terms and conditions must use the following wording for SUB Article XI.

SUB Article XI. Requirements Concerning Subrecipients' Lower-Tier Subawards. (DECEMBER 2014)

Section A. Purpose. This article specifies requirements you must include in any cost-type subaward under which you determine that the subrecipient of your subaward may make lower-tier cost-type subawards to other entities. Paragraph G.1 of SUB Article XII specifies requirements related to fixed-amount type subawards at lower tiers.

Section B. Requirements for lower-tier subawards. Your cost-type subaward terms and conditions must require your subrecipient, with respect to each lower-tier cost-type subaward that it makes, to:

1. Ensure that the lower-tier transaction is a subaward, rather than a procurement, by making the determination that SUB Article I of this award requires you to make for your subawards.

2. Conduct the pre-award risk assessment of its intended subrecipient that Section B of SUB Article II of this award requires you to make for your subawards.

3. Include in any cost-type subaward it makes at the next tier:

a. The informational content that SUB Article III specifies;

b. The administrative requirements that SUB Articles IV through VIII of this award specify;

c. The national policy requirements that SUB Article IX of this award specifies, as applicable; and

d. The requirements of this article if the next-tier subrecipient may make even lower-tier cost-type subawards to other entities.

4. Carry out the subrecipient monitoring and other post-award administration responsibilities specified in SUB Article X of this award.

Appendix L to Part 1138—Terms and Conditions for SUB Article XII, ''Fixed-Amount Subawards''

Unless modified as provided in § 1138.5 or 1138.1205, a DoD Component's general terms and conditions must use the following wording for SUB Article XII.

SUB Article XII. Fixed-Amount Subawards. (DECEMBER 2014)

Section A. Limitations on use.

1. You may not use a fixed-amount subaward:

a. If the total value over the life of the subaward will exceed the simplified acquisition threshold.

b. Unless the project or program scope is specific, with definite outcomes, and you are able to establish a reasonable estimate of the actual costs of accomplishing those outcomes.

c. If you will predetermine a set amount or percentage of cost sharing or matching that the subrecipient must provide under the subaward.

d. If the subrecipient will acquire any real property or equipment under the subaward.

2. For fixed-amount subawards not prohibited by paragraph 1 of this section and except as provided in Section B of this article, you must obtain our prior approval before making a fixed-amount type of subaward.

a. If Section B of FMS Article IV requires you to obtain our prior approval before you make any subaward, and you do not identify the subaward as a fixed-amount subaward when you obtain that approval, then you must subsequently request separate approval before awarding it as a fixed-amount type of subaward.

b. If a subaward is identified as a fixed-amount type of subaward in the budget you submit for our approval, then our approval of the budget is the required prior approval.

Section B. Fixed-amount subawards that do not require prior approval. You are not required to obtain our prior approval before using a fixed-amount type of subaward if:

1. The subaward is to either:

a. A foreign public entity; or

b. An organizational unit of a foreign organization, if that unit does not have a place of business in the United States, regardless of whether another organizational unit of that foreign organization has one.

2. You determine that the portion of the project or program under this award which the subrecipient will be carrying out under the subaward has one or more specific outcomes with the following characteristics:

a. You can define the outcomes well enough to specify them at the time you make the subaward. Note that:

i. Outcomes are distinct from inputs needed to achieve the outcomes, such as amounts or percentages of time that subrecipient employees or other participants will spend on the project or program.

ii. The inherently unpredictable nature of basic or applied research makes it rarely, if ever, possible to define specific research outcomes in advance, which makes fixed-amount subawards inappropriate for research. Note that technical performance reports serve to document research outcomes but are not themselves outcomes, notwithstanding the definition of ''performance goals'' in OMB guidance at 2 CFR 200.76.

b. The accomplishment of each outcome will be observable and verifiable by you when it occurs, so that you will not need to rely solely on the subrecipient's assurance of that accomplishment.

c. The subrecipient associates its estimated costs with outcomes in the proposal it submits to you, and you are confident that the costs of accomplishment of the outcomes will equal or exceed the subaward amount. This requires either that you have a high degree of confidence:

i. In your estimate of the costs associated with accomplishing the well-defined and observable outcomes, based on the prospective subrecipient's proposal (and using the applicable cost principles in FMS Article III as a guide); or

ii. That those costs will be within a finite range, rather than a specific amount, so that you may provide an amount of funding under the subaward that does not exceed the lower end of the range, with the provision that the subrecipient agrees to provide any balance above that amount that ultimately is needed to accomplish the outcomes. Your subaward then would include a term or condition to reflect the subrecipient's agreement to provide that balance (which would be in an amount to be post-determined, when the outcomes are accomplished). Note that this is distinct from a situation in which you predetermine a set amount or percentage of cost sharing or matching that the subrecipient must provide under its subaward, a situation in which paragraph A.1.c of this article prohibits use of a fixed-amount subaward.

3. a. The subaward is based on a fixed rate per unit of outcome (or ''unit cost'') and you have both the confidence:

i. That is described in paragraph B.2.c of this article in the estimated costs associated with each unit of outcome; and

ii. In the subrecipient's guarantee that it can accomplish at least the number of units of outcome on which your total subaward amount will be based (*i.e.,* the product of the unit cost and the number of units of outcome the subrecipient guarantees to accomplish).

b. Note, however, that not every fixed rate subaward is also a fixed-amount subaward. If you have confidence in the unit cost but not also in the subrecipient's ability to guarantee the number of units of outcome that it will accomplish, then you should set a not-to-exceed award amount based on the number of units desired and reduce the subaward amount at the end if the subrecipient accomplishes fewer than that number. Examples of activities for which it may be appropriate to award this type of fixed rate subaward that is not a fixed-amount subaward include:

i. A clinical trial for which the unit cost is the cost of treating each participant. The not-to-exceed amount would be based on the number of participants the subrecipient planned to recruit and the final award on the number who actually participated, documentation for which would be subject to audit.

ii. Labor costs for performance of a portion of the project or program under this award by a for-profit entity that treats its indirect cost rate as proprietary information. The unit cost in that case may be ''loaded'' labor rates for the entity's employees that include indirect costs. The final award amount would depend on the number of labor hours the entity's employees expended under the subaward, documentation for which may be audited without exposing proprietary details associated with the actual costs.

Section C. Informational content of fixed-amount subawards. You must include in each fixed-amount subaward the informational content, other than the indirect cost rate, that is described in SUB Article III of this award.

Section D. Terms and conditions addressing administrative requirements.

1. *General.* This section:

a. Specifies the minimum set of terms and conditions (in lieu of the more extensive set specified in SUB Articles IV through X for cost-type subawards) addressing administrative requirements that you must include in each fixed-amount subaward:

i. To an entity other than a foreign organization, as applicable; and

ii. To the maximum extent practicable, to a foreign organization.

b. Does not preclude the inclusion of other requirements that you need in order to meet your responsibilities under this award for performance of the project or program and compliance with applicable administrative and national policy requirements.

2. *Financial and program management requirements.*

a. *Financial management system standards.* For a subaward to other than a for-profit entity, your subaward must require the subrecipient to include the information specified in paragraph B.1 of FMS Article I in its financial management system, for the purposes of the non-Federal audits required by paragraph 2.d of this section.

b. *Payments.* Your payments must be based on accomplishment of the outcomes and associated costs that you used to establish the award amount, rather than on subrecipient expenditures for project or program purposes. Milestone payments before the end of the subaward's period of performance may be appropriate if there are outcomes that the subrecipient will accomplish at different times during that period.

c. *Revision of budget and program plans.* If our prior approval was required under paragraph A.2 of this article for use of a fixed-amount type of subaward, then you must:

i. Request our prior approval for any change in scope or objective of the subaward; and

ii. Include a requirement in the subaward for the subrecipient to request that approval through you.

d. *Non-Federal audits.* You must include the requirement for non-Federal audits described in Section F of SUB Article IV. The audits are intended to focus on compliance with the performance requirements in the subaward terms and conditions and not to review actual costs as they would for a cost-type subaward.

3. *Property requirements.*

a. *Federally owned property.* If the subrecipient will be accountable for federally owned property, you must include the property management system, use, and disposition requirements described in Sections C and F of SUB Article V that are applicable to federally owned property.

b. *Intangible property.* You must include the applicable intangible property requirements described in Section G of SUB Article V.

4. *Reporting requirements.* You must include requirements for reporting that you need in order to meet your responsibilities under this award for reporting to us.

5. *Other administrative requirements.*

a. *Integrity-related information.* You must include the substance of the provision in Section C of OAR Article I in any subaward you make under this award. The provision must require the subrecipient's disclosure of any evidence directly to the Inspector General, DoD.

b. *Records retention and access.*

i. You must include the requirements for records retention and access in paragraph A.3 and Sections B and F of OAR Article II, as applicable, if the subaward is to an institution of higher education, nonprofit organization, State, local government, or Indian tribe. You may not impose any other records retention or access requirements on the subrecipient.

ii. You must include the corresponding requirements of 32 CFR 34.42 if the subaward is to a for-profit entity.

c. *Remedies and termination.* You must include:

i. The requirements concerning remedies and termination that are described in paragraphs D.1 and 2 of SUB Article VIII;

ii. Provisions addressing any hearing and appeal rights the subrecipient has, as described in Section E of SUB Article VIII; and

iii. Terms and conditions addressing adjustment of the amount of the subaward if it is terminated before the subrecipient accomplishes all of the specified outcomes.

d. *Continuing responsibilities.* You must include requirements concerning continuing responsibilities for audits and records retention and access that are described in paragraphs B.1 and 3 of OAR Article VII.

e. *Collection of amounts due.* You should consider including requirements concerning collection of amounts due, as described in Section F of SUB Article VIII.

Section E. National policy requirements for fixed-amount subawards. You must include in the terms and conditions of each fixed-amount subaward the national policy requirements that SUB Article IX of this award specifies, as applicable.

Section F. Subrecipient monitoring and other post-award administration. You must carry out the subrecipient monitoring and post-award administration actions specified in SUB Article X, as applicable.

Section G. Fixed-amount subawards at lower tiers.

1. *Authority.*

a. If Section B of this article authorizes you to use a fixed-amount type of subaward without our prior approval in some situations, a cost-type subaward that you make may authorize the subrecipient to use fixed-amount subawards at the next lower tier in those same situations without our prior approval.

b. If you wish to allow a subrecipient of a cost-type subaward to use fixed-amount subawards at the next tier in other situations (*i.e.,* situations in which this article requires you to obtain our prior approval before using a fixed-amount type of subaward), your subaward terms and conditions must require the subrecipient to submit a request through you to obtain our prior approval for use of that type of subaward.

2. *Subaward requirements.* If your subrecipient is authorized to use lower-tier fixed-amount subawards, as described in paragraphs 1.a and b of this section, your subaward's terms and conditions must:

a. Require the subrecipient, before it makes any lower-tier fixed-amount subaward, to:

i. Ensure that the lower-tier transaction is a subaward, rather than a procurement, by making the determination that SUB Article I of this award requires you to make for your subawards.

ii. Conduct the pre-award risk assessment of its intended subrecipient that Section B of SUB Article II of this award requires you to make for your subawards.

b. Include the requirements specified in Sections A through F of this article.

Dated: July 24, 2020.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2020–16414 Filed 8–18–20; 8:45 am]

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DEPARTMENT OF DEFENSE

Office of the Secretary

2 CFR Part 1122

[DOD–2016–OS–0053]

RIN 0790–AJ48

National Policy Requirements: General Award Terms and Conditions

AGENCY: Office of the Secretary, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: This rule is the fourth of a sequence of six final rules published in this issue of the **Federal Register**. This final rule adds a new Department of Defense Grant and Agreement Regulations (DoDGARs) part to establish a consistent way for DoD Components to organize the portion of their general terms and conditions covering national policy requirements, such as nondiscrimination, environmental protection, and live organisms. It also provides standard wording of terms and conditions for national policy requirements that apply generally to DoD programs and awards.

DATES: This rule is effective October 19, 2020.

FOR FURTHER INFORMATION CONTACT: Barbara Orlando, Basic Research Office, telephone 571–372–6413.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Purpose of the Final Rule

As explained in the Supplementary Information section of the first of the sequence of final rules in this section of this issue of the **Federal Register**, these six rules collectively make a major portion of needed updates to the Department of Defense Grant and Agreement Regulations (DoDGARs). The purpose of this rule, the fourth of the sequence, is to maximize uniformity of general terms and conditions addressing national policy requirements within DoD grants and cooperative agreements.

As described in the second of the six final rules, 2 CFR part 1120 of the DoDGARs establishes a standard award format for DoD Components' grants and cooperative agreements. National policy requirements are one of the four sub elements of an award's general terms and conditions. This added part—-2 CFR part 1122—-provides (1) a standard organization for the general terms and conditions addressing national policy requirements, and (2) standard wording of terms and conditions for the national policy requirements that commonly apply to DoD Components' grants and cooperative agreements.

It should be noted that 2 CFR part 1122 applies to grants and cooperative agreements awarded to all types of recipient entities. That scope distinguishes part 1122 from the other final rules in 2 CFR parts 1126 through 1138 published in the **Federal Register**, which address requirements only for Department of Defense (DoD) grants and cooperative agreements awarded to institutions of higher education, nonprofit organizations, States, local governments, and Indian tribes.

B. Revisions Implemented by This Rule

This rule supersedes the Appendix of 32 CFR part 21, moving it to 2 CFR part 1122. It provides an updated version of the National Policies that apply to all DoD financial assistance awards.

C. Legal Authorities for the Regulatory Action

There are two statutory authorities for this final rule:

- 10 U.S.C. 113, which establishes the Secretary of Defense as the head of the Department of Defense; and
- 5 U.S.C. 301, which authorizes the head of an Executive department to

prescribe regulations for the governance of that department and the performance of its business.

II. Regulatory History

In December 2014 (79 FR 76047), DoD established an interim implementation of the final guidance, ''Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards,'' published by the Office of Management and Budget (OMB) on December 26, 2013, in 2 CFR part 200 (Uniform Guidance—available at 78 FR 78589). DoD then published a Notice of Proposed Rulemaking (November 7, 2016 (81 FR 78376)) that proposed to part title 2 part 1122 to provide standard wording of terms and conditions for national policy requirements that apply generally to DoD programs and awards.

III. Comments and Responses

DoD received one public comment on the Notice of Proposed Rulemaking (NPRM) for 2 CFR part 1122, published on November 7, 2016. That comment was from a nonprofit organization representing groundwater professionals.

Comment: The commenter pointed out that paragraph A.4.f of National Policy Article II (appendix B to 2 CFR part 1122), Environmental national policy requirements addressed only underground sources of drinking water that are designated as the sole or principal drinking water source (*i.e.,* a ''sole-source aquifer''), thereby understating the need for protection of groundwater sources of drinking water and not fully reflecting the provisions of the Safe Drinking Water Act (SDWA). The commenter pointed out that the SDWA (1) also has provisions followed by States and public water systems to designate ''wellhead protection areas'' around and supplying groundwater to public water system wells (42 U.S.C. 300h–7, also cited as SDWA Section 1428); and (2) requires States and communities to delineate the areas to be protected from contamination around public water supply wells and to have a program to manage potential sources of contamination to minimize their threat to underground drinking water sources supplying communities' wells.

Response: DOD agreed with the comment and amended the requirement by adding the wording ''. . . and in wellhead protection areas . . .'' to the specified paragraph after the words ''Underground sources of drinking water in areas that have an aquifer that is the sole or principal drinking water source . . .''

DoD made one other substantive change to this part as follows:

In National Policy (NP) Article IV, A.7 (appendix D to 2 CFR part 1122), we added clarifying language to indicate that ''Fly America'' requirements apply to transport of persons, as well as personal effects. This change was deemed necessary because the language of the NPRM dealt only with air travel of property. We also added language to refer to both the statute and its implementing regulations. A comparable change was made in the third of the final rules published in today's **Federal Register**. The change was made in Appendix C to 2 CFR part 1132, specifically in Procurement (PROC) Article III, ''Contract provisions for recipient procurements,'' Section B.10.

In addition, we made an editorial change for clarity and consistency with other of the final rules published in today's **Federal Register**. In several places, where the word ''agreement'' was used generically (rather than in the term ''cooperative agreement''), we changed it to ''award.''

IV. Regulatory Analyses

We developed this rule after considering numerous statutes and Executive Orders (E.O.s) related to rulemaking. Below we summarize our analyses based on these statutes or E.O.s.

A. Regulatory Planning and Review

Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review) 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 (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 rule has been designated as a ''not significant'' regulatory action, and not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has not been reviewed by the Office of Management and Budget (OMB) under the requirements of these Executive Orders.

Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs) directs agencies to reduce regulation and control regulatory costs and provides that ''for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process.'' This rule is not subject to the requirements of this Executive Order because it is not significant under Executive Order 12866.

Costs

DoD has found that this rule will not impose costs on the public, as there are not any costs associated with standardizing general terms and conditions addressing national policy requirements.

Benefits

DoD determined that providing a central location and standard language within the DoDGARs for the terms and conditions of the most commonly applicable national policy requirements will help maximize long-term benefits in relation to costs and burdens for recipients of DoD grants and cooperative agreements.

The principal benefits of this regulatory action are that recipients and others who use the content of awards from multiple DoD Component awarding offices should:

- Be able to find what they need within different offices' awards more quickly and easily due to the standard organization for general terms and conditions covering national policy requirements.
- Spend less time evaluating terms and conditions, because the standard wording for commonly applicable national policy requirements will obviate the need to interpret different wording various offices' awards include for the same requirement.

Alternatives

1. No action—If no action was taken DoD would not be compliance with OMB requirements to move all financial assistance regulations to 2 CFR.

2. Next Best alternative—The next best alternative would be to add additional terms, beyond those found in the DoDGARs, which give background explanations for the terms that are in the DoDGARs. While the new terms may add additional context to the terms in the DoDGARs, it would be more beneficial to expand the definition of the term than to direct the public to additional terms.

B. Congressional Review Act (5 U.S.C. 801, et seq.)

Under the Congressional Review Act, a major rule may not take effect until at least 60 days after submission to Congress of a report regarding the rule. A major rule is one that would have an annual effect on the economy of $100

million or more or have certain other impacts. This rule is not a major rule under the Congressional Review Act.

C. 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. This rule will not impose any impacts on any entities. This means that there will be no economic impacts on any entities. Therefore, the Department of Defense under 5 U.S.C. 601 *et seq.* certifies that this rule will not have a significant economic impact on a substantial number of small entities.

D. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121, we want to assist small entities in understanding this rule so that they can better evaluate its effects on them and participate in the rulemaking. 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 in the **FOR FURTHER INFORMATION CONTACT** section of this rule.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business 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.

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 1 year. Although this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

F. Collection of Information

The Paperwork Reduction Act (PRA) (44 U.S.C. 3501–3520) applies to collections of information using identical questions posed to, or reporting or recordkeeping requirements imposed on, ten or more members of the public. This rule does not call for a new collection of information under the PRA.

Federalism

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. This proposed rule does not have federalism implications that warrant the preparation of a federalism assessment in accordance with Executive Order 13132.

List of Subjects in 2 CFR Part 1122

Business and industry, Colleges and universities, Cooperative agreements, Grants administration, Hospitals, Human research subjects, Indians, Nonprofit organizations, Research misconduct, Small business, State and local governments.

■ Accordingly, 2 CFR chapter XI is amended by adding part 1122 to read as follows:

PART 1122—NATIONAL POLICY REQUIREMENTS: GENERAL AWARD TERMS AND CONDITIONS

Sec.

A—General

1122.1 Purpose of this part.
1122.2 Definition of ''national policy requirement.''
1122.3 Definitions of other terms as they are used in this part.

Subpart B—Terms and Conditions

1122.100 Purpose of this subpart.
1122.105 Where to find the terms and conditions.
1122.110 Organization of each article of national policy requirements.
1122.115 Cross-cutting national policy requirements.
1122.120 Other national policy requirements.
Appendix A Terms and condition for NP Article I, ''Nondiscrimination National Policy Requirements.''
Appendix B Terms and condition for NP Article II, ''Environmental National Policy Requirements.''
Appendix C Terms and conditions for NP Article III, ''National Policy Requirements Concerning Live Organisms.''
Appendix D Terms and conditions for NP Article IV, ''Other National Policy Requirements.''

Authority: 5 U.S.C. 301 and 10 U.S.C. 113.

Subpart A—General

§ 1122.1 Purpose of this part.

(a) This part specifies a standard format and standard wording of general terms and conditions for Subdivision B of the general terms and conditions of DoD grants and cooperative agreements, which concerns national policy requirements.

(b) It thereby implements:

(1) Office of Management and Budget (OMB) guidance in 2 CFR 200.210(b)(ii) and 200.300, as those paragraphs of 2 CFR part 200 relate to national policy requirements for general terms and conditions of DoD grants and cooperative agreements to institutions of higher education and other nonprofit organizations, States, local governments, and Indian tribes.

(2) National policy requirements, to the extent they apply, for general terms and conditions of DoD awards to for-profit firms, foreign organizations, and foreign public entities.

§ 1122.2 Definition of ''national policy requirement.''

For the purposes of this chapter, a national policy requirement is a requirement:

(a) That is prescribed by a statute, Executive order, policy guidance issued by the Executive Office of the President, or regulation that specifically refers to grants, cooperative agreements, or financial assistance in general;

(b) With which a recipient of a grant or cooperative agreement must comply during the period of performance; and

(c) That is outside subject matter areas covered by administrative requirements in subchapters D or E of this chapter.

§ 1122.3 Definition of other terms as they are used in this part.

Because the meaning of some terms used in this part derive from their definitions in the statutes, Executive orders, or other sources of national policy requirements that this part implements, the meanings of those terms may vary from their meanings in other parts of the DoD Grant and Agreement Regulations. For example, some statutes define ''State'' in ways that differ from each other and from the definition provided in 2 CFR part B. In each case, the definition in the source of the pertinent national policy requirement takes precedence over the definition in 2 CFR part B for the purposes of complying with that requirement.

Subpart B—Terms and Conditions

§ 1122.100 Purpose of this subpart.

This subpart provides:

(a) Direction to DoD Components on how to construct the four articles of national policy requirements for inclusion in the general terms and conditions of grants and cooperative agreements.

(b) Standard wording for national policy requirements that are more commonly applicable to DoD Components' grants and cooperative agreements.

§ 1122.105 Where to find the terms and conditions.

(a) Appendices A through D of this part provide standard wording of terms and conditions for the four articles of national policy requirements. The articles address the rights and responsibilities of the Government and the recipient related to those national policy requirements.

(b) The following table shows which national policy terms and conditions may be found in each appendix to this part:

In . . .	You will find terms and conditions specifying recipients' rights and responsibilities related to . . .	That would appear in an award within NP Article . . .
Appendix A	Non-discrimination national policy requirements	I.
Appendix B	Environmental national policy requirements	II.
Appendix C	National policy requirements concerning live organisms	III.
Appendix D	Other national policy requirements	IV.

§ 1122.110 Organization of each article of national policy requirements.

Each of NP Articles I through IV includes two sections.

(a) Section A of each article includes national policy requirements that are cross-cutting in that their applicability extends to many or all DoD awards. Appendices A through D to this part provide standard wording for each of those requirements.

(b) Section B of each article is the location in the award for program-specific national policy requirements. Section B is reserved in the standard wording of the articles provided in appendices A through D to this part.

§ 1122.115 Cross-cutting national policy requirements.

(a) *General requirement to include applicable cross-cutting requirements.* A DoD Component's general terms and conditions must include the standard wording provided in appendices A through D to this part for each national policy requirement addressed in Section A of NP Articles I, II, III, and IV, respectively, that may apply either to:

(1) A recipient of an award using those general terms and conditions; or

(2) A subrecipient of a subaward under an award using those general terms and conditions.

(b) *Authority to reserve or omit inapplicable paragraphs.* A DoD Component may reserve or omit any paragraph appendices A through D to this part provide for Section A of NP Articles I, II, III, and IV of its general terms and conditions if it determines that the national policy requirement addressed in that paragraph will not apply to any awards using those terms and conditions nor to any subawards under them.

(c) *Authority to use alternate wording.* (1) A DoD Component may use different wording for a national policy requirement than is provided in appendices A through D to this part if it is authorized or required to do so by a statute or a regulation published in the Code of Federal Regulations after opportunity for public comment.

(2) A DoD Component in that case:

(i) Must include the wording required by the statute or regulation in Section B of the appropriate article. This will help a recipient recognize the wording as a variation of the usual DoD wording for the requirement.

(ii) May either reserve the paragraph of Section A of the article in which that national policy requirement otherwise would appear or insert in that paragraph wording to refer the recipient to the paragraph in Section B of the article in which the requirement does appear.

§ 1122.120 Other national policy requirements.

If a DoD Component determines that awards using its general terms and conditions, or subawards under them, are subject to a national policy requirement that is not addressed in the standard wording appendices A through D to this part provide for cross-cutting requirements, the DoD Component must include the requirement in its general terms and conditions. It should add the requirement in Section B of NP Article I, II, III, or IV, as most appropriate to the subject matter of the requirement.

Appendix A to Part 1122—Terms and Conditions for NP Article I, ''Nondiscrimination National Policy Requirements''

A DoD Component must use the following wording for NP Article I of its general terms and conditions in accordance with the provisions of Subpart B of this part.

NP Article I. Nondiscrimination national policy requirements. (December 2014)

Section A. Cross-cutting nondiscrimination requirements. By signing this award or accepting funds under this award, you assure that you will comply with applicable provisions of the national policies prohibiting discrimination:

1. On the basis of race, color, or national origin, in Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*), as implemented by Department of Defense (DoD) regulations at 32 CFR part 195.

2. On the basis of gender, blindness, or visual impairment, in Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 *et seq.*), as implemented by DoD regulations at 32 CFR part 196.

3. On the basis of age, in the Age Discrimination Act of 1975 (42 U.S.C. 6101 *et seq.*), as implemented by Department of Health and Human Services regulations at 45 CFR part 90.

4. On the basis of disability, in the Rehabilitation Act of 1973 (29 U.S.C. 794), as implemented by Department of Justice regulations at 28 CFR part 41 and DoD regulations at 32 CFR part 56.

5. On the basis of disability in the Architectural Barriers Act of 1968 (42 U.S.C. 4151 *et seq.*) related to physically handicapped persons' ready access to, and use of, buildings and facilities for which Federal funds are used in design, construction, or alteration.

Section B. [Reserved]

Appendix B to Part 1122—Terms and Conditions for NP Article II, ''Environmental National Policy Requirements''

A DoD Component must use the following wording for NP Article II of its general terms and conditions in accordance with the provisions of Subpart B of this part.

NP Article II. Environmental national policy requirements. (December 2014)

Section A. Cross-cutting environmental requirements. You must:

1. You must comply with all applicable Federal environmental laws and regulations. The laws and regulations identified in this section are not intended to be a complete list.

2. Comply with applicable provisions of the Clean Air Act (42 U.S.C. 7401, *et seq.*) and Clean Water Act (33 U.S.C. 1251, *et seq.*).

3. Comply with applicable provisions of the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821–4846), as implemented

by the Department of Housing and Urban Development at 24 CFR part 35. The requirements concern lead-based paint in buildings owned by the Federal Government or housing receiving Federal assistance.

4. Immediately identify to us, as the Federal awarding agency, any potential impact that you find this award may have on:

a. The quality of the ''human environment'', as defined in 40 CFR 1508.14, including wetlands; and provide any help we may need to comply with the National Environmental Policy Act (NEPA, at 42 U.S.C. 4321 *et seq.*), the regulations at 40 CFR 1500–1508, and E.O. 12114, if applicable; and assist us to prepare Environmental Impact Statements or other environmental documentation. In such cases, you may take no action that will have an environmental impact (*e.g.,* physical disturbance of a site such as breaking of ground) or limit the choice of reasonable alternatives to the proposed action until we provide written notification of Federal compliance with NEPA or E.O. 12114.

b. Flood-prone areas and provide any help we may need to comply with the National Flood Insurance Act of 1968, as amended by the Flood Disaster Protection Act of 1973 (42 U.S.C. 4001 *et seq.*), which require flood insurance, when available, for federally assisted construction or acquisition in flood-prone areas.

c. A land or water use or natural resource of a coastal zone that is part of a federally approved State coastal zone management plan and provide any help we may need to comply with the Coastal Zone Management Act of 1972 (16 U.S.C. 1451, *et seq.*) including preparation of a Federal agency Coastal Consistency Determination.

d. Coastal barriers along the Atlantic and Gulf coasts and Great Lakes' shores and provide help we may need to comply with the Coastal Barrier Resources Act (16 U.S.C. 3501 *et seq.*), concerning preservation of barrier resources.

e. Any existing or proposed component of the National Wild and Scenic Rivers system and provide any help we may need to comply with the Wild and Scenic Rivers Act of 1968 (16 U.S.C. 1271 *et seq.*).

f. Underground sources of drinking water in areas that have an aquifer that is the sole or principal drinking water source and in wellhead protection areas, and provide any help we may need to comply with the Safe Drinking Water Act (42 U.S.C. 300f *et seq.*).

5. You must comply fully with the Endangered Species Act of 1973, as amended (ESA, at 16 U.S.C. 1531 *et seq.*), and implementing regulations of the Departments of the Interior (50 CFR parts 10–24) and Commerce (50 CFR parts 217–227). You also must provide any help we may need in complying with the consultation requirements of ESA section 7 (16 U.S.C. 1536) applicable to Federal agencies or any regulatory authorization we may need based on the award of this grant. This is not in lieu of responsibilities you have to comply with provisions of the Act that apply directly to you as a U.S. entity, independent of receiving this award.

6. You must fully comply with the Marine Mammal Protection Act of 1972, as amended (MMPA, at 16 U.S.C. 1361 *et seq.*) and provide any assistance we may need in obtaining any required MMPA permit based on an award of this grant.

Section B. [Reserved]

Appendix C to Part 1122—Terms and Conditions for NP Article III, ''National Policy Requirements Concerning Live Organisms''

A DoD Component must use the following wording for NP Article III of its general terms and conditions in accordance with the provisions of Subpart B of this part.

NP Article III. National policy requirements concerning live organisms. (December 2014)

Section A. Cross-cutting requirements concerning live organisms.

1. *Human subjects.*

a. You must protect the rights and welfare of individuals who participate as human subjects in research under this award and comply with the requirements at 32 CFR part 219, DoD Instruction (DoDI) 3216.02, 10 U.S.C. 980, and when applicable, Food and Drug Administration (FDA) regulations.

b. You must not begin performance of research involving human subjects, also known as human subjects research (HSR), that is covered under 32 CFR part 219, or that meets exemption criteria under 32 CFR 219.101(b), until you receive a formal notification of approval from a DoD Human Research Protection Official (HRPO). Approval to perform HSR under this award is received after the HRPO has performed a review of your documentation of planned HSR activities and has officially furnished a concurrence with your determination as presented in the documentation.

c. In order for the HRPO to accomplish this concurrence review, you must provide sufficient documentation to enable his or her assessment as follows:

i. If the HSR meets an exemption criterion under 32 CFR 219.101(b), the documentation must include a citation of the exemption category under 32 CFR 219.101(b) and a rationale statement.

ii. If your activity is determined as ''non-exempt research involving human subjects'', the documentation must include:

(A) Assurance of Compliance (*i.e.,* Department of Health and Human Services Office for Human Research Protections (OHRP) Federalwide Assurance (FWA)) appropriate for the scope of work or program plan; and

(B) Institutional Review Board (IRB) approval, as well as all documentation reviewed by the IRB to make their determination.

d. The HRPO retains final judgment on what activities constitute HSR, whether an exempt category applies, whether the risk determination is appropriate, and whether the planned HSR activities comply with the requirements in paragraph 1.a of this section.

e. You must notify the HRPO immediately of any suspensions or terminations of the Assurance of Compliance.

f. DoD staff, consultants, and advisory groups may independently review and inspect your research and research procedures involving human subjects and, based on such findings, DoD may prohibit research that presents unacceptable hazards or otherwise fails to comply with DoD requirements.

g. Definitions for terms used in paragraph 1 of this article are found in DoDI 3216.02.

2. *Animals.*

a. Prior to initiating any animal work under the award, you must:

i. Register your research, development, test, and evaluation or training facility with the Secretary of Agriculture in accordance with 7 U.S.C. 2136 and 9 CFR 2.30, unless otherwise exempt from this requirement by meeting the conditions in 7 U.S.C. 2136 and 9 CFR parts 1–4 for the duration of the activity.

ii. Have your proposed animal use approved in accordance with Department of Defense Instruction (DoDI) 3216.01, Use of Animals in DoD Programs by a DoD Component Headquarters Oversight Office.

iii. Furnish evidence of such registration and approval to the grants officer.

b. You must make the animals on which the research is being conducted, and all premises, facilities, vehicles, equipment, and records that support animal care and use available during business hours and at other times mutually agreeable to you, the United States Department of Agriculture Office of Animal and Plant Health Inspection Service (USDA/APHIS) representative, personnel representing the DoD component oversight offices, as well as the grants officer, to ascertain that you are compliant with 7 U.S.C. 2131 *et seq.,* 9 CFR parts 1–4, and DoDI 3216.01.

c. Your care and use of animals must conform with the pertinent laws of the United States, regulations of the Department of Agriculture, and regulations, policies, and procedures of the Department of Defense (see 7 U.S.C. 2131 *et seq.,* 9 CFR parts 1–4, and DoDI 3216.01).

d. You must acquire animals in accordance with DoDI 3216.01.

3. *Use of Remedies.*

Failure to comply with the applicable requirements in paragraphs 1–2 of this section may result in the DoD Component's use of remedies, *e.g.,* wholly or partially terminating or suspending the award, temporarily withholding payment under the award pending correction of the deficiency, or disallowing all or part of the cost of the activity or action (including the federal share and any required cost sharing or matching) that is not in compliance. See OAR Article III.

Section B. [Reserved]

Appendix D to Part 1122—Terms and Conditions for NP Article IV, ''Other National Policy Requirements''

A DoD Component must use the following wording for NP Article IV of its general terms and conditions in accordance with the provisions of Subpart B of this part.

NP Article IV. Other National Policy Requirements. (December 2014)

Section A. Cross-cutting requirements.

1. *Debarment and suspension.* You must comply with requirements regarding debarment and suspension in Subpart C of 2

CFR part 180, as adopted by DoD at 2 CFR part 1125. This includes requirements concerning your principals under this award, as well as requirements concerning your procurement transactions and subawards that are implemented in PROC Articles I through III and SUB Article II.

2. *Drug-free workplace.* You must comply with drug-free workplace requirements in Subpart B of 2 CFR part 26, which is the DoD implementation of 41 U.S.C. chapter 81, ''Drug-Free Workplace.''

3. *Lobbying.*

a. You must comply with the restrictions on lobbying in 31 U.S.C. 1352, as implemented by DoD at 32 CFR part 28, and submit all disclosures required by that statute and regulation.

b. You must comply with the prohibition in 18 U.S.C. 1913 on the use of Federal funds, absent express Congressional authorization, to pay directly or indirectly for any service, advertisement or other written matter, telephone communication, or other device intended to influence at any time a Member of Congress or official of any government concerning any legislation, law, policy, appropriation, or ratification.

c. If you are a nonprofit organization described in section 501(c)(4) of title 26, United States Code (the Internal Revenue Code of 1968), you may not engage in lobbying activities as defined in the Lobbying Disclosure Act of 1995 (2 U.S.C., chapter 26). If we determine that you have engaged in lobbying activities, we will cease all payments to you under this and other awards and terminate the awards unilaterally for material failure to comply with the award terms and conditions.

4. *Officials not to benefit.* You must comply with the requirement that no member of Congress shall be admitted to any share or part of this award, or to any benefit arising from it, in accordance with 41 U.S.C. 6306.

5. *Hatch Act.* If applicable, you must comply with the provisions of the Hatch Act (5 U.S.C. 1501–1508) concerning political activities of certain State and local government employees, as implemented by the Office of Personnel Management at 5 CFR part 151, which limits political activity of employees or officers of State or local governments whose employment is connected to an activity financed in whole or part with Federal funds.

6. *Native American graves protection and repatriation.* If you control or possess Native American remains and associated funerary objects, you must comply with the requirements of 43 CFR part 10, the Department of the Interior implementation of the Native American Graves Protection and Repatriation Act of 1990 (25 U.S.C., chapter 32).

7. *Fly America Act.* You must comply with the International Air Transportation Fair Competitive Practices Act of 1974 (49 U.S.C. 40118), commonly referred to as the ''Fly America Act,'' and implementing regulations at 41 CFR 301–10.131 through 301–10.143. The law and regulations require that U.S. Government financed international air travel of passengers and transportation of personal effects or property must use a U.S. Flag air carrier or be performed under a cost sharing arrangement with a U.S. carrier, if such service is available.

8. *Use of United States-flag vessels.* You must comply with the following requirements of the Department of Transportation at 46 CFR 381.7, in regulations implementing the Cargo Preference Act of 1954:

a. Pursuant to Public Law 83–664 (46 U.S.C. 55305), at least 50 percent of any equipment, materials or commodities procured, contracted for or otherwise obtained with funds under this award, and which may be transported by ocean vessel, must be transported on privately owned United States-flag commercial vessels, if available.

b. Within 20 days following the date of loading for shipments originating within the United States or within 30 working days following the date of loading for shipments originating outside the United States, a legible copy of a rated, ''on-board'' commercial ocean bill-of-lading in English for each shipment of cargo described in paragraph 8.a of this section must be furnished to both our award administrator (through you in the case of your contractor's bill-of-lading) and to the Division of National Cargo, Office of Market Development, Maritime Administration, Washington, DC 20590.

9. *Research misconduct.* You must comply with requirements concerning research misconduct in Enclosure 4 to DoD Instruction 3210.7, ''Research Integrity and Misconduct.'' The Instruction implements the Governmentwide research misconduct policy that the Office of Science and Technology Policy published in the **Federal Register** (65 FR 76260, December 6, 2000, available through the U.S. Government Printing Office website: *https://www.federalregister.gov/documents/2000/12/06/00-30852/executive-office-of-the-president-federal-policy-on-research-misconduct-preamble-for-research*).

10. *Requirements for an Institution of Higher Education Concerning Military Recruiters and Reserve Officers Training Corps (ROTC).*

a. As a condition for receiving funds available to the DoD under this award, you agree that you are not an institution of higher education (as defined in 32 CFR part 216) that has a policy or practice that either prohibits, or in effect prevents:

i. The Secretary of a Military Department from maintaining, establishing, or operating a unit of the Senior Reserve Officers Training Corps (ROTC)—in accordance with 10 U.S.C. 654 and other applicable Federal laws—at that institution (or any subelement of that institution);

ii. Any student at that institution (or any subelement of that institution) from enrolling in a unit of the Senior ROTC at another institution of higher education.

iii. The Secretary of a Military Department or Secretary of Homeland Security from gaining access to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer; or

iv. Access by military recruiters for purposes of military recruiting to the names of students (who are 17 years of age or older and enrolled at that institution or any subelement of that institution); their addresses, telephone listings, dates and places of birth, levels of education, academic majors, and degrees received; and the most recent educational institutions in which they were enrolled.

b. If you are determined, using the procedures in 32 CFR part 216, to be such an institution of higher education during the period of performance of this award, we:

i. Will cease all payments to you of DoD funds under this award and all other DoD grants and cooperative agreements; and

ii. May suspend or terminate those awards unilaterally for material failure to comply with the award terms and conditions.

11. *Historic preservation.* You must identify to us any:

a. Property listed or eligible for listing on the National Register of Historic Places that will be affected by this award, and provide any help we may need, with respect to this award, to comply with Section 106 of the National Historic Preservation Act of 1966 (54 U.S.C. 306108), as implemented by the Advisory Council on Historic Preservation regulations at 36 CFR part 800 and Executive Order 11593, ''Identification and Protection of Historic Properties,'' [3 CFR, 1971–1975 Comp., p. 559]. Impacts to historical properties are included in the definition of ''human environment'' that require impact assessment under NEPA (See NP Article II, Section A).

b. Potential under this award for irreparable loss or destruction of significant scientific, prehistorical, historical, or archeological data, and provide any help we may need, with respect to this award, to comply with the Archaeological and Historic Preservation Act of 1974 (54 U.S.C. chapter 3125).

12. *Relocation and real property acquisition.* You must comply with applicable provisions of 49 CFR part 24, which implements the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C. 4601, *et seq.*) and provides for fair and equitable treatment of persons displaced by federally assisted programs or persons whose property is acquired as a result of such programs.

13. *Confidentiality of patient records.* You must keep confidential any records that you maintain of the identity, diagnosis, prognosis, or treatment of any patient in connection with any program or activity relating to substance abuse education, prevention, training, treatment, or rehabilitation that is assisted directly or indirectly under this award, in accordance with 42 U.S.C. 290dd–2.

14. *Pro-Children Act.*

You must comply with applicable restrictions in the Pro-Children Act of 1994 (Title 20, Chapter 68, subchapter X, Part B of the U.S. Code) on smoking in any indoor facility:

a. Constructed, operated, or maintained under this award and used for routine or regular provision of kindergarten, elementary, or secondary education or library services to children under the age of 18.

b. Owned, leased, or contracted for and used under this award for the routine provision of federally funded health care, day care, or early childhood development (Head Start) services to children under the age of 18.

15. *Constitution Day.* You must comply with Public Law 108–447, Div. J, Title I, Sec. 111 (36 U.S.C. 106 note), which requires each educational institution receiving Federal funds in a Federal fiscal year to hold an educational program on the United States Constitution on September 17th during that year for the students served by the educational institution.

16. *Trafficking in persons.* You must comply with requirements concerning trafficking in persons specified in the award term at 2 CFR 175.15(b), as applicable.

17. *Whistleblower protections.* You must comply with 10 U.S.C. 2409, including the:

a. Prohibition on reprisals against employees disclosing certain types of information to specified persons or bodies; and

b. Requirement to notify your employees in writing, in the predominant native language of the workforce, of their rights and protections under that statute.

Section B. [Reserved]

Dated: July 24, 2020.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2020–16410 Filed 8–18–20; 8:45 am]

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DEPARTMENT OF DEFENSE

Office of the Secretary

2 CFR Part 1108

[DOD–2016–OS–0051]

RIN 0790–AJ46

Definitions for DoD Grant and Agreement Regulations

AGENCY: Office of the Secretary, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: This rule is the fifth of a sequence of six final rules published in the **Federal Register** to update the DoD Grant and Agreement Regulations (DoDGARs). Additionally, this rule provides definitions of terms that are common to the DoDGARs and establishes a central regulatory location for each term.

DATES: This rule is effective October 19, 2020.

FOR FURTHER INFORMATION CONTACT: Barbara Orlando, Basic Research Office, 571–372–6413.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Purpose of the Final Rule

This final rule incorporates the Office of Management and Budget's (OMB) guidance to Federal agencies on administrative requirements, cost principles, and audit requirements that apply to Federal grants, cooperative agreements, and other assistance instruments (2 CFR part 200). Additionally, this rule provides definitions of terms that are common to the DoDGARs and establishes a central regulatory location for each term.

B. Legal Authorities for the Regulatory Action

There are two statutory authorities for this rule:

- 10 U.S.C. 113, which establishes the Secretary of Defense as the head of the Department of Defense (DoD); and
- 5 U.S.C. 301, which authorizes the head of an Executive department to prescribe regulations for the governance of that department and the performance of its business.

II. Regulatory History

In December 2014 (79 FR 76047), DoD established an interim implementation of the final guidance, ''Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards,'' published by the Office of Management and Budget (OMB) on December 26, 2013, in 2 CFR part 200 (Uniform Guidance—available at 78 FR 78589). DoD then published a Notice of Proposed Rulemaking (November 7, 2016 (81 FR 78360)) that proposed changes to 2 CFR part 1108, Definitions, that would establish definitions of terms that are common to most portions of those regulations, as well as create a central location for the definitions.

III. Comments and Responses

DoD did not receive public comments in response to the Notice of Proposed Rulemaking that proposed 2 CFR part 1108, Definitions, which was published in the **Federal Register** on November 7, 2016. However, in reviewing the five other rules proposed on that date, which are being published as final rules in today's **Federal Register**, and in developing the yet-to-be-published portions of the updated DoDGARs, DoD identified the need for changes to make corrections and enhance the clarity and currency of this part and its consistency with other parts of the DoDGARs. Therefore, we:

- Added ''or agreements'' to modify ''officer'' in 2 CFR 1108.80, Claim.
- Added ''Indian tribe'' in 2 CFR 1108.85(a), Cognizant agency for indirect costs.
- Added a definition of ''cost-type award'' at 2 CFR 1108.128 to be parallel to other terms defined in 2 CFR part 1108.
- Added a definition of ''prior approval'' at 2 CFR 1108.298 to ensure consistent understanding of use of the term.
- Added to the definition of ''State'' in 2 CFR 1108.350 the qualifier ''for purposes of the administrative requirements of these regulations . . .'' for clarity. Although this part already recognizes that a term can be defined differently in a national policy requirement, there also may be instances where an authorizing statute defines the term ''State'' differently when establishing eligibility for financial assistance.
- Modified the name of appendix A by substituting the term ''types of awards'' with ''types of legal instruments'' (*i.e.,* Background on assistance, acquisition, and terms for types of legal instruments) for consistency with the usage in the Federal Grant and Cooperative Agreement Act. Throughout this part, where appropriate, we used the word(s) ''instruments'' or ''legal instruments, in lieu of ''awards.''
- Eliminated redundancy, *e.g.,* by removing ''prime'' as a modifier of the defined term ''award.''
- Updated language to ensure use of current terminology, *e.g.,* substituted ''notice of funding opportunity'' for ''program announcement'' in 2 CFR 1108.405(a), Voluntary (committed or uncommitted) cost sharing.

In addition, we made some minor edits, *e.g.,* changing plural usage to singular where the context warranted it; using defined terms, rather than descriptive language; and substituting language that is consistent with other parts of the DoDGARs.

IV. Regulatory Analyses

We developed this rule after considering numerous statutes and Executive Orders (E.O.s) related to rulemaking. Below we summarize our analyses based on these statutes or E.O.s.

A. Regulatory Planning and Review

Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review) 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

(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 rule has been designated as a ''not significant'' regulatory action, and not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has not been reviewed by the Office of Management and Budget (OMB) under the requirements of these Executive Orders.

Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs) directs agencies to reduce regulation and control regulatory costs and provides that ''for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process.'' This rule is not subject to the requirements of this Executive Order because it is not significant under Executive Order 12866.

Costs

DoD has found that this rule will not impose costs on the public because this rule is establishing a central regulatory location for definitions in the DoDGARs without imposing additional requirements or burdens on the public.

Benefits

DoD determined that creating a central location for definitions used throughout the DoDGARs will help maximize long term benefits in relation to costs and burdens for recipients of DoD awards. The public will benefit from all terms being located in one location.

Alternatives

1. No action—If no action was taken, DoD would not be compliant with OMB requirements to move all financial assistance regulations to 2 CFR.

2. Next Best alternative—The next best alternative would be to add additional definitions, beyond those found in the DODGARs, which give background explanations for the terms that are in the DODGARs. While the new definitions may add additional context to the wording in the DODGARs, it would be more beneficial to expand the definition than to direct the public to additional definitions.

B. Congressional Review Act (5 U.S.C. 801, et seq.)

Under the Congressional Review Act, a major rule may not take effect until at least 60 days after submission to Congress of a report regarding the rule. A major rule is one that would have an annual effect on the economy of $100 million or more or have certain other impacts. This rule is not a major rule under the Congressional Review Act.

C. 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. This rule will not impose any impacts on any entities. This means that there will be no economic impacts on any entities. Therefore, the Department of Defense under the Regulatory Flexibility Act [1] certifies that this rule will not have a significant economic impact on a substantial number of small entities.

D. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121, we want to assist small entities in understanding this rule so that they can better evaluate its effects on them and participate in the rulemaking. 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 in the **FOR FURTHER INFORMATION CONTACT** section of this rule.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business 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.

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 1 year. Although this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

F. Collection of Information

The Paperwork Reduction Act (PRA) (44 U.S.C. 3501–3520) applies to collections of information using identical questions posed to, or reporting or recordkeeping requirements imposed on, ten or more members of the public. This rule does not call for a new collection of information under the PRA.

G. Federalism

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. This proposed rule does not have federalism implications that warrant the preparation of a federalism assessment in accordance with Executive Order 13132.

List of Subjects in 2 CFR Part 1108

Accounting, Business and Industry, Cooperative agreements, Grants administration, Hospitals, Indians, Nonprofit organizations, Reporting and recordkeeping requirements, Small business, State and local governments.

■ Accordingly, under the authority of 5 U.S.C. 301 and 10 U.S.C. 113, 2 CFR chapter XI, subchapter A, is amended by adding part 1108 to read as follows:

PART 1108—DEFINITIONS OF TERMS USED IN SUBCHAPTERS A THROUGH F OF THIS CHAPTER

Subpart A—General

Sec.
1108.1 Purpose of this part.
1108.2 Precedence of definitions of terms in national policy requirements.
1108.3 Definitions of terms used in the Governmentwide cost principles or single audit requirements.
1108.4 Definitions of terms that vary depending on context.

Subpart B—Definitions

1108.10 Acquire.
1108.15 Acquisition.
1108.20 Acquisition cost.
1108.25 Administrative offset.
1108.30 Advance payment.
1108.35 Advanced research.
1108.40 Agreements officer.
1108.45 Applied research.
1108.50 Approved budget.

[1] 5 U.S.C. 601, et seq. (1980).

1108.55 Assistance.
1108.60 Award.
1108.65 Award administration office.
1108.70 Basic research.
1108.75 Capital asset.
1108.80 Claim.
1108.85 Cognizant agency for indirect costs.
1108.90 Contract.
1108.95 Contracting activity.
1108.100 Contracting officer.
1108.105 Contractor.
1108.110 Cooperative agreement.
1108.115 Co-principal investigator.
1108.120 Cost allocation plan.
1108.125 Cost sharing or matching.
1108.128 Cost-type award.
1108.130 Cost-type contract.
1108.135 Cost-type subaward.
1108.140 Debarment.
1108.145 Debt.
1108.150 Delinquent debt.
1108.155 Development.
1108.160 Direct costs.
1108.165 DoD Components.
1108.170 Equipment.
1108.175 Exempt property.
1108.180 Expenditures.
1108.185 Federal interest.
1108.190 Federal share.
1108.195 Fixed-amount award.
1108.200 Fixed-amount subaward.
1108.205 Foreign organization.
1108.210 Foreign public entity.
1108.215 Grant.
1108.220 Grants officer.
1108.225 Indian tribe.
1108.230 Indirect costs (also known as ''Facilities and Administrative,'' or F&A, costs).
1108.235 Institution of higher education.
1108.240 Intangible property.
1108.245 Local government.
1108.250 Management decision.
1108.255 Nonprocurement instrument.
1108.260 Nonprofit organization.
1108.265 Obligation.
1108.270 Office of Management and Budget.
1108.275 Outlays.
1108.280 Participant support costs.
1108.285 Period of performance.
1108.290 Personal property.
1108.295 Principal investigator.
1108.298 Prior approval
1108.300 Procurement contract.
1108.305 Procurement transaction.
1108.310 Program income.
1108.315 Project costs.
1108.320 Property.
1108.325 Real property.
1108.330 Recipient.
1108.335 Research.
1108.340 Simplified acquisition threshold.
1108.345 Small award.
1108.350 State.
1108.355 Subaward.
1108.360 Subrecipient.
1108.365 Supplies.
1108.370 Suspension.
1108.375 Technology investment agreement.
1108.380 Termination.
1108.385 Third-party in-kind contribution.
1108.390 Total value.
1108.395 Unique entity identifier.
1108.400 Unobligated balance.
1108.405 Voluntary (committed or uncommitted) cost sharing.
1108.410 Working capital advance.
Appendix A to Part 1108—Background on Assistance, Acquisition, and Terms for Types of Legal Instruments

Authority: 5 U.S.C. 301 and 10 U.S.C. 113.

Subpart A—General

§ 1108.1 Purpose of this part.

(a) This part provides:

(1) Definitions of terms used in subchapters A through F of this chapter; and

(2) Background information as context for understanding terms related to assistance and acquisition purposes, legal instruments that DoD Components make at the prime tier, and lower-tier transactions into which recipients and subrecipients enter when carrying out programs at lower tiers under DoD awards.

(b) This part is, for DoD, the regulatory implementation of OMB guidance in subpart A of 2 CFR part 200.

§ 1108.2 Precedence of definitions of terms in national policy requirements.

(a) *General.* Some portions of the DoD Grant and Agreement Regulations (DoDGARs) may use a term in relation to compliance with a national policy requirement in a statute, Executive order, or other source that defines the term differently than it is defined in subpart B of this part. For purposes of that particular national policy requirement, the definition of a term provided by the source of the requirement and any regulation specifically implementing it takes precedence over the definition in subpart B of this part. Using the definition of a term that takes precedence for each national policy requirement is therefore important when determining the applicability and effect of that requirement.

(b) *Examples.* (1) Current portions of the DoDGARs that specifically implement national policy requirements, as described in paragraph (a) of this section, are:

(i) A Governmentwide regulation currently codified by DoD at 32 CFR part 26, which implements the Drug-Free Workplace Act of 1988 as it applies to grants (41 U.S.C. chapter 81, as amended);

(ii) A Government regulation currently codified by DoD at 32 CFR part 28, which implements restrictions on lobbying in 31 U.S.C. 1352;

(iii) A DoD regulation at part 1125 of this chapter, which implements Governmentwide guidance on nonprocurement debarment and suspension (2 CFR part 180) that has bases both in statute (section 2455 of Public Law 103–355, 108 Stat. 3327) and in Executive orders 12549 and 12689; and

(iv) Part 1122 of this chapter, which provides standard wording of terms and conditions related to a number of national policy requirements.

(2) To illustrate that a term may be defined differently in conjunction with specific national policy requirements than it is in this part, the term ''State'' is defined differently in the drug-free workplace requirements at 32 CFR part 26, the lobbying restrictions at 32 CFR part 28, and Subpart B of this part.

§ 1108.3 Definitions of terms used in the Governmentwide cost principles or single audit requirements.

(a) Some DoDGARs provisions state that DoD Components or recipients must comply with single audit or cost principles requirements in a Governmentwide issuance that contains defined terms and include the requirements by reference to the issuance without restating them.

(b) For any term in one of those issuances, this part includes the definition of the term only if the DoDGARs also use that term directly.

(c) If the DoDGARs only use the term indirectly, *i.e.,* through the DoDGARs' reference to the issuance, then this part will not include a definition and a user of the DoDGARs should consult definitions in the pertinent Governmentwide source, as follows:

(1) The Single Audit Act requirements for audits of recipients and subrecipients that are in subpart F of OMB guidance in 2 CFR part 200;

(2) The Governmentwide cost principles for institutions of higher education, nonprofit organizations, States, local governments, and Indian tribes that are contained in subpart E of OMB guidance in 2 CFR part 200; and

(3) The cost principles for for-profit entities at Subpart 31.2 of the Federal Acquisition Regulation (FAR) at 48 CFR part 31, as supplemented by provisions of the Defense Federal Acquisition Regulation Supplement at subpart 231.2 of 48 CFR part 231.

§ 1108.4 Definitions of terms that vary depending on context.

DoDGARs definitions of some terms related to types of legal instruments (*e.g.,* ''contract'') and purposes for which they are used (*e.g.,* ''procurement'' or ''acquisition'') may vary, depending on the context. Appendix A to this part provides additional information about those terms and their definitions.

Subpart B—Definitions

§ 1108.10 Acquire.

Acquire means to:

(a) When the term is used in connection with a DoD Component action at the prime tier, obtain property or services by purchase, lease, or barter for the direct benefit or use of the United States Government.

(b) When the term is used in connection with a recipient action or a subrecipient action at a tier under a DoD Component's award:

(1) Purchase services;

(2) Obtain property under the award by:

(i) Purchase;

(ii) Construction;

(iii) Fabrication;

(iv) Development;

(v) The recipient's or subrecipient's donation of the property to the project or program under the award to meet a cost-sharing or matching requirement (*i.e.,* including within the entity's share of the award's project costs the value of the remaining life of the property or its fair market value, rather than charging depreciation); or

(vi) Otherwise.

§ 1108.15 Acquisition.

Acquisition means the process of acquiring as described in:

(a) Paragraph (a) of § 1108.10 when used in connection with DoD Component actions at the prime tier.

(b) Paragraph (b) of § 1108.10 when used in connection with recipient or subrecipient actions at a lower tier under a DoD Component's award.

§ 1108.20 Acquisition cost.

Acquisition cost means the cost of an asset to a recipient or subrecipient, including the cost to ready the asset for its intended use.

(a) For example, when used in conjunction with:

(1) The purchase of equipment, the term means the net invoice price of the equipment, including the cost of any modifications, attachments, accessories, or auxiliary apparatus necessary to make it usable for the purpose for which it is acquired.

(2) Equipment that a recipient or subrecipient constructs or fabricates—or software that it develops—under an award, the term includes, when capitalized in accordance with generally accepted accounting principles (GAAP):

(i) The construction and fabrication costs of that equipment; and

(ii) The development costs of that software.

(b) Ancillary charges, such as taxes, duty, protective in-transit insurance, freight, and installation may be included in, or excluded from, the acquisition cost in accordance with the recipient's or subrecipient's regular accounting practices.

§ 1108.25 Administrative offset.

Administrative offset means an action whereby money payable by the United States Government to, or held by the Government for, a recipient is withheld to satisfy a delinquent debt.

§ 1108.30 Advance payment.

Advance payment means a payment that DoD or a recipient or subrecipient makes by any appropriate payment mechanism, including a predetermined payment schedule, before the recipient or subrecipient disburses the funds for project or program purposes.

§ 1108.35 Advanced research.

Advanced research means advanced technology development that creates new technology or demonstrates the viability of applying existing technology to new products and processes in a general way. Advanced research is most closely analogous to precompetitive technology development in the commercial sector (*i.e.,* early phases of research and development on which commercial competitors are willing to collaborate, because the work is not so coupled to specific products and processes that the results of the work must be proprietary). It does not include development of military systems and hardware where specific requirements have been defined. It is typically funded in Advanced Technology Development (Budget Activity 3) programs within DoD's Research, Development, Test and Evaluation (RDT&E) appropriations.

§ 1108.40 Agreements officer.

Agreements officer means a DoD official with the authority to enter into, administer, and/or terminate technology investment agreements.

§ 1108.45 Applied research.

Applied research means efforts that attempt to determine and exploit the potential of scientific discoveries or improvements in technology, such as new materials, devices, methods and processes. It typically is funded in Applied Research (Budget Activity 2) programs within DoD's Research, Development, Test and Evaluation (RDT&E) appropriations. Applied research often follows basic research but may not be fully distinguishable from the related basic research. The term does not include efforts whose principal aim is the design, development, or testing of specific products, systems or processes to be considered for sale or acquisition, efforts that are within the definition of ''development.''

§ 1108.50 Approved budget.

Approved budget means, in conjunction with a DoD Component award to a recipient, the most recent version of the budget the recipient submitted, and the DoD Component approved (either at the time of the initial award or subsequently), to summarize planned expenditures for the project or program under the award. It includes:

(a) All Federal funding made available to the recipient under the award to use for project or program purposes.

(b) Any cost sharing or matching that the recipient is required to provide under the award.

(c) Any options that have been exercised but not any options that have not yet been exercised.

§ 1108.55 Assistance.

Assistance means the transfer of a thing of value to a recipient to carry out a public purpose of support or stimulation authorized by a law of the United States (see 31 U.S.C. 6101(3)). Grants, cooperative agreements, and technology investment agreements are examples of legal instruments that DoD Components use to provide assistance.

§ 1108.60 Award.

Award means a grant, cooperative agreement, technology investment agreement, or other nonprocurement instrument subject to one or more parts of the DoDGARs. Within each part of the regulations, the term includes only the types of instruments subject to that part.

§ 1108.65 Award administration office.

Award administration office means a DoD Component office that performs post-award functions related to the administration of grants, cooperative agreements, technology investment agreements, or other nonprocurement instruments subject to one or more parts of the DoDGARs.

§ 1108.70 Basic research.

Basic research means efforts directed toward increasing knowledge and understanding in science and engineering, rather than the practical application of that knowledge and understanding. It typically is funded within Basic Research (Budget Activity 1) programs within DoD's Research, Development, Test and Evaluation (RDT&E) appropriations. For the purposes of the DoDGARs, basic research includes:

(a) Research-related, science and engineering education and training,

including graduate fellowships and research traineeships; and

(b) Research instrumentation and other activities designed to enhance the infrastructure for science and engineering research.

§ 1108.75 Capital asset.

Capital asset means a tangible or intangible asset used in operations having a useful life of more than one year which is capitalized in accordance with GAAP. Capital assets include:

(a) Land, buildings (facilities), equipment, and intellectual property (including software) whether acquired by purchase, construction, manufacture, lease-purchase, exchange, or through capital leases; and

(b) Additions, improvements, modifications, replacements, rearrangements, reinstallations, renovations or alterations to capital assets that materially increase their value or useful life (not ordinary repairs and maintenance).

§ 1108.80 Claim.

Claim means a written demand or written assertion by one of the parties to an award seeking as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of an award term or condition, or other relief arising under or relating to the award. A routine request for payment that is not in dispute when submitted is not a claim. The submission may be converted to a claim by written notice to the grants or agreements officer if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

§ 1108.85 Cognizant agency for indirect costs.

Cognizant agency for indirect costs means the Federal agency responsible for reviewing, negotiating, and approving cost allocation plans and indirect cost proposals on behalf of all Federal agencies. The cognizant agency for indirect costs for a particular entity may be different than the cognizant agency for audit. The cognizant agency for indirect costs:

(a) For an institution of higher education, nonprofit organization, State, local government, or Indian tribe is assigned as described in the appendices to 2 CFR part 200. See 2 CFR 200.19 for specific citations to those appendices.

(b) For a for-profit entity, normally will be the agency with the largest dollar amount of pertinent business, as described in the Federal Acquisition Regulation at 48 CFR 42.003.

§ 1108.90 Contract.

Contract means a procurement transaction, as that term is defined in this subpart. A contract is a transaction into which a recipient or subrecipient enters. It is therefore distinct from the term ''procurement contract,'' which is a transaction that a DoD Component awards at the prime tier.

§ 1108.95 Contracting activity.

Contracting activity means an activity to which the Head of a DoD Component has delegated broad authority regarding acquisition functions pursuant to 48 CFR 1.601.

§ 1108.100 Contracting officer.

Contracting officer means a DoD official with the authority to enter into, administer, and/or terminate procurement contracts and make related determinations and findings.

§ 1108.105 Contractor.

Contractor means an entity to which a recipient or subrecipient awards a procurement transaction (also known as a contract).

§ 1108.110 Cooperative agreement.

Cooperative agreement means a legal instrument which, consistent with 31 U.S.C. 6305, is used to enter into the same kind of relationship as a grant (see definition of ''grant'' in this subpart), except that substantial involvement is expected between DoD and the recipient when carrying out the activity contemplated by the cooperative agreement. The term does not include ''cooperative research and development agreements'' as defined in 15 U.S.C. 3710a.

§ 1108.115 Co-principal investigator.

Co-principal investigator means any one of a group of individuals whom an organization that is carrying out a research project with DoD support designates as sharing the authority and responsibility for leading and directing the research intellectually and logistically, other than the one among the group identified as the primary contact for scientific, technical, and related budgetary matters (see the definition of ''principal investigator'').

§ 1108.120 Cost allocation plan.

Cost allocation plan means either a:

(a) Central service cost allocation plan, as defined at 2 CFR 200.9 and described in Appendix V to 2 CFR part 200; or

(b) Public assistance cost allocation plan as described in Appendix VI to 2 CFR part 200.

§ 1108.125 Cost sharing or matching.

Cost sharing or matching means the portion of project costs not borne by the Federal Government, unless a Federal statute authorizes use of any Federal funds for cost sharing or matching.

§ 1108.128 Cost type award.

Cost-type award means an award that a DoD Component makes that provides for the recipient to be paid based on the actual, allowable costs it incurs in carrying out the award.

§ 1108.130 Cost-type contract.

Cost-type contract means a procurement transaction awarded by a recipient or a subrecipient at any tier under a DoD Component's grant or cooperative agreement that provides for the contractor to be paid on the basis of the actual, allowable costs it incurs (plus any fee or profit for which the contract provides).

§ 1108.135 Cost-type subaward.

Cost-type subaward means a subaward that:

(a) A recipient or subrecipient makes to another entity at the next lower tier; and

(b) Provides for payments to the entity that receives the cost-type subaward based on the actual, allowable costs it incurs in carrying out the subaward.

§ 1108.140 Debarment.

Debarment means an action taken by a Federal agency debarring official to exclude a person or entity from participating in covered Federal transactions, in accordance with debarment and suspension policies and procedures for:

(a) Nonprocurement instruments, which are in OMB guidance at 2 CFR part 180, as implemented by the DoD at 2 CFR part 1125; or

(b) Procurement contracts, which are in the Federal Acquisition Regulation at 48 CFR 9.4.

§ 1108.145 Debt.

Debt means any amount of money or any property owed to a Federal agency by any person, organization, or entity except another United States Federal agency. Debts include any amounts due from insured or guaranteed loans, fees, leases, rents, royalties, services, sales of real or personal property, or overpayments, penalties, damages, interest, fines and forfeitures, and all other claims and similar sources. For the purposes of this chapter, amounts due a non-appropriated fund instrumentality are not debts owed the United States.

§ 1108.150 Delinquent debt.

Delinquent debt means a debt:

(a) That the debtor fails to pay by the date specified in the initial written notice from the agency owed the debt, normally within 30 calendar days, unless the debtor makes satisfactory payment arrangements with the agency by that date; and

(b) With respect to which the debtor has elected not to exercise any available appeals or has exhausted all agency appeal processes.

§ 1108.155 Development.

Development means, when used in the context of ''research and development,'' the systematic use of scientific and technical knowledge in the design, development, testing, or evaluation of potential new products, processes, or services to meet specific performance requirements or objectives. It includes the functions of design engineering, prototyping, and engineering testing. It typically is funded within programs in Budget Activities 4 through 7 of DoD's Research, Development, Test and Evaluation (RDT&E) appropriations.

§ 1108.160 Direct costs.

Direct costs means any costs that are identified specifically with a particular final cost objective, such as an award, in accordance with the applicable cost principles.

§ 1108.165 DoD Components.

DoD Components means the Office of the Secretary of Defense; the Military Departments; the National Guard Bureau (NGB); and all Defense Agencies, DoD Field Activities, and other organizational entities within the DoD that are authorized to award or administer grants, cooperative agreements, and other non-procurement instruments subject to the DoDGARs.

§ 1108.170 Equipment.

Equipment means tangible personal property (including information technology systems) having a useful life of more than one year and a per-unit acquisition cost which equals or exceeds the lesser of:

(a) $5,000; or

(b) The recipient's or subrecipient's capitalization threshold for financial statement purposes.

§ 1108.175 Exempt property.

(a) *Exempt property* means tangible personal property acquired in whole or in part with Federal funds under a DoD Component's awards, for which the DoD Component:

(1) Has statutory authority to vest title in recipients (or allow for vesting in subrecipients) without further obligation to the Federal Government or subject to conditions the DoD Component considers appropriate; and

(2) Elects to use that authority to do so.

(b) An example of exempt property authority is contained in the Federal Grant and Cooperative Agreement Act (31 U.S.C. 6306) for tangible personal property acquired under an award to conduct basic or applied research by a nonprofit institution of higher education or nonprofit organization whose primary purpose is conducting scientific research.

§ 1108.180 Expenditures.

Expenditures mean charges made by a recipient or subrecipient to a project or program under an award.

(a) The charges may be reported on a cash or accrual basis, as long as the methodology is disclosed and is consistently applied.

(b) For reports prepared on a cash basis, expenditures are the sum of:

(1) Cash disbursements for direct charges for property and services;

(2) The amount of indirect expense charged;

(3) The value of third-party in-kind contributions applied; and

(4) The amount of cash advance payments and payments made to subrecipients.

(c) For reports prepared on an accrual basis, expenditures are the sum of:

(1) Cash disbursements for direct charges for property and services;

(2) The amount of indirect expense incurred;

(3) The value of third-party in-kind contributions applied; and

(4) The net increase or decrease in the amounts owed by the recipient or subrecipient for:

(i) Goods and other property received;

(ii) Services performed by employees, contractors, subrecipients, and other payees; and

(iii) Programs for which no current services or performance are required, such as annuities, insurance claims, or other benefit payments.

§ 1108.185 Federal interest.

Federal interest means, in relation to real property, equipment, or supplies acquired or improved under an award or subaward, the dollar amount that is the product of the:

(a) Federal share of total project costs; and

(b) Current fair market value of the property, improvements, or both, to the extent the costs of acquiring or improving the property were included as project costs.

§ 1108.190 Federal share.

Federal share means the portion of the project costs under an award that is paid by Federal funds.

§ 1108.195 Fixed-amount award.

Fixed-amount award means a DoD Component grant or cooperative agreement that provides for the recipient to be paid on the basis of performance and results, rather than the actual, allowable costs the recipient incurs.

§ 1108.200 Fixed-amount subaward.

Fixed-amount subaward means a subaward:

(a) That a recipient or subrecipient makes to another entity at the next lower tier; and

(b) Under which the total amount to be paid to the other entity is based on performance and results, and not on the actual, allowable costs that entity incurs.

§ 1108.205 Foreign organization.

Foreign organization means an entity that is:

(a) A public or private organization that is located in a country other than the United States and its territories and is subject to the laws of the country in which it is located, irrespective of the citizenship of project staff or place of performance;

(b) A private nongovernmental organization located in a country other than the United States and its territories that solicits and receives cash contributions from the general public;

(c) A charitable organization located in a country other than the United States and its territories that is nonprofit and tax exempt under the laws of its country of domicile and operation, and is not a university, college, accredited degree-granting institution of education, private foundation, hospital, organization engaged exclusively in research or scientific activities, church, synagogue, mosque or other similar entity organized primarily for religious purposes; or

(d) An organization located in a country other than the United States and its territories that is not recognized as a foreign public entity.

§ 1108.210 Foreign public entity.

Foreign public entity means:

(a) A foreign government or foreign governmental entity;

(b) A public international organization, which is an organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act (22 U.S.C. 288–288f);

(c) An entity owned (in whole or in part) or controlled by a foreign government; or

(d) Any other entity consisting wholly or partially of one or more foreign governments or foreign governmental entities.

§ 1108.215 Grant.

Grant means a legal instrument which, consistent with 31 U.S.C. 6304, is used to enter into a relationship:

(a) Of which the principal purpose is to transfer a thing of value to the recipient to carry out a public purpose of support or stimulation authorized by a law of the United States, rather than to acquire property or services for the DoD's direct benefit or use.

(b) In which substantial involvement is not expected between DoD and the recipient when carrying out the activity contemplated by the award.

§ 1108.220 Grants officer.

Grants officer means a DoD official with the authority to enter into, administer, and/or terminate grants or cooperative agreements.

§ 1108.225 Indian tribe.

Indian tribe means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. Chapter 33), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians (25 U.S.C. 450b(e)). See the annually published Bureau of Indian Affairs list of Indian Entities Recognized and Eligible to Receive Services.

§ 1108.230 Indirect costs (also known as "Facilities and Administrative," or F&A, costs).

Indirect costs means those costs incurred for a common or joint purpose benefitting more than one cost objective, and not readily assignable to the cost objectives specifically benefitted, without effort disproportionate to the results achieved.

§ 1108.235 Institution of higher education.

Institution of higher education has the meaning specified at 20 U.S.C. 1001.

§ 1108.240 Intangible property.

Intangible property means:

(a) Property having no physical existence, such as trademarks, copyrights, patents and patent applications; and

(b) Property such as loans, notes and other debt instruments, lease agreements, stock and other instruments of property ownership, whether the property is considered tangible or intangible.

§ 1108.245 Local government.

Local government means any unit of government within a State, including a:

(a) County;

(b) Borough;

(c) Municipality;

(d) City;

(e) Town;

(f) Township;

(g) Parish;

(h) Local public authority, including any public housing agency under the United States Housing Act of 1937;

(i) Special district;

(j) School district;

(k) Intrastate district;

(l) Council of governments, whether or not incorporated as a nonprofit corporation under State law; and

(m) Any other agency or instrumentality of a multi-, regional, or intra-state or local government.

§ 1108.250 Management decision.

Management decision means a written decision issued to an audited entity by a DoD Component, another Federal agency that has audit or indirect cost cognizance or oversight responsibilities for the audited entity, or a recipient or subrecipient from which the audited entity received an award or subaward. The DoD Component, cognizant or oversight agency, recipient, or subrecipient issues the management decision to specify the corrective actions that are necessary after evaluating the audit findings and the audited entity's corrective action plan.

§ 1108.255 Nonprocurement instrument.

Nonprocurement instrument means a legal instrument other than a procurement contract that a DoD Component may award. Examples include an instrument of financial assistance, such as a grant or cooperative agreement, or an instrument of technical assistance, which provides services in lieu of money.

§ 1108.260 Nonprofit organization.

Nonprofit organization means any corporation, trust, association, cooperative, or other organization, not including an institution of higher education, that:

(a) Is operated primarily for scientific, educational, service, charitable, or similar purposes in the public interest;

(b) Is not organized primarily for profit; and

(c) Uses net proceeds to maintain, improve, or expand the operations of the organization.

§ 1108.265 Obligation.

Obligation means:

(a) When used in conjunction with a DoD Component's award, a legally binding agreement that will result in outlays, either immediately or in the future. Examples of actions through which a DoD Component incurs an obligation include the grants or agreements officer's signature of a grant, cooperative agreement, or technology investment agreement (or modification of such an award) authorizing the recipient to use funds under the award.

(b) When used in conjunction with a recipient's or subrecipient's use of funds under an award or subaward, an order placed for property and services, a contract or subaward made, or a similar transaction, during a given period that requires payment during the same or a future period.

§ 1108.270 Office of Management and Budget.

Office of Management and Budget means the Executive Office of the President, United States Office of Management and Budget.

§ 1108.275 Outlays.

Outlays means ''expenditures,'' as defined in this subpart.

§ 1108.280 Participant support costs.

Participant support costs means direct costs for items such as stipends or subsistence allowances, travel allowances, and registration fees paid to or on behalf of participants or trainees (but not employees) in connection with conferences or training projects.

§ 1108.285 Period of performance.

Period of performance means the time during which a recipient or subrecipient may incur new obligations to carry out the work authorized under an award or subaward, respectively.

§ 1108.290 Personal property.

Personal property means property other than real property. It may be tangible, having physical existence, or intangible, such as copyrights, patents, and securities.

§ 1108.295 Principal investigator.

Principal investigator means either:

(a) The single individual whom an organization that is carrying out a research project with DoD support designates as having an appropriate level of authority and responsibility for leading and directing the research intellectually and logistically, which includes the proper conduct of the research, the appropriate use of funds, and compliance with administrative

requirements such as the submission of performance reports to DoD; or

(b) If the organization designates more than one individual as sharing that authority and responsibility, the individual within that group identified by the organization as the one with whom the DoD Component's program manager generally should communicate as the primary contact for scientific, technical, and related budgetary matters concerning the project (others within the group are ''co-principal investigators,'' as defined in this subpart).

§ 1108.298 Prior approval.

Prior approval means written or electronic approval by a DoD grants or agreements officer evidencing prior consent. When prior approval is required for an activity or expenditure that would result in a direct cost to a DoD award, the grants or agreements officer's signature on an award that includes the planned activity or expenditure in the scope of work or approved budget satisfies the requirement for prior approval. Otherwise, a recipient is required to obtain such approval after award.

§ 1108.300 Procurement contract.

Procurement contract means a legal instrument which, consistent with 31 U.S.C. 6303, reflects a relationship between the Federal Government and a State, a local government, or other recipient when the principal purpose of the instrument is to acquire property or services for the direct benefit or use of the Federal Government. A procurement contract is a prime-tier transaction and therefore distinct from a recipient's or subrecipient's ''procurement transaction'' or ''contract'' as defined in this subpart.

§ 1108.305 Procurement transaction.

Procurement transaction means a legal instrument by which a recipient or subrecipient purchases property or services it needs to carry out the project or program under its award or subaward, respectively. A procurement transaction is distinct both from ''subaward'' and ''procurement contract,'' as those terms are defined in this subpart.

§ 1108.310 Program income.

Program income means gross income earned by a recipient or subrecipient that is directly generated by a supported activity or earned as a result of an award or subaward (during the period of performance unless the award or subaward specifies continuing requirements concerning disposition of program income after the end of that period).

(a) Program income includes, but is not limited to, income from:

(1) Fees for services performed;

(2) The use or rental of real or personal property for which the recipient or subrecipient is accountable under the award or subaward (whether acquired under the award or subaward, or other Federal awards from which accountability for the property was transferred);

(3) The sale of commodities or items fabricated under the award or subaward;

(4) License fees and royalties on patents and copyrights; and

(5) Payments of principal and interest on loans made with award or subaward funds.

(b) Program income does not include:

(1) Interest earned on advances of Federal funds;

(2) Proceeds from the sale of real property or equipment under the award; or

(3) Unless otherwise specified in Federal statute or regulation, or the terms and conditions of the award or subaward:

(i) Rebates, credits, discounts, and interest earned on any of them; or

(ii) Governmental revenues, taxes, special assessments, levies, fines, and similar revenues raised by the recipient or subrecipient.

§ 1108.315 Project costs.

Project costs means the total of:

(a) Allowable costs incurred under an award by the recipient, including costs of any subawards and contracts under the award; and

(b) Cost-sharing or matching contributions that are required under the award, which includes voluntary committed (but not voluntary uncommitted) contributions and the value of any third-party in-kind contributions.

§ 1108.320 Property.

Property means real property and personal property (equipment, supplies, intangible property, and debt instruments), unless stated otherwise.

§ 1108.325 Real property.

Real property means land, including land improvements, structures and appurtenances thereto, but excluding moveable machinery and equipment.

§ 1108.330 Recipient.

Recipient means an entity that receives an award directly from a DoD Component. The term does not include subrecipients.

§ 1108.335 Research.

Research means basic, applied, and advanced research.

§ 1108.340 Simplified acquisition threshold.

Simplified acquisition threshold means the dollar amount set by the Federal Acquisition Regulation at 48 CFR subpart 2.1, which is adjusted periodically for inflation in accordance with 41 U.S.C. 1908.

§ 1108.345 Small award.

Small award means a DoD grant or cooperative agreement or a subaward with a total value over the life of the award that does not exceed the simplified acquisition threshold.

§ 1108.350 State.

State, for purposes of applying the administrative requirements in these regulations, means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any agency or instrumentality thereof exclusive of local governments.

§ 1108.355 Subaward.

Subaward means a legal instrument by which a recipient or subrecipient at any tier transfers—for performance by an entity at the next lower tier—a portion of the substantive program for which the DoD Component made an award.

§ 1108.360 Subrecipient.

Subrecipient means an entity that receives a subaward.

§ 1108.365 Supplies.

Supplies means all tangible personal property, including computing devices, acquired under an award that does not meet the definition of equipment in this subpart.

§ 1108.370 Suspension.

Suspension means either:

(a) When used in the context of a specific award or subaward, the temporary withdrawal of authority for that recipient or subrecipient to obligate funds under the award or subaward, pending its taking corrective action or a decision to terminate the award or subaward.

(b) When used in the context of an entity, an action by a DoD Component's suspending official under 2 CFR part 1125, DoD's regulation implementing OMB guidance on nonprocurement debarment and suspension in 2 CFR part 180, to immediately exclude the entity from participating in covered

Federal Government transactions, pending completion of an investigation and any legal or debarment proceedings that ensue.

§ 1108.375 Technology investment agreement.

Technology investment agreement means one of a special class of assistance instruments used to increase involvement of commercial firms in defense research programs and for other purposes related to integration of the commercial and defense sectors of the nation's technology and industrial base. Technology investment agreements include one kind of cooperative agreement with provisions tailored for involving commercial firms, as well as one kind of assistance transaction other than a grant or cooperative agreement. Technology investment agreements are subject to, and described more fully in, 32 CFR part 37.

§ 1108.380 Termination.

Termination means the ending of an award or subaward, in whole or in part, at any time prior to the planned end of period of performance.

§ 1108.385 Third-party in-kind contribution.

Third-party in-kind contribution means the value of a non-cash contribution (*i.e.,* property or services) that:

(a) A non-Federal third party contributes, without charge, either to a recipient or subrecipient at any tier under a DoD Component's award; and

(b) Is identified and included in the approved budget of the DoD Component's award, as a contribution being used toward meeting the award's cost-sharing or matching requirement (which includes voluntary committed, but not voluntary uncommitted, contributions).

§ 1108.390 Total value.

Total value of a DoD grant, cooperative agreement, or TIA means the total amount of costs that are currently expected to be charged to the award over its life, which includes amounts for:

(a) The Federal share and any non-Federal cost sharing or matching required under the award; and

(b) Any options, even if not yet exercised, for which the costs have been established in the award.

§ 1108.395 Unique entity identifier.

Unique entity identifier means the identifier required for System for Award Management registration to uniquely identify entities with which the Federal Government does business (currently the Dun and Bradstreet Data Universal Numbering System, or DUNS, number).

§ 1108.400 Unobligated balance.

Unobligated balance means the amount of funds under an award or subaward that the recipient or subrecipient has not obligated. The amount is computed by subtracting the cumulative amount of the recipient's or subrecipient's unliquidated obligations and expenditures of funds from the cumulative amount of funds that it was authorized to obligate under the award or subaward.

§ 1108.405 Voluntary (committed or uncommitted) cost sharing.

(a) *Voluntary cost sharing* means cost sharing that an entity pledges voluntarily in its application (*i.e.,* not due to a stated cost-sharing requirement in the notice of funding opportunity to which the entity's application responds).

(b) *Voluntary committed cost sharing* means voluntary cost sharing that a DoD Component accepts through inclusion in the approved budget for the project or program and as a binding requirement of the terms and conditions of the award made to the entity in response to its application.

(c) *Voluntary uncommitted cost sharing* means voluntary cost sharing that does not meet the criteria in paragraph (b) of this section.

§ 1108.410 Working capital advance.

Working capital advance means a payment method under which funds are advanced to a recipient or subrecipient to cover its estimated disbursement needs for a given initial period, after which the DoD component making the award makes payment to the recipient or subrecipient by way of reimbursement.

Appendix A to Part 1108—Background on Assistance, Acquisition, and Terms for Types of Legal Instruments

I. Purpose of This Appendix

This appendix provides background intended to clarify some terms:

A. That are used in this chapter to describe either types of legal instruments that DoD Components, recipients, and subrecipients issue, or the purposes for which those types of instruments are used; and

B. For which this part provides definitions that vary depending on the context within which the terms are used.

II. Why Definitions of Some Terms Are Context-Dependent

A. The DoDGARs contain both:

1. Direction to DoD Components concerning their award of grants and cooperative agreements at the prime tier; and

2. Terms and conditions that DoD Components include in their grants and cooperative agreements to specify the Government's and recipients' rights and responsibilities, including post-award requirements with which recipients' actions must comply.

B. In some cases, the same defined term or two closely related terms are used in relation to both DoD Component actions at the prime tier and recipient or subrecipient actions at lower tiers under DoD Components' awards. But a given defined term may have meanings that differ at the two tiers. For example, in part because the Federal Grant and Cooperative Agreement Act applies to DoD Component actions at the prime tier but not to recipient or subrecipient actions at lower tiers (see sections III and IV of this appendix):

1. The terms ''acquire'' and ''acquisition'' do not have precisely the same meaning in conjunction with actions at the prime and lower tiers.

2. The meaning of the term ''procurement contract'' used to describe DoD Component prime-tier actions is not precisely the same as the meaning of ''procurement transaction'' or ''contract'' used to describe recipient or subrecipient actions at lower tiers.

III. Background: Distinguishing Prime-Tier Relationships and Legal Instruments

A. The Federal Grant and Cooperative Agreement Act (31 U.S.C. chapter 63) specifies that the type of legal instrument a DoD Component is to use is based on the nature of the relationship between the DoD Component and the recipient.

B. Specifically, except where another statute authorizes DoD to do otherwise, 31 U.S.C. chapter 63 specifies use of:

1. A procurement contract as the legal instrument reflecting a relationship between a DoD Component and a recipient when the principal purpose of the relationship is to acquire property or services for the direct benefit or use of the Federal Government.

2. A grant or cooperative agreement as the legal instrument reflecting a relationship between those two parties when the principal purpose of the relationship is to transfer a thing of value to the recipient to carry out a public purpose of support or stimulation authorized by Federal statute.

C. The terms ''acquisition'' and ''assistance'' are defined in this part to correspond to the principal purposes described in paragraphs III.B.1 and 2 of this section, respectively. Using those terms, paragraphs III.B.1 and B.2 may be restated to say that grants and cooperative agreements are assistance instruments that DoD Components use, as distinct from procurement contracts they use for acquisition.

IV. Background: Distinguishing Types of Recipients' and Subrecipients' Instruments

A. While the Federal Grant and Cooperative Agreement Act applies to Federal agencies, it does not govern types of instruments that recipients and subrecipients of any tier use. That statute does not require a recipient or subrecipient to:

1. Consider any instrument it makes at a lower tier under a Federal assistance award

to be a grant or cooperative agreement. Therefore, at its option, a recipient or subrecipient may consider all of its lower-tier instruments to be ''contracts.''

2. Associate an ''assistance'' relationship, as that term is defined in this part and used in this chapter, with any lower-tier transaction that it makes.

B. However, the DoDGARs in this chapter do distinguish between two classes of lower-tier transactions that recipients and subrecipients make: Subawards and procurement transactions. The distinction promotes uniformity in requirements for lower-tier transactions under DoD grants and cooperative agreements. It is based on a long-standing distinction in OMB guidance to Federal agencies, currently at 2 CFR part 200, which DoD implements in this chapter.

C. The distinction between a subaward and procurement transaction is based on the primary purpose of that transaction.

1. The transaction is a subaward if a recipient or subrecipient enters into it with another entity at the next lower tier in order to transfer—for performance by that lower-tier entity—a portion of the substantive program for which the DoD grant or cooperative agreement provided financial assistance to the recipient. Because the Federal Grant and Cooperative Agreement Act does not apply to the recipient or subrecipient, it may make a subaward as defined in this part using an instrument that it considers a contract.

2. The transaction is a procurement transaction if the recipient or subrecipient enters into it in order to purchase goods or services from the lower-tier entity that the recipient or subrecipient needs to perform its portion of the substantive program supported by the DoD award.

Dated: July 24, 2020.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

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DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Parts 21, 22, 32, 33, 34, and 37

[DOD–2016–OS–0055]

RIN 0790–AJ50

DoD Grant and Agreement Regulations

AGENCY: Office of the Secretary, DoD.

ACTION: Final rule.

SUMMARY: This final rule is the last in a sequence of six documents in this issue of the **Federal Register** that collectively establish for DoD grants and cooperative agreements an updated interim implementation of Government wide guidance on administrative requirements, cost principles, and audit requirements for Federal awards and make other needed updates to the DoD Grant and Agreement Regulations (DoDGARs). It removes two existing DoDGARs parts and revises four others to conform them with the 11 parts of the DoDGARs preceding this one in this section of this **Federal Register**.

DATES: This rule is effective October 19, 2020.

FOR FURTHER INFORMATION CONTACT: Barbara Orlando, Basic Research Office, telephone 571–372–6413.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Purpose of the Final Rule

As explained in the Supplementary Information section of the first of the sequence of six final rules in this section of this **Federal Register**, these rules collectively make a major portion of the updates to the Department of Defense Grant and Agreement Regulations (DoDGARs) that are needed in order to implement Office of Management and Budget (OMB) guidance at 2 CFR part 200 and for other purposes. The first five rules in the sequence represent eleven new DoDGARs parts located in chapter XI of title 2 of the Code of Federal Regulations (CFR), which will ultimately be the location in the CFR for all of the DoDGARs. This sixth and final rule in the sequence includes conforming changes to the portion of the DoDGARs that will remain for an interim period in subchapter C of chapter I of title 32 of the CFR, which is where all of the DoDGARs were originally located. Subsequent rounds of DoDGARs updates to be proposed for comment in the future will relocate the content of the remaining portion of the DoDGARs from title 32 to title 2 of the CFR. The conforming changes in this rule are essential to ensuring internal consistency within the DoDGARs during this period of transition.

B. Revisions Implemented by This Rule

This final rule removes two of the eight DoDGARs parts currently located in subchapter C of chapter I of 32 CFR, revises four parts in that subchapter, and makes no changes to the other two parts. Specifically, it:

- Removes existing DoDGARs parts 32 and 33 (32 CFR parts 32 and 33). Part 32 of the DoDGARs (32 CFR part 32) was the CFR part in which DoD implemented OMB Circular A–110, which governed the administrative requirements for grant and cooperative agreement awards to institutions of higher education, hospitals, and other nonprofit organizations. Part 33 was the part in which DoD adopted the Governmentwide common rule implementing OMB Circular A 102, which governed the administrative requirements for grant and cooperative agreement awards to States, local governments, and Indian tribal governments. Both Circulars A 110 and A 102 were superseded by Governmentwide guidance for grants and cooperative agreements that OMB issued at 2 CFR part 200, ''Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards.'' DoD issued an interim final rule, pending updates to the DoDGARs to implement that OMB guidance, on December 19, 2014, at 2 CFR part 1103, to: (1) Direct DoD Components to conform requirements for recipients in their award terms and conditions with those in 2 CFR part 200,; and (2) grant a deviation from the administrative requirements in DoDGARs parts 32 and 33. The removal of DoDGARs parts 32 and 33 from title 32 of the CFR resulting from this final rule precludes any apparent conflict between the administrative requirements in parts 32 and 33 and the administrative requirements in the new DoDGARs parts addressing general terms and conditions.
- Revises existing DoDGARs parts 21, 22, 34, and 37 (32 CFR parts 21, 22, 34, and 37). to update outdated references and (2) eliminate internal inconsistencies between the portion of the DoDGARs that will remain in 32 CFR for an interim period and the new DoDGARs parts in chapter XI of 2 CFR that are included in the five final rules preceding this one in this **Federal Register**.
- Includes updates to references and language in 32 CFR parts 21, 22, 34, and 37) that are not related to the deletion of parts 32 and 33 or generally to the implementation of the guidance at 2 CFR part 200. Some of these changes are necessary to conform these parts of the DoDGARs in 32 CFR to statutes, regulations, or policy that were issued, revised, or repealed subsequent to the last revision of those parts.

C. Legal Authorities for the Regulatory Action

There are two statutory authorities for this rule:

- 10 U.S.C. 113, which establishes the Secretary of Defense as the head of the Department of Defense; and
- 5 U.S.C. 301, which authorizes the head of an Executive department to prescribe regulations for the governance of that department and the performance of its business.

Regulatory History

In December 2014 (79 FR 76047), DoD established an interim implementation of the final guidance, ''Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards,'' published by the Office of Management and Budget (OMB) on December 26, 2013, in 2 CFR part 200 (Uniform Guidance—available at 78 FR 78589). DoD then published a Notice of Proposed Rulemaking (November 7, 2016 (81 FR 78442)) that proposed to remove two existing DoDGARs parts and revise four others in order to conform them with the 11 parts of the DoDGARs.

Comments and Responses

We received no public comments on the November 7, 2016 NPRM proposing these technical amendments. We have, however, updated § 21.530 to change the title, delete paragraph (a), and renumber the remaining paragraphs, to accommodate changes in organizational responsibilities subsequent to the publication of the NPRM.

II. Regulatory Analyses

We developed this rule after considering numerous statutes and Executive Orders (E.O.s) related to rulemaking. Below we summarize our analyses based on these statutes or E.O.s.

A. Regulatory Planning and Review

Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review) 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 (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 rule has been designated as a ''not significant'' regulatory action, and not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has not been reviewed by the Office of Management and Budget (OMB) under the requirements of these Executive Orders.

Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs) directs agencies to reduce regulation and control regulatory costs and provides that ''for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process.'' This is not subject to the requirements of this Executive Order because it is not significant under Executive Order 12866.

Costs

DoD has found that this rule will not impose costs on the public because this final rule does not create new requirements or additional burdens to the public. Additionally, this rule removes two of the eight DoDGARs parts currently located in subchapter C of chapter I of 32 CFR, revises four parts in that subchapter, and makes no changes to the other two parts.

Cost Savings

DoD determined that these technical amendments to the DoD Grant and Agreement Regulations are necessary both to ensure consistency with the other rulemakings being published today and include the most current information available.

The primary benefit of this regulatory action is to allow DoD to implement the portions of OMB's Governmentwide guidance on uniform administrative requirements, cost principles, and audit requirements that have an impact on its grant and cooperative agreement terms and conditions, rather than delaying these changes until all remaining parts of the DoDGARS are fully implemented in 2 CFR chapter XI.

However, one of the changes in these technical amendments, which is not directly related to the implementation of 2 CFR part 200, will narrow the impacted population. That change relates to the audit requirements for grants and agreements with for-profit entities, which are found in 32 CFR part 34. This change is modeled on administrative requirements for grants and agreements with institutions of higher education, hospitals, and other non-profit organizations and increases the dollar threshold at which for-profit entities are required to receive an annual audit from $500,000 to $750,000 to parallel the threshold for States, local governments, Indian tribes, institutions of higher education, and nonprofit organizations located in 2 CFR 200.501. Though DoD anticipates that portion of the grant community will realize an annual cost saving, the fluid nature of the levels and source of funds, covered under these audit, requirements prohibits DoD from being able to calculate an annual cost saving.

Alternatives

No action—If no action was taken DoD would not be compliance with OMB requirements to move all financial assistance regulations to 2 CFR.

B. Congressional Review Act (5 U.S.C. 801, et seq.)

Under the Congressional Review Act, a major rule may not take effect until at least 60 days after submission to Congress of a report regarding the rule. A major rule is one that would have an annual effect on the economy of $100 million or more or have certain other impacts. This rule is not a major rule under the Congressional Review Act.

C. 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. This rule will not impose any impacts on any entities. This means that there will be no economic impacts on any entities. Therefore, the Department of Defense under 5 U.S.C. 601 *et seq.* certifies that this rule will not have a significant economic impact on a substantial number of small entities.

D. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121, we want to assist small entities in understanding this rule so that they can better evaluate its effects on them and participate in the rulemaking. 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 in the **FOR FURTHER INFORMATION CONTACT** section of this rule.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business 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.

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 1 year. Although this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

F. Collection of Information

The Paperwork Reduction Act (PRA) (44 U.S.C. 3501–3520) applies to collections of information using identical questions posed to, or reporting or recordkeeping requirements imposed on, ten or more members of the public. This rule does not call for a new collection of information under the PRA.

Federalism

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. This proposed rule does not have federalism implications that warrant the preparation of a federalism assessment in accordance with Executive Order 13132.

List of Subjects in 32 CFR Parts 21, 22, 32, 33, 34, and 37

Business and Industry, Colleges and universities, Cooperative agreements, Grants administration, Hospitals, Indians, Nonprofit organizations, Small business, State and local governments.

Accordingly, under the authority of 5 U.S.C. 301 and 10 U.S.C. 113, 32 CFR chapter I, subchapter C is amended as follows:

PART 21—DoD GRANTS AND AGREEMENTS—GENERAL MATTERS

■ 1. The authority citation for part 21 continues to read as follows:

Authority: 5 U.S.C. 301 and 10 U.S.C. 113.

§ 21.215 [Amended]

■ 2. Section 21.215 is amended by removing ''Director of Defense Research and Engineering'' and adding ''Assistant Secretary of Defense for Research and Engineering (ASD(R&E))'' in its place.

■ 3. Section 21.220 is revised to read as follows:

§ 21.220 What publications are in the DGARS?

The DoD Grant and Agreement Regulations comprise the principal element of the DGARS. The ASD(R&E) also may publish DGARS policies and procedures in DoD instructions and other DoD publications, as appropriate.

■ 4. Section 21.300 is amended by:

■ a. In paragraph (a), removing ''subpart D'' and adding ''subpart F'' in its place; and

■ b. Revising paragraph (b).

The revision reads as follows:

§ 21.300 What instruments are subject to the DoD Grant and Agreement Regulations (DoDGARs)?

* * * * *

(b) Note that each portion of the DoDGARs identifies the types of instruments to which it applies.

* * * * *

§ 21.320 [Amended]

■ 5. Section 21.320 is amended by removing paragraph (d).

■ 6. Revise § 21.330 to read as follows:

§ 21.330 How are the DoDGARs published and maintained?

(a) The DoD publishes the DoDGARs in the Code of Federal Regulations (CFR).

(b) The location of the DoDGARs in the CFR currently is in transition. The regulations are moving from chapter I, subchapter C, title 32, to a new location in chapter XI, title 2 of the CFR. During the transition, there will be some parts of the DoDGARs in each of the two titles.

(c) The DoD publishes updates to the DoDGARs in the **Federal Register** for public comment.

(d) A standing working group recommends revisions to the DoDGARs to the ASD(R&E). The ASD(R&E), Director of Defense Procurement, and each Military Department must be represented on the working group. Other DoD Components that make or administer awards may also nominate representatives. The working group meets when necessary.

■ 7. Section 21.335 is amended by revising paragraph (b) to read as follows:

§ 21.335 Who can authorize deviations from the DoDGARs?

* * * * *

(b) The ASD(R&E) or his or her designee must approve in advance any deviation for a class of awards. Note that, as described at 2 CFR 1126.3, OMB concurrence also is required for some class deviations from requirements included in awards to institutions of higher education, nonprofit organizations, States, local governments, and Indian tribes.

■ 8. Section 21.340 is amended by revising paragraph (a) to read as follows:

§ 21.340 What are the procedures for requesting and documenting deviations?

(a) DoD Components must submit copies of justifications and agency approvals for individual deviations and written requests for class deviations to: Principal Deputy Assistant Secretary of Defense for Research and Engineering, ATTN: Basic Research, 3030 Defense Pentagon, Washington, DC 20301–3030.

* * * * *

§ 21.505 [Amended]

■ 9. Section 21.505 is amended by removing ''domestic assistance programs'' and adding ''assistance programs'' in its place.

§ 21.510 [Amended]

■ 10. Section 21.510 is amended by:

■ a. Removing ''OMB Circular A–89'' and adding ''OMB guidance at 2 CFR 200.202'' in its place;

■ b. Removing ''domestic assistance programs'' and adding ''assistance programs'' in its place;

■ c. Removing ''and maintaining the Federal Assistance Programs Retrieval System, a computerized data base of the information''; and

■ d. Removing footnote 4.

■ 11. Section 21.515 is revised to read as follows:

§ 21.515 Who reports the information for the CFDA?

(a) Each DoD Component that provides financial assistance must:

(1) Report to the Defense Assistance Awards Data System (DAADS) Administrator all new programs and changes as they occur or as the DoD Component submits its annual updates to existing CFDA information. DAADS is further described in §§ 21.520 through 21.555.

(2) Identify to the DAADS Administrator a point-of-contact who will be responsible for reporting the program information and for responding to inquiries related to it.

(b) The DAADS Administrator is the Department of Defense's single liaison with whom DoD Components that collect and compile such program information work to report the information to OMB and GSA.

■ 12. Section 21.520 is amended by revising paragraph (b) to read as follows:

§ 21.520 What are the purposes of the Defense Assistance Awards Data System (DAADS)?

* * * * *

(b) A basis for meeting Governmentwide requirements to report to *USASpending.gov* (or any successor site designated by OMB) and for preparing other recurring and special reports to the President, the Congress, the Government Accountability Office, and the public.

* * * * *

§ 21.525 [Amended]

■ 13. Section 21.525 is amended by removing ''Deputy Director, Defense Research and Engineering (DDDR&E)'' and adding ''Principal Deputy Assistant Secretary of Defense for Research and Engineering (PDASD(R&E))'' in its place.

■ 14. Section 21.530 is revised to read as follows:

§ 21.530 What are the responsibilities of the DAADS Administrator?

The DAADS Administrator, consistent with guidance issued by the PDASD(R&E):

(a) Processes DAADS information twice a month and prepares recurring and special reports using such information.

(b) Prepares, updates, and disseminates instructions for reporting information to the DAADS. The instructions are to specify procedures, formats, and editing processes to be used by DoD Components, including record layout, submission deadlines, media, methods of submission, and error correction schedules.

§ 21.535 [Amended]

■ 15. Section 21.535 is amended in paragraph (d) by removing ''to the DIOR, WHS, at the address given in § 21.555(a). DIOR, WHS serves as the central point'' and adding ''to the DAADS administrator. The DAADS Administrator serves as the central point'' in its place.

■ 16. Section 21.540 is amended by revising paragraphs (b) and (c) to read as follows:

§ 21.540 What are the duties of the DoD Components' central points for the DAADS?

* * * * *

(b) Collect information required by the DAADS User Guide from those contracting activities, and report it to the DAADS Administrator, in accordance with §§ 21.545 through 21.555. Note that the DAADS User Guide, which a registered DAADS user may find at the Resources section of the DAADS website (*https://www.dmdc.osd.mil/daads/*), provides further information about required data elements and instructions for submitting data.

(c) Submit to the DAADS Administrator any recommended changes to the DAADS.

■ 17. Section 21.555 is revised to read as follows:

§ 21.555 When and how must DoD Components report to the DAADS?

DoD Components must report:

(a) Each obligating or deobligating action no later than 15 days after the date of the obligation or deobligation. Doing so enables DAADS to comply with the deadline in the Federal Funding Accountability and Transparency Act of 2006 (Pub. L. 109–282; 31 U.S.C. 6101 note) to report to the Governmentwide data system (*USASpending.gov*) established to implement requirements of that Act.

(b) Using a method and in a format permitted either by the DAADS User Guide described in § 21.540(b) or by agreement with the DAADS Administrator.

§ 21.565 [Amended]

■ 18. Section 21.565 is amended by:

■ a. Redesignating footnote number 6 as footnote number 2; and

■ b. Removing ''Director for Basic Sciences, ODDR&E'' and adding ''Director for Basic Research, OASD(R&E)'' in its place.

■ 19. Appendix A is revised to read as follows:

Appendix A to Part 21—Instruments to Which DoDGARs Portions Apply

I. For each DoDGARs part that DoD already has adopted in chapter XI of title 2 of the Code of Federal Regulations (CFR), the following table summarizes the general subject area that the part addresses and its applicability. All of the DoDGARs ultimately will be located in chapter XI of 2 CFR.

DoDGARs . . .	Which addresses . . .	Applies to . . .
Part 1104	DoD's interim implementation of the OMB guidance in 2 CFR part 200.	grants and cooperative agreements other than TIAs.
Part 1108 (2 CFR part 1108)	Definitions of terms	terms used throughout the DoDGARs in chapter XI of 2 CFR other than the portion containing regulations implementing specific national policy requirements that provide their own definitions of terms.
Part 1120 (2 CFR part 1120)	Award format	grants and cooperative agreements, other than TIAs.
Part 1122 (2 CFR part 1122)	National policy requirements general award terms and conditions.	grants and cooperative agreements other than TIAs. Portions of this part apply to TIAs, but only as 32 CFR part 37 refers to them and makes them apply.
Part 1125 (2 CFR part 1125)	Governmentwide debarment and suspension requirements.	nonprocurement generally, including grants, cooperative agreements, TIAs, and any other instruments that are ''covered transactions'' under OMB guidance in 2 CFR 180.210 and 180.215, as implemented by 2 CFR part 1125, except acquisition transactions to carry out prototype projects (*see* 2 CFR 1125.20).
Parts 1126, 1128, 1130, 1132, 1134, 1136, and 1138 (subchapter D of 2 CFR chapter XI).	Administrative Requirements Terms and Conditions for Cost-type Awards to Nonprofit and Governmental Entities.	cost-type grants and cooperative agreements other than TIAs. Portions of this subchapter apply to TIAs, but only as 32 CFR part 37 refers to them and makes them apply.

II. For each DoDGARs part that will remain in subchapter C of chapter I of title 32 of the CFR, pending completion of the DoDGARs updating needed to fully implement OMB guidance in 2 CFR part 200 and for other purposes, the following table summarizes the general subject area that the part addresses and its applicability. All of the substantive content of these DoDGARs parts ultimately will be located in new parts in chapter XI of 2 CFR.

DoDGARs . . .	which addresses . . .	applies to . . .
Part 21 (32 CFR part 21), all but subparts D and E.	The Defense Grant and Agreement Regulatory System and the DoD Grant and Agreement Regulations.	''awards,'' which are grants, cooperative agreements, technology investment agreements (TIAs), and other nonprocurement instruments subject to one or more parts of the DoDGARs.
Part 21 (32 CFR part 21), subpart D.	Authorities and responsibilities for assistance award and administration.	grants, cooperative agreements, and TIAs.
Part 21 (32 CFR part 21), subpart E.	DoD Components' information reporting requirements ..	grants, cooperative agreements, TIAs, and other nonprocurement instruments subject to reporting requirements in 31 U.S.C. chapter 61.
Part 22 (32 CFR part 22)	DoD grants officers' responsibilities for award and administration of grants and cooperative agreements.	grants and cooperative agreements other than TIAs. Portions of this part apply to TIAs, but only as 32 CFR part 37 refers to them and makes them apply.
Part 26 (32 CFR part 26)	Governmentwide drug-free workplace requirements	grants, cooperative agreements and other financial assistance instruments, including TIAs, that are included in the definition of ''award'' at 32 CFR 26.605.
Part 28 (32 CFR part 28)	Governmentwide restrictions on lobbying	grants, cooperative agreements and other financial assistance instruments, including TIAs, that are included in the definitions of ''Federal grant'' and ''Federal cooperative agreement'' at 32 CFR 28.105.
Part 34 (32 CFR part 34)	Administrative requirements for grants and agreements with for-profit organizations.	grants and cooperative agreements other than TIAs (''award,'' as defined in 32 CFR 34.2). Portions of this part apply to TIAs, but only as 32 CFR part 37 refers to them and makes them apply.
Part 37 (32 CFR part 37)	Agreements officers' responsibilities for award and administration of TIAs.	TIAs. Note that this part refers to other portions of DoDGARs that apply to TIAs.

PART 22—DoD GRANTS AND AGREEMENTS—AWARD AND ADMINISTRATION

■ 20. The authority citation for part 22 continues to read as follows:

Authority: 5 U.S.C. 301 and 10 U.S.C. 113.

■ 21. Section 22.100 is revised to read as follows:

§ 22.100 Purpose.

This part outlines grants officers' and DoD Components' responsibilities related to the award and administration of grants and cooperative agreements.

§ 22.220 [Amended]

■ 22. Section 22.220 is amended by:

■ a. In paragraph (a)(2), removing ''Director of Defense Research and Engineering (DDR&E)'' and adding ''Assistant Secretary of Defense for Research and Engineering (ASD (R&E))'' in its place; and

■ b. In paragraph (b), removing ''DDR&E'' everywhere it appears and adding ''ASD (R&E)'' in its place.

§ 22.310 [Amended]

■ 23. Section 22.310 is amended in paragraph (b)(1)(iii) by removing ''Deputy Director, Defense Research and Engineering'' and adding ''Principal Deputy Assistant Secretary of Defense for Research and Engineering'' in its place.

§ 22.315 [Amended]

■ 24. Section 22.315 is amended in paragraph (a)(3) by removing ''*http://www.FedGrants.gov*'' and adding ''*http://www.Grants.gov*'' in its place.

§ 22.325 [Removed]

■ 25. Section 22.325 is removed.

§ 22.405 [Amended]

■ 26. Section 22.405 is amended in paragraph (b) by removing ''32 CFR 32.14, 33.12, or 34.4'' and adding ''32 CFR 34.4 for awards to for-profit organizations or as described in OMB guidance at 2 CFR 200.207 for awards to institutions of higher education, nonprofit organizations, States, local governments, and Indian tribes'' in its place.

■ 27. Section 22.420 is amended by revising paragraphs (b)(1), (c)(1) introductory text, and (c)(1)(ii) to read as follows:

§ 22.420 Pre-award procedures.

* * * * *

(b) * * *

(1) Should the grants officer in a particular case decide that a pre-award credit report, audit, or survey is needed, he or she should consult first with the appropriate grants administration office (identified in § 22.710), and decide whether pre-existing surveys or audits of the recipient, such as those of the recipient's internal control systems under OMB guidance in subpart F of 2 CFR part 200, will satisfy the need (see § 22.715(a)(1)).

* * * * *

(c) * * *

(1) Is not identified in the Exclusions area of the System for Award Management (SAM Exclusions) as being debarred, suspended, or otherwise ineligible to receive the award (SAM is at *www.sam.gov*). In addition to being a requirement for every new award, note that checking SAM Exclusions also is a requirement for subsequent obligations of additional funds, such as incremental funding actions, in the case of pre-existing awards to institutions of higher education, as described at § 22.520(e)(5). The grants officer's responsibilities include (see the OMB guidance at 2 CFR 180.425 and 180.430, as implemented by the Department of Defense at 2 CFR 1125.425) checking SAM Exclusions for:

* * * * *

(ii) A recipient's principals (as defined in OMB guidance at 2 CFR 180.995, implemented by the Department of Defense in 2 CFR part 1125), potential recipients of subawards, and principals of those potential subaward recipients, if DoD Component approval of those principals or lower-tier recipients is required under the terms of the award.

* * * * *

■ 28. Section 22.505 is revised to read as follows:

§ 22.505 Purpose.

The purpose of this subpart is to supplement other regulations that implement national policy requirements, to the extent that it is necessary to provide additional guidance to DoD grants officers.

■ 29. Section 22.510 is amended by revising paragraph (b) to read as follows:

§ 22.510 Certifications, representations, and assurances.

* * * * *

(b) *Representations and assurances.* Many national policies, either in statute or in regulation, require recipients of grants and cooperative agreements to make representations or provide assurances (rather than certifications) that they are in compliance with the policies. Part 1122 of the DoDGARs (2 CFR part 1122) provides standard wording of general award terms and conditions to address several of the more commonly applicable national policy requirements. These terms and conditions may be used to obtain required assurances and representations for national policy matters covered in part 1122 at the time of award, which is as effective and more efficient and less administratively burdensome than obtaining them at the time of each proposal. If any other assurances or representations must be obtained at the time of proposal, grants officers should use the most efficient method for doing so—*e.g.,* for a program that has a program announcement and applications using the standard application form (SF–424 [5]), the program announcement should include the texts of the required assurances and representations and clearly state that the applicant's electronic signature of the SF–424 will serve to affirm its agreement with each representation or assurance.

[5] For copies of Standard Forms listed in this part, contact regional grants administration offices of the Office of Naval Research. Addresses for the offices are listed in the ''Federal Directory of Contract Administration Services (CAS) Components,'' which may be accessed through the Defense Contract Management Agency homepage at: *http://www.dcma.mil.*

■ 30. Section 22.520 is amended by:
■ a. In paragraph (d)(2):
■ i. Removing ''Director of Defense Research and Engineering'' and adding ''Assistant Secretary of Defense for Research and Engineering'' in its place.
■ ii. Removing ''Director for Basic Sciences, ODUSD(LABS)'' and adding ''Director for Basic Research, OASD(R&E)'' in its place.
■ b. Revising paragraph (e)(1).
■ c. In paragraph (e)(5) introductory text, removing ''on the EPLS'' and adding ''in SAM Exclusions'' in its place.
■ d. In paragraph (e)(5)(i):
■ i. Removing ''check the EPLS'' and adding ''check SAM Exclusions'' in its place.
■ ii. Removing ''an institution's EPLS listing'' and adding ''an institution's SAM Exclusions listing'' in its place.
■ e. In paragraph (e)(5)(iii)(A), removing ''removed from the EPLS'' and adding ''removed from SAM Exclusions'' in its place.

The revision reads as follows:

§ 22.520 Campus access for military recruiting and Reserve Officer Training Corps (ROTC).

* * * * *

(e) * * * (1) A grants officer shall not award any grant or cooperative agreement to an institution of higher education that has been identified pursuant to the procedures of 32 CFR part 216. Such institutions are identified as being ineligible in the Exclusions area of the System for Award Management (SAM Exclusions). The exclusion types in SAM Exclusions broadly indicate the nature of an institution's ineligibility, as well as the effect of the exclusion, and the Additional Comments field may have further details about the exclusion. Note that OMB guidance in 2 CFR 180.425 and 180.430, as implemented by the Department of Defense at 2 CFR part 1125, require a grants officer to check the SAM Exclusions prior to determining that a recipient is qualified to receive an award.

* * * * *

■ 31. Section 22.605 is amended by:
■ a. Revising the introductory text and paragraphs (a) and (b).
■ b. In paragraph (c)(2), redesignating footnote number 9 as footnote number 6 and revising newly redesignated footnote 6.

The revisions read as follows:

§ 22.605 Grants officers' responsibilities.

At the time of award, the grants officer is responsible for ensuring that:

(a) The award:

(1) Conforms to the award format specified in 2 CFR part 1120.

(2) Includes appropriate general terms and conditions and any program-specific and award-specific terms and conditions needed to specify applicable administrative, national policy, and programmatic requirements. These requirements include:

(i) Federal statutes or Executive orders that apply broadly to Federal or DoD grants and cooperative agreements; and

(ii) Any requirements specific to the program, as prescribed in the program statute (see § 22.210(a)(2)), or specific to the funding, as stated in pertinent Congressional appropriations (see § 22.515).

(b) Information about the award is reported to the Defense Assistance Award Data System (DAADS), in accordance with Subpart E of 32 CFR part 21.

(c) * * *

(2) * * *

[6] See footnote 5 to § 22.510(b).

§ 22.610 [Removed]

■ 32. Section 22.610 is removed.

§ 22.700 [Amended]

■ 33. Section 22.700 is amended by removing ''32 CFR parts 32, 33, and 34'' and adding ''32 CFR part 34 and subchapter D of 2 CFR chapter XI'' in its place.
■ 34. Section 22.710 is amended by:
■ a. In the introductory text, redesignating footnote number 10 as footnote number 7 and revising newly redesignated footnote 7;
■ b. In paragraph (a)(1):
■ i. Removing ''the university cost principles in OMB Circular A–21'' and adding ''the cost principles in subpart E of 2 CFR part 200'' in its place;
■ ii. Removing footnote 11;
■ c. In paragraph (a)(2):
■ i. Removing ''OMB Circular A–122'' and adding ''subpart E of 2 CFR part 200'' in its place;
■ ii. Removing footnote 12;
■ d. In paragraph (b) introductory text, removing ''Defense Contract Management Command'' and adding ''Defense Contract Management Agency'' in its place;
■ e. In paragraph (b)(2), removing ''Attachment C of OMB Circular A–122'' and adding ''appendix VIII to 2 CFR part 200'' in its place; and
■ f. In paragraph (b)(3), removing ''OMB Circular A–122'' and adding ''subpart E of 2 CFR part 200'' in its place.

The revision reads as follows:

§ 22.710 Assignment of grants administration offices.

* * * * *

[7] The ''Federal Directory of Contract Administration Services (CAS) Components'' may be accessed through the Defense Contract Management Agency homepage at *http://www.dcma.mil.*

* * * * *

■ 35. Section 22.715 is amended by:
■ a. In paragraph (a)(1) and paragraph (a)(3) introductory text, removing ''OMB Circular A–133'' and adding ''subpart F of 2 CFR part 200'' in its place.
■ b. In paragraph (a)(3)(iii):
■ i. Removing ''OMB Circular A–133, as implemented at 32 CFR 32.26 and 33.26'' and adding ''subpart F of 2 CFR part 200, as implemented at subpart E of 2 CFR part 1128'' in its place.
■ ii. Removing ''400 Army-Navy Drive, Arlington, VA 22202'' and adding ''4800 Mark Center Drive, Alexandria, VA 22350–1500'' in its place.
■ c. In paragraph (a)(4):
■ i. Removing ''DoD Directive 7640.2'' and adding ''DoD Instruction 7640.02'' in its place.

■ ii. Removing ''DoD Directive 7600.10'' and adding ''DoD Instruction 7600.10'' in its place.
■ iii. Redesignating footnote numbers 13 and 14 as footnote numbers 8 and 9, respectively, and revising newly redesignated footnote 9.

§ 22.715 Grants administration office functions.

* * * * *

(a) * * *
(4) * * *

[9] See footnote 8 to this section.

* * * * *

■ 36. Section 22.805 is amended by revising the introductory text and paragraph (a) to read as follows:

§ 22.805 Post-award requirements in other parts.

Grants officers responsible for post-award administration of grants and cooperative agreements shall administer such awards in accordance with the following parts of the DoDGARs, as supplemented by this subpart:

(a) *Awards to domestic recipients.* Standard administrative requirements for grants and cooperative agreements with domestic recipients are specified in other parts of the DoDGARs, as follows:

(1) For awards to domestic institutions of higher education, nonprofit organizations, States, local governments, and Indian tribes, requirements are specified in subchapter D of 2 CFR chapter XI.

(2) For awards to domestic for-profit organizations, requirements are specified in 32 CFR part 34.

* * * * *

■ 37. Section 22.810 is amended by:
■ a. Revising paragraphs (b)(1) and (2).
■ b. Removing and reserving paragraph (c)(1).
■ c. In paragraph (c)(3)(i), redesignating footnote number 15 as footnote number 10 and revising newly redesignated footnote 10.
■ d. In paragraph (c)(3)(iii), removing ''ensure that the recipients' Taxpayer Identification Number (TIN)'' and adding ''ensure that, for recipients not required to register in the System for Award Management, the recipients' Taxpayer Identification Number (TIN)'' in its place.

The revisions read as follows:

§ 22.810 Payments.

* * * * *

(b) * * * (1) It is Governmentwide policy to minimize the time elapsing between any payment of funds to a recipient and the recipient's disbursement of the funds for program purposes.

(2) It also is a Governmentwide requirement to use electronic funds transfer (EFT) in the payment of any grant unless the recipient has obtained a waiver in accordance with Department of the Treasury regulations at 31 CFR part 208. As a matter of DoD policy, this requirement applies to cooperative agreements, as well as grants. Within the Department of Defense, the Defense Finance and Accounting Service implements this EFT requirement, and grants officers have collateral responsibilities at the time of award, as described in § 22.605(c), and in post-award administration, as described in paragraph (c)(3)(iv) of this section.

* * * * *

(c) * * *
(3) * * *
(i) * * *

[10] See footnote 8 to § 22.715(a)(4).

* * * * *

■ 38. Section 22.825 is amended by:
■ a. Revising paragraph (a).
■ b. In paragraph (b)(2)(ii), removing ''OMB Circular A–133, where that Circular is applicable'' and adding ''OMB guidance in subpart F of 2 CFR part 200, where that guidance is applicable'' in its place.

The revision reads as follows:

§ 22.825 Closeout audits.

(a) *Purpose.* This section establishes DoD policy for obtaining audits at closeout of individual grants and cooperative agreements.

* * * * *

Appendix B to Part 22—[Removed]

■ 39. Appendix B to part 22 is removed.

Appendix C to Part 22—[Removed]

■ 40. Appendix C to part 22 is removed.

PART 32—[REMOVED]

■ 41. Under the authority of 5 U.S.C. 301 and 10 U.S.C. 113, part 32 is removed.

PART 33—[REMOVED]

■ 42. Under the authority of 5 U.S.C. 301 and 10 U.S.C. 113, part 33 is removed.

PART 34—ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND AGREEMENTS WITH FOR–PROFIT ORGANIZATIONS

■ 43. The authority citation for part 34 continues to read as follows:

Authority: 5 U.S.C. 301 and 10 U.S.C. 113.

§ 34.1 [Amended]

■ 44. Section 34.1 is amended in paragraph (b)(2)(ii) by removing ''(*e.g.,* 32 CFR part 33 specifies requirements for subrecipients that are States or local governments, and 32 CFR part 32 contains requirements for universities or other nonprofit organizations)''.
■ 45. Section 34.2 is amended by revising the definition of ''Small award'' to read as follows:

§ 34.2 Definitions.

* * * * *

Small award. See the definition for this term in 2 CFR part 1108.

* * * * *

§ 34.3 [Amended]

■ 46. Section 34.3 is amended in paragraph (c) by removing ''Director, Defense Research and Engineering'' and adding ''Assistant Secretary of Defense for Research and Engineering'' in its place.
■ 47. Section 34.12 is amended in paragraph (d) by revising footnote 1 to read as follows:

§ 34.12 Payment.

* * * * *

(d) * * *

[1] For copies of Standard Forms listed in this part, contact regional grants administration offices of the Office of Naval Research. Addresses for the offices are listed in the ''Federal Directory of Contract Administration Services (CAS) Components,'' which is available through the ''CAS Directory'' link at the Defense Contract Management Agency homepage (*http://www.dcma.mil*).

* * * * *

§ 34.15 [Amended]

■ 48. Section 34.15 is amended in paragraph (c)(3)(i) by removing ''$100,000'' and adding ''the simplified acquisition threshold'' in its place.

§ 34.16 [Amended]

■ 49. Section 34.16 is amended by:
■ a. In paragraph (a), removing ''$500,000'' and adding ''$750,000'' in its place; and
■ b. In paragraph (d)(2)(ii):
■ i. In the second sentence, removing ''Defense Contract Management Command (DCMC)'' and adding ''Defense Contract Management Agency (DCMA)'' in its place; and
■ ii. In the third sentence, removing ''DCMC'' and adding ''DCMA'' in its place.
■ 50. Section 34.17 is amended by revising paragraph (b) to read as follows:

§ 34.17 Allowable costs.

* * * * *

(b) *Other types of organizations.* Allowability of costs incurred by other types of organizations that may be subrecipients under a prime award to a for-profit organization is determined as follows:

(1) *Institutions of higher education, nonprofit organizations, States, local governments, and Indian tribes.* Allowability is determined in accordance with the cost principles in subpart E of OMB guidance in 2 CFR part 200. Note that 2 CFR 200.401(c) provides that a nonprofit organization listed in appendix VIII to 2 CFR part 200 is subject to the FAR and DFARS cost principles specified in paragraph (a)(1) of this section for for-profit organizations.

(2) *Hospitals.* Allowability is determined in accordance with the cost principles identified in appendix IX to 2 CFR part 200 (currently 45 CFR part 75).

§ 34.41 [Amended]

■ 51. In § 34.41 amend the introductory text by removing ''32 CFR 32.51 and 32.52'' and adding ''subparts A and B of 2 CFR part 1134'' in its place.

■ 52. Appendix A to part 34 is amended by:

■ a. In paragraph 2, removing ''*40 U.S.C. 276c*'' and adding ''*40 U.S.C. 3145*'' in its place.

■ b. In paragraph 3, removing ''40 U.S.C. 327–333'' in both places it appears and adding ''40 U.S.C., chapter 37'' in their places.

■ c. In paragraph 5, removing ''$100,000'' and adding ''$150,000'' in its place.

■ d. Revising paragraph 7.

■ e. Adding paragraphs 8 through 10.

The revision and additions read as follows:

Appendix A to Part 34—Contract Provisions

* * * * *

7. *Debarment and Suspension (E.O.s 12549 and 12689)*—A contract award with an amount expected to equal or exceed $25,000 and certain other contract awards (see 2 CFR 1125.220, which implements OMB guidance at 2 CFR 180.220) shall not be made to parties identified in the Exclusions area of the System for Award Management (SAM Exclusions) as being currently debarred, suspended, or otherwise excluded. This restriction is in accordance with the DoD adoption at 2 CFR part 1125 of the OMB guidance implementing E.O.s 12549 (3 CFR, 1986 Comp., p. 189) and 12689 (3 CFR, 1989 Comp., p. 235), ''Debarment and Suspension.''

8. *Wage Rate Requirements (Construction), formerly the Davis Bacon Act.* When required by Federal program legislation, you must take the following actions with respect to each construction contract for more than $2,000 to be awarded using funding provided under this award:

a. Place in the solicitation under which the contract will be awarded a copy of the current prevailing wage determination issued by the Department of Labor;

b. Condition the decision to award the contract upon the contractor's acceptance of that prevailing wage determination;

c. Include in the contract the clauses specified at 29 CFR 5.5(a) in Department of Labor regulations (29 CFR part 5, ''Labor Standards Provisions Applicable to Contracts Governing Federally Financed and Assisted Construction'') to require the contractor's compliance with the Wage Rate Requirements (Construction), as amended (40 U.S.C. 3141–44, 3146, and 3147); and

d. Report all suspected or reported violations to the award administration office identified in this award.

9. *Fly America requirements.* In each contract under which funds provided under this award might be used to participate in costs of international air travel or transportation for people or property, you must include a clause to require the contractor to:

a. Comply with the International Air Transportation Fair Competitive Practices Act of 1974 (49 U.S.C. 40118, also known as the ''Fly America'' Act), as implemented by the General Services Administration at 41 CFR 301–10.131 through 301–10.143, which provides that U.S Government financed international air travel and transportation of personal effects or property must use a U.S. Flag air carrier or be performed under a cost sharing arrangement with a U.S. carrier, if such service is available; and

b. Include the requirements of the Fly America Act in all subcontracts that might involve international air transportation.

10. *Cargo preference for United States flag vessels.* In each contract under which equipment, material, or commodities may be shipped by oceangoing vessels, you must include the clause specified in Department of Transportation regulations at 46 CFR 381.7(b) to require that at least 50 percent of equipment, materials or commodities purchased or otherwise obtained with Federal funds under this award, and transported by ocean vessel, be transported on privately owned U.S. flag commercial vessels, if available.

PART 37—TECHNOLOGY INVESTMENT AGREEMENTS

■ 53. The authority citation for part 37 continues to read as follows:

Authority: 5 U.S.C. 301 and 10 U.S.C. 113.

■ 54. Section 37.130 is amended by revising paragraph (c) to read as follows:

§ 37.130 Which other parts of the DoD Grant and Agreement Regulations apply to TIAs?

* * * * *

(c) Portions of other DoDGARs parts apply to TIAs only as cited by reference in this part.

§ 37.225 [Amended]

■ 55. In § 37.225 amend the introductory text by removing ''In accordance with § 37.1030, you will report your answers to these questions to help the DoD measure the Department-wide benefits of using TIAs and meet requirements to report to the Congress.'' and adding ''In accordance with § 37.1020, you must document your answers to these questions in the award file.'' in its place.

■ 56. Section 37.620 is revised to read as follows:

§ 37.620 What financial management standards do I include for participants that are nonprofit?

So as not to force system changes for any State, local government, institution of higher education, or other nonprofit organization, your expenditure-based TIA's requirements for the financial management system of any nonprofit participant are the same as those that apply to the participant's other Federal assistance awards.

■ 57. Section 37.635 is revised to read as follows:

§ 37.635 What cost principles do I require a nonprofit participant to use?

So as not to force financial system changes for any nonprofit participant, your expenditure-based TIA will provide that costs to be charged to the research project by any nonprofit participant must be determined to be allowable in accordance with:

(a) Subpart E of OMB guidance in 2 CFR part 200, if the participant is a State, local government, Indian tribe, institution of higher education, or nonprofit organization. In conformance with 2 CFR 200.401(c) of that OMB guidance, a nonprofit organization listed in appendix VIII to 2 CFR part 200 is subject to the cost principles in the Federal Acquisition Regulation (48 CFR subpart 31.2) and Defense Federal Acquisition Regulation Supplement (48 CFR subpart 231.2).

(b) The cost principles identified in appendix IX to the OMB guidance in 2 CFR part 200 (see 45 CFR part 75), if the participant is a hospital.

§ 37.645 [Amended]

■ 58. Section 37.645 is amended in paragraph (b)(1) by removing ''$500,000'' and adding ''$750,000'' in its place.

§ 37.650 [Amended]

■ 59. Section 37.650 is amended in paragraph (c) by removing ''400 Army-Navy Drive, Arlington, VA 22202'' and adding ''4800 Mark Center Drive, Alexandria, VA 22350–1500'' in its place.

§ 37.660 [Amended]

■ 60. Section 37.660 is amended by redesignating footnote number 4 as footnote number 2.

■ 61. Section 37.665 is revised to read as follows:

§ 37.665 Must I require nonprofit participants to have periodic audits?

Yes, expenditure-based TIAs are assistance instruments subject to the Single Audit Act (31 U.S.C. 7501–7507), so nonprofit participants are subject to their usual requirements under that Act, as implemented by subpart F of 2 CFR part 200. Specifically, the requirements are the same as those in subpart E of 2 CFR part 1128 for grants and cooperative agreements to institutions of higher education, nonprofit organizations, States, local governments, and Indian tribes. Note that those requirements also apply to Federally Funded Research and Development Centers (FFRDCs) and other Government-owned, Contractor-Operated (GOCO) facilities administered by nonprofit organizations, because nonprofit FFRDCs and GOCOs are subject to the Single Audit Act.

§ 37.675 [Removed]

■ 62. Section 37.675 is removed.

§ 37.680 [Removed]

■ 63. Section 37.680 is removed.

■ 64. Section 37.690 is revised to read as follows:

§ 37.690 How are nonprofit participants to manage real property and equipment?

For nonprofit participants, your TIA's requirements for vesting of title, use, management, and disposition of real property or equipment acquired under the award are the same as those that apply to the participant's other Federal assistance awards.

■ 65. Section 37.695 is amended by:

■ a. Revising paragraph (b); and

■ b. Removing paragraph (c).

The revision reads as follows:

§ 37.695 What are the requirements for Federally owned property?

* * * * *

(b) The requirements that apply to the participant's other Federal awards, if it is an entity other than a for-profit firm. If the other Federal awards of a participant that is a GOCO or FFRDC administered by a nonprofit organization are procurement contracts, it is appropriate for you to specify the same property standards that apply to those Federal procurement contracts.

■ 66. Section 37.710 is amended by revising paragraph (a) to read as follows:

§ 37.710 What standards do I include for purchasing systems of nonprofit organizations?

(a) So as not to force system changes for any nonprofit participant, your expenditure-based TIA will provide that each nonprofit participant's purchasing system comply with standards that conform as much as practicable with requirements that apply to the participant's other Federal awards.

* * * * *

§ 37.875 [Amended]

■ 67. Section 37.875 is amended by redesignating footnote number 6 as footnote number 3.

■ 68. Section 37.880 is revised to read as follows:

§ 37.880 What requirements must I include for periodic reports on program and business status?

Your TIA must include requirements that, as a minimum, include periodic reports addressing program and, if it is an expenditure-based award, business status. You must require submission of the reports at least annually, and you may require submission as frequently as quarterly (this does not preclude a recipient from electing to submit more frequently than quarterly the financial information that is required to process payment requests if the award is an expenditure-based TIA that uses reimbursement or advance payments under § 37.810(a)). The requirements for the content of the reports are as follows:

(a) The program portions of the reports must address progress toward achieving program performance goals, including current issues, problems, or developments.

(b) The business portions of the reports, applicable only to expenditure-based awards, must provide summarized details on the status of resources (federal funds and non-federal cost sharing), including an accounting of expenditures for the period covered by the report. The report should compare the resource status with any payment and expenditure schedules or plans provided in the original award; explain any major deviations from those schedules; and discuss actions that will be taken to address the deviations. You may require a recipient to separately identify in these reports the expenditures for each participant in a consortium and for each programmatic milestone or task, if you, after consulting with the program official, judge that those additional details are needed for good stewardship.

■ 69. Section 37.890 is amended by redesignating footnote number 7 as footnote number 4 and revising newly redesignated footnote 4 to read as follows:

§ 37.890 Must I require a final performance report?

* * * * *

[4] See footnote 3 to § 37.875(b)(1).

§ 37.895 [Amended]

■ 70. Section 37.895 is amended by redesignating footnote number 8 as footnote number 5.

■ 71. Section 37.920 is revised to read as follows:

§ 37.920 What requirement for access to a nonprofit participant's records do I include in a TIA?

Your TIA must include for any nonprofit participant, including any FFRDC or GOCO administered by a nonprofit organization, the standard access-to-records requirement that subpart B of 2 CFR part 1136 specifies in Section F of OAR Article II (the standard wording for Section F of OAR Article II is provided in appendix B to 2 CFR part 1136).

§ 37.1000 [Amended]

■ 72. In § 37.1000 amend paragraph (c) by removing ''§§ 37.1025 through 37.1035'' and adding ''§ 37.1025'' in its place.

§ 37.1010 [Amended]

■ 73. In § 37.1010 amend paragraph (l) by removing ''and § 37.680.''

§ 37.1030 [Removed]

■ 74. Section 37.1030 is removed.

§ 37.1035 [Removed]

■ 75. Section 37.1035 is removed.

§ 37.1040 [Removed]

■ 76. Section 37.1040 is removed.

§ 37.1100 [Amended]

■ 77. Section 37.1100 is amended by removing paragraph (g).

■ 78. Appendix D to part 37 is amended by revising Sections B and C to read as follows:

Appendix D to Part 37—What Common National Policy Requirements May Apply and Need to be Included in TIAs?

* * * * *

B. Assurances That Apply to All TIAs

DoD policy is to use a certification, as described in the preceding paragraph, only for a national policy requirement that specifically requires one. The usual approach to communicating other national policy requirements to recipients is to incorporate them as award terms or conditions, or assurances. Part 1122 of 2 CFR lists national policy requirements that commonly apply to DoD grants and cooperative agreements. It also has standard wording of general terms and conditions to incorporate the requirements in award documents. Of those requirements, the following six apply to all TIAs. (Note that TIAs must generally use the standard wording in 2 CFR part 1122 for the terms and conditions of these six requirements, but not the standard format.)

1. Requirements concerning debarment and suspension in the OMB guidance in 2 CFR part 180, as implemented by the DoD at 2 CFR part 1125. The requirements apply to all nonprocurement transactions.

2. Requirements concerning drug-free workplace in the Governmentwide common rule that the DoD has codified at 32 CFR part 26. The requirements apply to all financial assistance.

3. Prohibitions on discrimination on the basis of race, color, or national origin in Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d, *et seq.*), as implemented by DoD regulations at 32 CFR part 195. These apply to all financial assistance. They require recipients to flow down the prohibitions to any subrecipients performing a part of the substantive research program (as opposed to suppliers from whom recipients purchase goods or services).

4. Prohibitions on discrimination on the basis of age, in the Age Discrimination Act of 1975 (42 U.S.C. 6101, *et seq.*). They apply to all financial assistance and require flow down to subrecipients, as implemented by Department of Health and Human Services regulations at 45 CFR part 90.

5. Prohibitions on discrimination on the basis of handicap, in section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), as implemented by Department of Justice regulations at 28 CFR part 41 and DoD regulations at 32 CFR part 56. They apply to all financial assistance recipients and require flow down to subrecipients.

6. Preferences for use of U.S.-flag air carriers in the International Air Transportation Fair Competitive Practices Act of 1974 (49 U.S.C. 40118), commonly referred to as the ''Fly America Act,'' and implementing regulations at 41 CFR 301–10.131 through 301–10.143, which apply to uses of U.S. Government funds.

C. Other National Policy Requirements

Additional national policy requirements may apply in certain circumstances, as follows:

1. If construction work is to be done under a TIA or its subawards, it is subject to the prohibitions in Executive Order 11246, as amended, on discrimination on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin. You must include the clause provided in 41 CFR 60–1.4(b) in any ''federally assisted construction contract'' (as defined in 41 CFR 60–1.3) under this award unless provisions of 41 CFR part 60–1 exempt the contract from the requirement. The clause will require the contractor to comply with equal opportunity requirements in 41 CFR chapter 60.

2. If the research involves human subjects or animals, it is subject to the applicable requirements identified in appendix C of 2 CFR part 1122.

3. If the research involves actions that may affect the human environment, it is subject to the requirements of the National Environmental Policy Act in paragraph A.4.a of NP Article II, which is found in appendix B of 2 CFR part 1122. It also may be subject to one or more of the other requirements in paragraphs A.4.b through A.4.f, A.5, and A.6 of NP Article II, which concern flood-prone areas, coastal zones, coastal barriers, wild and scenic rivers, underground sources of drinking water, endangered species, and marine mammal protection.

4. If the project may impact any property listed or eligible for listing on the National Register of Historic Places, it is subject to the National Historic Preservation Act of 1966 (54 U.S.C. 306108) as specified in paragraph 11.a of NP Article IV, which is found in appendix D of 2 CFR part 1122.

5. If the project has potential under this award for irreparable loss or destruction of significant scientific, prehistorical, historical, or archeological data, it is subject to the Archaeological and Historic Preservation Act of 1974 (54 U.S.C. Chapter 3125) as specified in paragraph 11.b of NP Article IV, which is found in appendix D of 2 CFR part 1122.

■ 79. Appendix E to part 37 is revised to read as follows:

Appendix E to Part 37—What Provisions May A Participant Need to Include When Purchasing Goods or Services Under a TIA?

A. As discussed in § 37.705, you must inform recipients of any national policy requirements that flow down to their purchases of goods or services (*e.g.,* supplies or equipment) under their TIAs. Note that purchases of goods or services differ from subawards, which are for substantive research program performance.

B. Appendix A to 32 CFR part 34 lists ten national policy requirements that commonly apply to firms' purchases under grants or cooperative agreements. Of those ten, two that apply to all recipients' purchases under TIAs are:

1. *Byrd Anti-Lobbying Amendment (31 U.S.C. 1352).* A contractor submitting a bid to the recipient for a contract award of $100,000 or more must file a certification with the recipient that it has not and will not use Federal appropriations for certain lobbying purposes. The contractor also must disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. For further details, see 32 CFR part 28, the DoD's codification of the Governmentwide common rule implementing this amendment.

2. *Debarment and suspension.* A contract award with an amount expected to equal or exceed $25,000 and certain other contract awards (see 2 CFR 1125.220, which implements OMB guidance at 2 CFR 180.220) shall not be made to parties identified in the Exclusions area of the System for Award Management (SAM Exclusions) as being currently debarred, suspended, or otherwise excluded. This restriction is in accordance with the DoD adoption at 2 CFR part 1125 of the OMB guidance implementing E.O.s 12549 (3 CFR, 1986 Comp., p. 189) and 12689 (3 CFR, 1989 Comp., p. 235), ''Debarment and Suspension.''

C. The following requirements apply to recipient's purchases under TIAs in the situations specified below:

1. *Equal Employment Opportunity.* Although construction work should happen rarely under a TIA, the agreements officer in that case should inform the recipient that Department of Labor regulations at 41 CFR 60–1.4(b) prescribe a clause that must be incorporated into recipients' and subrecipients' construction contracts under their awards and subawards, respectively. Further details are provided in appendix B to part 22 of the DoDGARs (32 CFR part 22), in section b. under the heading ''Nondiscrimination.'' any ''federally assisted construction contract'' (as defined in 41 CFR 60–1.3) under the award unless provisions of 41 CFR part 60–1 exempt the contract from the requirement. The clause will require the contractor to comply with equal opportunity requirements in 41 CFR chapter 60.

2. *Wage Rate Requirements (Construction), formerly the Davis Bacon Act.* When required by Federal program legislation, you must take the following actions with respect to each construction contract for more than $2,000 to be awarded using funding provided under this award:

a. Place in the solicitation under which the contract will be awarded a copy of the current prevailing wage determination issued by the Department of Labor;

b. Condition the decision to award the contract upon the contractor's acceptance of that prevailing wage determination;

c. Include in the contract the clauses specified at 29 CFR 5.5(a) in Department of Labor regulations (29 CFR part 5, ''Labor Standards Provisions Applicable to Contracts Governing Federally Financed and Assisted Construction'') to require the contractor's compliance with the Wage Rate Requirements (Construction), as amended (40 U.S.C. 3141–44, 3146, and 3147); and

d. Report all suspected or reported violations to the award administration office identified in this award.

3. *Fly America requirements.* In each contract under which funds provided under this award might be used to participate in costs of international air travel or

transportation for people or property, you must include a clause to require the contractor to:

a. Comply with the International Air Transportation Fair Competitive Practices Act of 1974 (49 U.S.C. 40118, also known as the ''Fly America'' Act), as implemented by the General Services Administration at 41 CFR 301–10.131 through 301–10.143, which provides that U.S Government financed international air travel and transportation of personal effects or property must use a U.S. Flag air carrier or be performed under a cost sharing arrangement with a U.S. carrier, if such service is available; and

b. Include the requirements of the Fly America Act in all subcontracts that might involve international air transportation.

4. *Cargo preference for United States flag vessels.* In each contract under which equipment, material, or commodities may be shipped by oceangoing vessels, you must include the clause specified in Department of Transportation regulations at 46 CFR 381.7(b) to require that at least 50 percent of equipment, materials or commodities purchased or otherwise obtained with Federal funds under this award, and transported by ocean vessel, be transported on privately owned U.S. flag commercial vessels, if available.

Dated: July 24, 2020.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

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Part III

Securities and Exchange Commission

Self-Regulatory Organizations; BOX Exchange LLC; Notice of Filing of Amendment No. 1 and Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change, as Modified by Amendment No. 1, To Adopt Rules Governing the Trading of Equity Securities on the Exchange Through a Facility of the Exchange Known as the Boston Security Token Exchange; Notice

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–89536; File No. SR–BOX–2020–14]

Self-Regulatory Organizations; BOX Exchange LLC; Notice of Filing of Amendment No. 1 and Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change, as Modified by Amendment No. 1, To Adopt Rules Governing the Trading of Equity Securities on the Exchange Through a Facility of the Exchange Known as the Boston Security Token Exchange

August 12, 2020.

On May 21, 2020, BOX Exchange LLC (''Exchange'' or ''BOX'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to adopt rules governing the listing and trading of equity securities that would be NMS stocks on the Exchange through a facility of the Exchange known as the Boston Security Token Exchange LLC (''BSTX''). The proposed rule change was published for comment in the **Federal Register** on June 1, 2020.[3] On July 16, 2020, pursuant to Section 19(b)(2) of the Act,[4] the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.[5] On July 31, 2020, the Exchange filed Amendment No. 1 to the proposed rule change, which replaced and superseded the proposed rule change as originally filed.[6]

In Amendment No. 1 to the proposed rule change, the Exchange states that the proposed rule change was previously filed with the Commission as SR–BOX–2019–19, which the Exchange amended twice, and that the current proposed rule change, SR–BOX–2020–14, is ''substantively identical'' to previously-filed proposed rule change, SR–BOX–2019–19, as modified by Amendment No. 2 thereto.[7] SR–BOX–2019–19, as modified by Amendment 2 thereto, was published for comment in the **Federal Register** on March 6, 2020.[8] The Commission received comments on the substance of SR–BOX–2019–19, as well as responses submitted by BOX.[9] BOX withdrew proposed rule change SR–BOX–2019–19 on May 12, 2020.[10] As applicable and discussed below, the Commission will consider comments submitted on SR–BOX–2019–19 and SR–BOX–2020–14 in its review of SR–BOX–2020–14.

The Commission is publishing this notice and order to solicit comments on the proposed rule change, as modified by Amendment No. 1, from interested persons and to institute proceedings pursuant to Section 19(b)(2)(B) of the Act [11] to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.

I. The Exchange's Description of the Proposed Rule Change, as Modified by Amendment No. 1

Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 as amended (''Exchange Act''),[12] BOX Exchange LLC (''BOX or the ''Exchange'') is filing with the Securities and Exchange Commission (''SEC'' or ''Commission'') a proposed rule change to adopt rules to govern the trading of equity securities on the Exchange through a facility of the Exchange known as Boston Security Token Exchange LLC (''BSTX''). As described more fully below, BSTX would operate a fully automated, price/time priority execution system for the trading of ''Securities,'' which would be equity securities that meet BSTX listing standards and for which ancillary records of ownership would be able to be created and maintained using distributed ledger (or ''blockchain'') technology. The proposed additions to the Exchange's Rules setting forth new Rule Series 17000–28000 are included as Exhibit 5A. All text set forth in Exhibit 5A would be added to the Exchange's rules and therefore underlining of the text is omitted to improve readability. Forms proposed to be used in connection with the proposed rule change, such as the application to become a BSTX Participant, are included as Exhibits 3A through 3N.

In addition, the Exchange proposes to make certain amendments to several existing BOX Rules to facilitate trading on BSTX. The proposed changes to the existing BOX Rules would not change the core purpose of the subject Rules or the functionality of other BOX trading systems and facilities. Specifically, the Exchange is seeking to amend BOX Rules 100, 2020, 2060, 3180, 7130, 7150, 7230, 7245, IM–8050–3, 11010, 11030, 12030, and 12140. These proposed changes are set forth in Exhibit 5B. Material proposed to be added to the Rule as currently in effect is underlined

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 88946 (May 26, 2020), 85 FR 33454 (June 1, 2020) (''Notice''). Comment received on the Notice is available on the Commission's website at: *https://www.sec.gov/comments/sr-box-2020-14/srbox202014.htm.*

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 89328 (July 16, 2020), 85 FR 44338 (July 22, 2020). The Commission designated August 30, 2020, as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

[6] In Amendment No. 1, the Exchange revised the proposal to: (i) Change the name used to refer to BSTX-listed securities from ''security tokens'' to ''Securities''; (ii) eliminate the proposed requirement for trades on the Exchange to settle one business day after the trade date (''T+1''), which is not the settlement cycle for NMS stock; (iii) add proposed rule text that the Exchange describes as containing measures to ensure the accuracy of end-of-day security token balance reports; (iv) add proposed rule text specifying that the time by which Exchange members must report end-of-day security token balances to the Exchange will be set forth by the Exchange via regulatory circular; (v) provide additional description of several aspects of the proposal, including end-of-day security token balance reporting and implications of the trading of BSTX-listed security tokens on other national securities exchanges on the end-of-day reporting process; and (vi) make technical and conforming changes. Amendment No. 1 is available on the Commission's website at: *https://www.sec.gov/comments/sr-box-2020-14/srbox202014-7570237-222233.pdf.*

On July 31, 2020, the Exchange also submitted a letter to the Commission requesting that the Commission concur with Exchange's conclusion that members that enter orders into BSTX's trading system satisfy the conditions of Rule 11a2–2(T) under the Act (17 CFR 240.11a2–2(T)). *See* Letter from Lisa Fall, President, BOX, to Vanessa Countryman, Secretary, Commission, and Tyler Raimo, Assistant Director, Division of Trading and Markets, Commission dated January 31, 2020, available at *https://www.sec.gov/comments/sr-box-2020-14/srbox202014-7506169-221931.pdf.*

[7] *See* Amendment No. 1, *supra* note 6, at 5, n.3.

[8] *See* Securities Exchange Act Release No. 88300 (February 28, 2020), 85 FR 13242 (March 6, 2020) (Notice of Filing of Amendment No. 2 to Proposed Rule Change). *See also* Securities Exchange Act Release Nos. 87287 (October 11, 2019), 84 FR 56022 (October 18, 2019) (Notice of Filing of Proposed Rule Change) (noticing SR–BOX–2019–19 as originally filed); and 88002 (January 16, 2020), 85 FR 4040 (January 23, 2020) (Notice of Filing of Amendment No. 1 and Order Instituting Proceedings) (noticing Amendment No. 1 to SR–BOX–2019–19 and instituting proceedings to determine whether to disapprove the proposed rule change as modified by Amendment No. 1). The only differences between SR–BOX–2019–19, as modified by Amendment No. 2, and SR–BOX–2020–14 relate to: Removal of references to Amendment No. 2; modification of a reference to Exhibit 5 to the filing; modification of the description of BSTX ownership interests to reflect the addition of a small percentage (less than 10%) of non-voting economic interest-holders; updating a reference to a related filing (SR–BOX–2019–37, which was also withdrawn and refiled as SR–BOX–2020–16); corrections to citations; and grammatical corrections.

[9] Comments on SR–BOX–2019–19 can be found at: *https://www.sec.gov/comments/sr-box-2019-19/srbox201919.htm.* These comments also include response letters from the Exchange.

[10] *See* Securities Exchange Act Release No. 89018 (June 4, 2020), 85 FR 35458 (June 10, 2020) (Notice of Withdrawal of a Proposed Rule Change).

[11] 15 U.S.C. 78s(b)(2)(B).

[12] 15 U.S.C. 78s(b)(1).

and material proposed to be deleted is bracketed.

All capitalized terms not defined herein have the same meaning as set forth in the Exchange's Rules.[13]

The text of the proposed rule change is available from the principal office of the Exchange, at the Commission's Public Reference Room and also on the Exchange's internet website at *http://boxoptions.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and the 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 these statements may be examined at the places specified in Item IV below. The self-regulatory organization 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is proposing to adopt a series of rules to govern the trading of equity securities through a facility of the Exchange known as BSTX and make certain amendments to the existing BOX rules to facilitate trading on BSTX.[14] As described more fully below, BSTX would operate a fully automated, price/time priority execution system (''BSTX System'') for the trading of securities that will be considered ''Securities'' under the proposed rules. The ''Securities'' [15] under the proposed rules would be equity securities that meet BSTX listing standards, and that trade on the BSTX System, and for which ancillary records of ownership would be able to be created and maintained using distributed ledger technology. These ancillary records of ownership that would be maintained using distributed ledger technology would not be official records of Security ownership. Instead, as described further herein, such records would be ancillary records that would reflect certain end-of-day Security position balance information as reported by market participants. All BOX Participants would be eligible to participate in BSTX provided that they become a BSTX Participant pursuant to the proposed rules. Under the proposed rules, BSTX would serve as the listing market for eligible companies that wish to issue their registered securities as Securities. Securities would trade as NMS stock.[16] The Exchange is not proposing rules that would support its extension of unlisted trading privileges to other NMS stock, and accordingly the Exchange does not intend to extend any such unlisted trading privileges in connection with this proposal. The Exchange would therefore only trade Securities listed on BSTX unless and until it proposes and receives Commission approval for rules that would support trading in other types of securities, including through any extension of unlisted trading privileges to other NMS stock. A guide to the structure of the proposed rule change is described immediately below.

I. Guide to the Scope of the Proposed Rule Change

The proposal for trading of securities that will be ''Securities'' (under the BSTX Rules, as defined below) through BSTX generally involves changes to existing BOX Rules and new BOX Rules pertaining specifically to BSTX (''BSTX Rules''). In addition, BSTX corporate governance documents as well as certain discrete changes to existing BOX corporate governance documents are necessary, which the Exchange has submitted to the Commission through separate proposed rule changes. To support the trading of Securities through BSTX, certain conforming changes are proposed to existing BOX Rules and entirely new BSTX Rules are also proposed as Rule Series 17000 through 28000.[17] Each of those new Rule Series and the provisions thereunder are described in greater detail below. Where the BSTX Rules are based on existing rules of another national securities exchange, the source rule from the relevant exchange is noted along with a discussion of notable differences between the source rule and the proposed BSTX Rule. The proposed BSTX Rules are addressed in Part III below and they generally cover the following areas:

- Section 17000—General Provisions of BSTX;
- Section 18000—Participation on BSTX;
- Section 19000—Business Conduct for BSTX Participants;
- Section 20000—Financial and Operational Rules for BSTX Participants;
- Section 21000—Supervision;
- Section 22000—Miscellaneous Provisions;
- Section 23000—Trading Practice Rules;
- Section 24000—Discipline and Summary Suspension;
- Section 25000—Trading Rules;
- Section 25200—Market Making on BSTX;
- Section 26000—BSTX Listing Rules;
- Section 27000—Suspension and Delisting;
- Section 27100—Guide to Filing Requirements;
- Section 27200—Procedures for Review of Exchange Listing Determinations; and
- Section 28000—Dues, Fees, Assessments and Other Charges.

II. Overview of BSTX and Considerations Related to the Listing, Trading and Clearance and Settlement of Securities

A. The Joint Venture and Ownership of BSTX

On June 19, 2018, t0.com Inc. (''tZERO'') and BOX Digital Markets

[13] The Exchange's Rules can be found on the Exchange's public website: *https://boxoptions.com/regulatory/rulebook-filings/.*

[14] The Exchange notes that the proposed rule change was previously filed with the Commission as SR–BOX–2019–19, Exchange Act Release No. 87287 (Oct. 11, 2019), 84 FR 56002 (October 18, 2019) and was amended twice. See Exchange Act Release No. 88634 (Apr. 14, 2020), 85 FR 21906 (Apr. 20, 2020). This proposal (SR–BOX–2020–14) is substantively identical to SR–BOX–2019–19, as amended. The Exchange proposes an amendment to SR–BOX–2020–14 to address certain additional comments received from Commission staff as well as to address the comment letter received on the proposal. *See* Letter from Ellen Greene, Managing Director, Equities & Options Market Structure, Securities Industry and Financial Markets Association (''SIFMA'') and Thomas F. Price, Managing Director Operations, Technology, Cyber & BCP, SIFMA, to Vanessa Countryman, Secretary, Commission (June 23, 2020) (''SIFMA June Letter''), *https://www.sec.gov/comments/sr-box-2020-14/srbox202014-7340739-218667.pdf.* The primary changes to the proposal set forth in this amendment are to: (i) Eliminate the proposed use of T+1 as the standard settlement cycle for trades occurring on BSTX, meaning that trades will now settle ''regular way'' on a T+2 basis; (ii) provide additional clarifying guidance with respect to certain aspects of the proposal; and (3) change the name of BSTX-listed securities from ''security tokens'' to ''Securities.''

[15] As discussed further below, BSTX proposes to use the term ''Security'' to refer to BSTX-listed securities to distinguish them from other securities that are not designed to use blockchain technology as an ancillary recordkeeping mechanism. Given that an investor seeking to obtain a Security would go through the normal channels of investing as he would for other NMS stock (*e.g.,* through his or her broker) rather than the process for obtaining a blockchain-native asset by accessing a cryptocurrency exchange and/or a hardware wallet, there appears to be little opportunity for confusion. Even if some form of confusion occurred regarding whether an asset was an uncertificated security held at DTC versus a blockchain-native asset, such confusion would not be meaningful since an investor would receive equity rights in the listing company in either case.

[16] 17 CFR 242.600(b)(48).

[17] The proposed changes to BOX Rules and the proposed BSTX Rules are attached as Exhibits 5B and 5A, respectively.

LLC (''BOX Digital'') announced a joint venture to facilitate the trading of Securities on the Exchange.[18] As part of the joint venture, BOX Digital, which is a subsidiary of BOX Holdings Group LLC, and tZERO each own 50% of the voting class of equity and over 45% economic interest of BSTX LLC. Pursuant to the BSTX LLC Agreement, BOX Digital and tZERO will perform certain specified functions with respect to the operation of BSTX. As noted, these details, as well as the proposed governance structure of the joint venture and accompanying changes to the Exchange's current governance documents and bylaws, will be the subject of a separate proposed rule change that the Exchange plans to submit to the Commission.

B. BSTX Is a Facility of BOX That Would Support Trading in the New Asset Class of Securities for BOX

BSTX would operate as a facility[19] of BOX, which is a national securities exchange registered with the SEC. As a facility of BOX, BSTX's operations would be subject to applicable requirements in Sections 6 and 19 of the Exchange Act, among other applicable rules and regulations.[20] Currently, BOX functions as an exchange only for standardized options. While BSTX may eventually support a wider variety of securities, subject to Commission approval, at the time that BSTX commences operations it would only support trading in Securities that are equity securities. Accordingly, this represents a new asset class for BOX, and this proposal sets forth the changes and additions to the Exchange's rules to support the trading of equity securities as Securities on BSTX.

The Exchange proposes to use the term ''Security''[21] to describe the BSTX-listed securities that would use blockchain technology as an ancillary recordkeeping mechanism, as described in further detail below. However, ownership of securities that are Securities under the BSTX rules would still be able to be transferred without regard to the blockchain-based ancillary recordkeeping functionality (as also described further below). Notwithstanding this, the Exchange believes that it is appropriate to use the term ''Securities'' to distinguish them from other securities for which there is no related legal and regulatory structure that is designed to use blockchain technology as an ancillary recordkeeping mechanism and as a way of indicating the additional proposed obligations of BSTX Participants trading Securities to obtain a wallet address and report end-of-day Security balances to BSTX.[22] The legal significance, therefore, of a ''Security'' is that it will be an equity security that is approved for listing on BSTX, and that trades on the BSTX System, and for which BSTX Participants are therefore required under BSTX Rule 17020 to obtain a whitelisted wallet address and report certain end-of-day Security position balance information to BSTX. A security that is offered by an issuer with the intent of it becoming listed on BSTX would therefore not become a ''Security'' under the proposed BSTX Rules unless and until it actually does become listed on BSTX and trades on the BSTX System. The Exchange believes that the obligations on a BSTX Participant under the proposal to obtain a wallet address and to report certain end-of-day Security position balance information to BSTX are the only legal rights or obligations associated with Securities that would differ from how NMS stock is generally traded by market participants today.[23]

C. Securities Would Be NMS Stocks

The Securities would qualify as NMS stocks pursuant to Regulation NMS,[24] which defines the term ''NMS security'' in relevant part to mean ''any security or class of securities for which transaction reports are collected, processed and made available pursuant to an effective transaction reporting plan. . . .''[25] The Exchange plans to join existing transaction reporting plans, as discussed in Part VIII below, for the purposes of Security quotation and transaction reporting.[26] The term ''NMS stock'' means ''any NMS security other than an option''[27] and therefore Securities traded on BSTX that represent equity securities will be classified as NMS stock.

Securities would meet the definition of NMS stocks and would trade, clear, and settle in the same manner as all other NMS stocks traded today. The Exchange will also collect ancillary records related to Securities, as discussed herein. In this way, Securities are entirely compatible with the existing NMS structure, with one additional reporting and recordkeeping component specific to BSTX Participants.[28] As described in further detail below, the ancillary recordkeeping process would in no way modify or alter market participants' obligations under Regulation NMS.

D. BSTX Would Support Trading of Registered Securities

All Securities traded on BSTX would generally be required to be registered with the Commission under both Section 12 of the Exchange Act[29] and Section 6 of the Securities Act of 1933 (''Securities Act'').[30] BSTX would not support trading of Securities offered under an exemption from registration for public offerings, with the exception of certain offerings under Regulation A

[18] *See* tZERO and BOX Digital Markets Sign Deal to Create Joint Venture, Business Wire (June 19, 2018), *available at https://www.businesswire.com/news/home/20180619005897/en/tZERO-BOX-Digital-Markets-Sign-Deal-Create.*

[19] 15 U.S.C. 78c(a)(2). Section 3(a)(2) of the Exchange Act, provides that ''the term 'facility' when used with respect to an exchange includes its premises, tangible or intangible property whether on the premises or not, any right to the use of such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange (including, among other things, any system of communication to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange), and any right of the exchange to the use of any property or service.'' Because BSTX will share certain systems of the Exchange, BSTX is a facility of the Exchange.

[20] 15 U.S.C. 78f; 15 U.S.C. 78s.

[21] The Exchange proposes to define the term ''Security'' to mean NMS stock, as defined in Rule 600(b)(47) of the Exchange Act, trading on the BSTX System and for which ancillary Ethereum blockchain records are maintained under the BSTX Rules. *See* proposed Rule 17000(a)(30).

[22] *See* Part II, Sections G and J for further description of these obligations.

[23] The Exchange notes that its proposed Rule 17000(a)(30) defines ''Security'' to mean an ''NMS stock, as defined in Rule 600(b)(47) of the Exchange Act, trading on the BSTX System and for which ancillary Ethereum blockchain records are maintained . . .''

[24] 17 CFR 242.600 through 613.

[25] 17 CFR 242.600(b)(47).

[26] 17 CFR 242.601(a)(1). The Rule states in relevant part that ''every national securities exchange shall file [with the SEC] a transaction reporting plan regarding transactions in listed equity and Nasdaq securities executed through its facilities . . . .''

[27] 17 CFR 242.600(b)(47).

[28] The SIFMA June Letter stated primarily that SIFMA believed that the Exchange had not fully addressed the concerns SIFMA raised in an earlier comment submitted to SR–BOX–2019–19 in April 2020, though SIFMA only noted a single specific example regarding the proposed use of T+1 settlement rather than T+2 settlement. See Letter from Ellen Greene, Managing Director, Equities & Options Market Structure, SIFMA and Thomas F. Price, Managing Director Operations, Technology, Cyber & BCP, SIFMA, to Vanessa Countryman, Secretary, Commission, re: SR–BOX–2019–19 (Apr. 22, 2020) (''SIFMA April Letter'') *https://www.sec.gov/comments/sr-box-2019-19/srbox201919-7105488-215831.pdf.* The Exchange responded to the SIFMA April Letter on April 27, 2020. See Letter from Lisa Fall, president, BOX Exchange LLC to Vanessa Countryman, Secretary, Commission re: SR–BOX–2019–19 (Apr. 27, 2020), *https://www.sec.gov/comments/sr-box-2019-19/srbox201919-7105488-215831.pdf.* The Exchange proposes to eliminate T+1 settlement in this amendment and instead expects that trades would clear through NSCC using T+2 settlement as is the case today on the other equities exchanges for confirmed trades in NMS stock. The Exchange has endeavored to address other concerns raised in the SIFMA April Letter through this amendment 1.

[29] 15 U.S.C. 78l.

[30] 15 U.S.C. 77f.

that meet the proposed BSTX listing standards.

E. Clearance and Settlement of Securities

BSTX would maintain certain rules, as described below, to address custody, clearance and settlement in connection with Securities. All transactions in Securities would clear and settle in accordance with the rules, policies and procedures of registered clearing agencies. Specifically, BSTX anticipates that at the time it commences operations, Securities that are listed and traded on BSTX would be securities that have been made eligible for services by The Depository Trust Company (''DTC'') and that DTC would serve as the securities depository [31] for such Securities. It is also expected that confirmed trades in Securities on BSTX would be transmitted to National Securities Clearing Corporation (''NSCC'') for clearing such that NSCC would clear the trades through its systems to produce settlement obligations that would be due for settlement between participants at DTC. BSTX believes that this custody, clearance and settlement structure is the same general structure that exists today for other exchange traded equity securities. Importantly, for purposes of NSCC's clearing activities and DTC's settlement activities in respect of the Securities, the relevant securities will be cleared and settled by NSCC and DTC in exactly the same manner as those activities are performed by NSCC and DTC currently regarding a class of NMS Stock.[32] This is because the ancillary recordkeeping process that will be implemented through the operation of the proposed BSTX Rules will occur separate and apart from the clearance and settlement process and the security itself will not exist in tokenized form. Rather, the security will be an ordinary equity security for NSCC's and DTC's purposes. The tokenized feature in connection with the security that will be implemented through the operation of BSTX's Rules is that there will also be a separate, ancillary recordkeeping process that will use distributed ledger technology to record BSTX Participant end-of-day position balance information for the relevant security.

1. Issuance of Equity Securities Eligible To Become a Security

With the exception of certain offerings under Regulation A that meet the proposed BSTX listing standards, all Securities traded on BSTX will have been offered and sold in registered offerings under the Securities Act, which means that purchasers of the Securities will benefit from all of the protections of registration. The Division of Corporation Finance will need to make a public interest finding in order to accelerate the effectiveness of the registration statements for these offerings. Because BSTX is a facility of a national securities exchange, all Securities will be registered under Section 12(b) of the Exchange Act, thereby subjecting all of these issuers to the reporting regime in Section 13(a) of the Exchange Act.

All offerings of securities that are intended to be listed as Securities on BSTX will be conducted in the same general manner in which offerings of exchange-listed equity securities are conducted today under the federal securities laws. An issuer will enter into a firm commitment or best efforts underwriting agreement with a sole underwriter or underwriting syndicate; the underwriter(s) will market the securities and distribute them to purchasers; and secondary trading in the securities (that are intended to trade on BSTX as Securities) will thereafter commence on BSTX. The ancillary recordkeeping function associated with the Security will not commence until the conclusion of the first day of the Security's secondary trading on BSTX pursuant to proposed BSTX Rule 17020.[33]

Issuers on BSTX could include both (1) new issuers who do not currently have any class of securities registered on a national securities exchange, and (2) issuers who currently have securities registered on a national securities exchange and who are seeking registration of a separate class of equity securities for listing on BSTX. BSTX does not intend for Securities listed, or intended to be listed, on BSTX to be fungible with any other class of securities from the same issuer.[34] If an issuer sought to list securities on BSTX that are not a separate class of an issuer's securities, BSTX does not intend to approve such a class of security for listing on BSTX, pursuant to BSTX's authority under BSTX Rule 26101. At the commencement of BSTX's operations, only equity securities would be eligible for listing as Securities. This would be addressed by BSTX Rules 26102 (Equity Issues), 26103 (Preferred Securities) and 26105 (Warrant Securities), which would be part of BSTX's listing rules and would contemplate that only those specified types of equity securities would be eligible for listing.

2. Securities Depository Eligibility

BSTX would maintain rules that would promote a structure in which Securities would be held in ''street name'' with DTC.[35] BSTX Rule 26136

[31] 15 U.S.C. 78c(a)(23)(A). Section 3(a)(23)(A) of the Exchange Act defines the term ''clearing agency'' to include ''any person, such as a securities depository, who (i) acts as a custodian of securities in connection with a system for the handling of securities whereby all securities of a particular class or series of any issuer deposited within the system are treated as fungible and may be transferred, loaned, or pledged by bookkeeping entry without physical delivery of securities certificates, or (ii) otherwise permits or facilitates the settlement of securities transactions or the hypothecation or lending of securities without physical delivery of securities certificates.''

[32] In the SIFMA April Comment Letter, the Exchange believes SIFMA mischaracterized the Proposal as ''encouraging the adoption of [distributed ledger] technology with the likely eventual goal of having it become a system for tracking equity security ownership outside of the current system maintained by DTC and broker-dealers.'' SIFMA April Comment Letter at 3. This comment is unfounded and without merit. The proposal is bounded by its terms and is designed to operate entirely within the existing equity market structure—including its requirements for clearance through NSCC and settlement through DTC. It is precisely because the Exchange is sensitive to market participants' concerns related to the introduction and use of new technology that it has proposed a use of blockchain that is consistent with existing market infrastructure and regulation. Any future changes to this model would be subject to the Commission's rule filing process under Section 19 of the Exchange Act and public notice and comment. The Exchange further believes as a general matter that it is incorrect to dismiss any possible application of new technology simply because it has the potential to disrupt current ways of operating in the future. Similar claims were voiced with the introduction of computer technology to trading during the shift away from manual markets to toward electronic markets.

[33] Although the smart contract that would be used to carry out the ancillary recordkeeping function related to the security would need to be built by or at the direction of the issuer prior to the commencement of the security's trading on BSTX, the corresponding smart contract would effectively remain dormant until the ancillary recordkeeping process contemplated under the proposed BSTX Rules is activated due to trading on the BSTX System in that Security.

[34] BSTX notes that market participants, including SIFMA, have asked why Securities listed on BSTX would not be fungible with another class of securities from the same issuer and what the implications of this might be. The Exchange notes that Securities would not be fungible with another class of securities of the same issuer because no class of an issuer's securities is fungible with a separate class of its securities—otherwise they would be the same class of security. Nothing herein proposes any change to existing framework for different classes of securities.

[35] The term ''street name'' refers to a securities holding structure in which DTC, through its nominee Cede & Co., would be the registered holder of the securities and, in turn, DTC would grant security entitlements in such securities to relevant accounts of its participants. Proposed BSTX Rule 26135 would also provide, with certain exceptions, that securities listed on BSTX must be eligible for a direct registration program operated by a clearing agency registered under Section 17A of the Exchange Act. DTC operates the only such program today, known as the Direct Registration System,

Continued

would require that for an equity security to be eligible to be a Security BSTX must have received a representation from the issuer that a CUSIP number that identifies the security is included in a file of eligible issues maintained by a securities depository that is registered with the SEC as a clearing agency. This is based on rules that are currently maintained by other equities exchanges.[36] In practice, BSTX Rule 26136 requires the Security to have a CUSIP number that is included in a file of eligible securities that is maintained by DTC because the Exchange believes that DTC currently is the only clearing agency registered with the SEC that provides securities depository services.[37]

3. Book-Entry Settlement at a Securities Depository

BSTX would also maintain Proposed BSTX Rule 26137 regarding uniform book-entry settlement. The rule would require each BSTX Participant to use the facilities of a securities depository for the book-entry settlement of all transactions in depository eligible securities with another BSTX Participant or a member of a national securities exchange that is not BSTX or a member of a national securities association.[38] Proposed BSTX Rule 26137 is based on the depository eligibility rules of other equities exchanges and Financial Industry Regulatory Authority (''FINRA'').[39] Those rules were first adopted as part of a coordinated industry effort in 1995 to promote book-entry settlement for the vast majority of initial public offerings and ''thereby reduce settlement risk'' in the U.S. national market system.[40]

4. Participation in a Registered Clearing Agency That Uses a Continuous Net Settlement System

Under proposed BSTX Rule 25140, each BSTX Participant would be required to either (i) be a member of a registered clearing agency that uses a continuous net settlement (''CNS'') system, or (ii) clear transactions executed on BSTX through a member of such a registered clearing agency. The Exchange believes that today NSCC is the only registered clearing agency that uses a CNS system to clear equity securities, and proposed BSTX Rule 25140 further specifies that BSTX will maintain connectivity and access to the Universal Trade Capture system of NSCC to transmit confirmed trade details to NSCC regarding trades executed on BSTX. The proposed rule would also address the following: (i) A requirement that each Security transaction executed through BSTX must be executed on a locked-in basis for automatic clearance and settlement processing; (ii) the circumstances under which the identity of contra parties to a Security transaction that is executed through BSTX would be required to remain anonymous or may be revealed; and (iii) certain circumstances under which a Security transaction may be cleared through arrangements with a member of a foreign clearing agency. Proposed BSTX Rule 25140 is based on a substantially identical rule of the Investor's Exchange, LLC (''IEX''), which, in turn, is consistent with the rules of other equities exchanges.[41]

BSTX believes that the operation of its depository eligibility rule and its book-entry services rule would promote a framework in which Securities that would be eligible to be listed and traded on BSTX would be equity securities that have been made eligible for services by a registered clearing agency that operates as a securities depository and that are settled through the facilities of the securities depository by book-entry. The Exchange believes that because DTC currently is the only clearing agency registered with the SEC that provides securities depository services, at the commencement of BSTX's operations, Securities would be securities that have been made eligible for services by DTC, including book-entry settlement services.

5. Settlement Cycle

Proposed BSTX Rule 25100(d) would address settlement cycle considerations regarding trades in Securities. Security trades that result from orders matched against the electronic order book of BSTX would be required to clear and settle pursuant to the rules, policies and procedures of a registered clearing agency. As noted above in connection with the description of proposed BSTX Rule 25140, the Exchange expects that at the commencement of operations by BSTX it would transmit confirmed trade details to NSCC regarding Security trades that occur on BSTX and that NSCC would be the registered clearing agency that clears Security trades. The Exchange expects that such trades would be cleared through NSCC using a T+2 settlement cycle, as is the case today for all other exchanges that facilitate trading in NMS stock.

F. Compatibility With the BSTX Protocol for BSTX-Listed Securities To Facilitate Ancillary Recordkeeping

BSTX would maintain listing standards that would enable Securities to have an ancillary record of ownership recorded on the Ethereum blockchain using a protocol standard determined by BSTX (the ''BSTX Protocol'' or the ''Protocol'').[42] In this way, the Ethereum blockchain would serve as a complementary recordkeeping mechanism to official records of Security ownership maintained by market participants.[43]

1. Background on Blockchain Technology

In general, a blockchain is an open, decentralized ledger that can maintain digital records of assets and transactions that are accessible to anyone running the same protocol.[44] The blockchain's

which permits an investor to hold a security as the registered owner in electronic form on the books of the issuer.

[36] Proposed BSTX Rule 26136 is based on current NYSE Rule 777.

[37] *See* Exchange Act Release No. 78963 (September 28, 2016), 81 FR 70744, 70748 (October 13, 2016) (footnote 46 and the accompanying text acknowledge that DTC is the only registered clearing agency that provides securities depository services for the U.S. securities markets).

[38] FINRA is currently the only national securities association registered with the SEC.

[39] *See e.g.,* FINRA Rule 11310. Book-Entry Settlement and NYSE Rule 776. Book-Entry Settlement of Transactions.

[40] These coordinated depository eligibility rules resulted from proposed listing rules amendments developed by the Legal and Regulatory Subgroup of the U.S. Working Committee, Group of Thirty Clearance and Settlement Project. *See* Securities Exchange Act Release Nos 35774 (May 26, 1995) (SR–NASD–95–24), 60 FR 28813 (June 2, 1995); 35773 (May 26, 1995), 60 FR 28817 (June 2, 1995) (SR–NYSE–95–19).

[41] *See* IEX Rule 11.250 (Clearance and Settlement; Anonymity), which was approved by the Commission in 2016 as part of its approval of IEX's application for registration as a national securities exchange. Exchange Act Release No. 78101 (June 17, 2016); 81 FR 41142 (June 23, 2016); *see also* Cboe BZX Rule 11.14 (Clearance and Settlement; Anonymity).

[42] While BSTX initially intends to support only the trading of eligible Securities that are compatible with the Ethereum public blockchain, BSTX may support assets compatible with other blockchains that support smart contract functionality in the future.

[43] In the SIFMA April Letter, SIFMA stated that it believes that the proposed use of blockchain by the Exchange constitutes ''novel equity market structure issues'' that should be addressed by the Commission into a concept release. SIFMA April Letter at 4. The Exchange disagrees. The proposal would not introduce any novel equity market structure issues that would impact trading, clearance or settlement, and the proposed, limited used of blockchain technology is entirely separate from these processes and applicable only to BSTX Participants. The Exchange believes it is important for exchanges to have the ability make changes to their rules that incorporate new features, including uses of new technology that have no impact on the existing equities market infrastructure, without necessitating a market-wide referendum.

[44] A ''protocol'' for this purpose is a set of rules governing the format of messages that are exchanged between the participants.

central function is to encode transitions or changes to the ledger, such as the movement of an asset from one person to another person. Whenever one change to the blockchain ledger occurs to record a state transition, the entire blockchain is immutably changed to reflect the state transition. The purpose of requiring Securities to adopt the BSTX Protocol is to enable Security ownership to be recorded as a tokenized asset on the public Ethereum blockchain as an ancillary recordkeeping mechanism and to ensure uniformity among Securities rather than permitting each Security to have its own unique specifications that might complicate updates to the blockchain and add unnecessary complexity.

2. Background on the Ethereum Blockchain

The Ethereum blockchain is an open-source, public blockchain that operates as a computing platform and operating system that supports smart contract functionality.[45] Smart contracts are computer protocols designed to digitally facilitate, verify, and enforce the performance of a contract. Ethereum-based smart contracts are executed on the Ethereum Virtual Machine, which can be thought of as a global computer network upon which the smart contracts run. Ether is the digital currency used to pay fees associated with operating smart contracts (known as ''gas'') on the Ethereum networks. This is because there are costs involved in performing the computations necessary to execute a smart contract and to record any state transitions onto the Ethereum blockchain.[46] Thus, moving tokenized assets from one address to another address (*i.e.,* a state transition) requires some amount of Ether to pay the fee (*i.e.,* ''gas'') associated with recording the movement of tokenized assets to the Ethereum blockchain. Parties to a transaction in Ethereum-based smart contracts can determine what those gas costs are depending on how quickly they would like the transaction to be reflected on the Ethereum blockchain.

3. Background on Smart Contracts

The term ''smart contract'' is commonly used to describe computer-coded functions in connection with the Ethereum blockchain. An Ethereum smart contract is neither ''smart'' nor a legal contract in the traditional sense. Smart contracts in this context refer to immutable[47] computer programs that run deterministically[48] in the context of the Ethereum Virtual Machine. Smart contracts operate within a very limited execution context. They can access their own state, the context of the transaction that called them, and some information about the most recent blocks (*i.e.,* the most recent recording of transactions and other events recorded to the Ethereum blockchain).

In the context of tokens representing Securities, smart contracts generally may have three components: (i) Functions, (ii) configurations; (iii) and events.[49] Functions describe the basic operations of a smart contract, such as the ability to query a particular address to determine the quantity of tokenized assets that belong to that address.[50] Configurations are attributes of a smart contract that are typically set at the launch of a smart contract, such as designating the name of the smart contract (*e.g.,* as XYZ Security). Events describe the functions of a smart contract that, when executed, result in a log or record being recorded to the Ethereum blockchain, such as the transfer of tokenized assets from one address to another. Not all functions of a smart contract result in a log or record being recorded to the Ethereum blockchain. Smart contracts only run if they are called by a transaction.[51]

Smart contracts can call another smart contract, which can call another contract, and so on. Smart contracts never run ''on their own'' or ''in the background,'' but rather lie dormant until a transaction triggers them to carry out a specified operation pursuant to the protocol on which they operate. All transactions execute in their entirety or not at all, regardless of how many smart contracts they call or what those smart contracts do. Only if a transaction successfully executes in its entirety is there an ''event'' representing a change to the state of the blockchain with respect that transaction. If an execution of a smart contract's operation fails due to an error, all of its effects (*e.g.,* events) are rolled back as if the transaction never ran.

4. Background on Tokenized Assets or ''Tokens''

Tokens historically referred to privately issued, special-purpose coin-like items (*e.g.,* laundry tokens or arcade game tokens). In the context of blockchain technology, tokens generally mean blockchain-based abstractions that can be owned and that represent assets, currency, or access rights. A token on the blockchain used for ancillary recordkeeping of ownership can be thought of as a digital representation of shareholder equity in a legal entity organized under the authority of state or federal law and that meet BSTX's listing standards. Having a token attributed to a particular address, however, would not convey ownership of shareholder equity in the issuer because the official records of ownership would be maintained by participants at DTC.[52]

To create a new token (or tokenized asset) on Ethereum, including for purposes of facilitating ancillary recordkeeping of Security ownership, one must create a new smart contract. The smart contract would be configured to detail, among other things, the name of the issuer and the total supply of the tokens that correspond to the BSTX-listed Security. Smart contracts can be designed to carry out any event that one wants, but using a set standard or protocol allows for participants transacting in those smart contracts to have uniform expectations and functionality with respect to the tokens.

5. Background on Protocols

A protocol (also sometimes referred to as a ''standard'' or ''protocol standard'') defines the functions, events, configurations, and other features of a given smart contract. The most common protocol used with Ethereum is the ERC–20 protocol, which describes the minimum functions that are necessary

[45] *See* Ethereum White Paper (last updated Aug. 1, 2018) *available at https://github.com/ethereum/wiki/wiki/White-Paper.*

[46] *See What Is Gas,* MyEtherWallet (2018) *available at https://kb.myetherwallet.com/posts/transactions/what-is-gas/.*

[47] Smart contracts are immutable in that, once deployed, the code of a smart contract cannot change. Unlike with traditional software, the only way to modify a smart contract is to deploy a new instance.

[48] Deterministic in this context means that the outcome of the execution of a smart contract is the same for everyone who runs it, given the context of the transaction that initiated its execution.

[49] However, a smart contract need not necessarily have each of these components. Some smart contracts may simply be used to support the functioning of other smart contracts and may not itself result in events being recorded to the Ethereum blockchain.

[50] An ''address'' in this context refers to a number that is associated with a particular market participant within the smart contract that can be updated to reflect changes in ownership of tokenized assets.

[51] The term ''transaction'' in this context refer not to an actual execution or transaction occurring on BSTX or in the marketplace, but rather to an operation triggering a smart contract to carry out its specified function, which must ultimately originate from a human source.

[52] Rather, a digital representation of a Security associated with a particular address reflects an ancillary record of Security ownership based on data provided to BSTX by BSTX Participants. The records reflected on the Ethereum blockchain regarding Securities may not be current to reflect the most recent transactions in the marketplace and may not reflect ownership by all market participants.

to be considered an ERC–20 token.[53] The ERC–20 protocol offers basic functionalities to transfer tokens, obtain account balances, and query the total supply of tokens, among other features. The BSTX Protocol is compliant with the ERC–20 protocol but adds additional requirements and functionality, as described below.

As noted above, Ether is the digital currency used to pay fees associated with operating smart contracts (known as ''gas'') on the Ethereum network. Payment of gas is required to operate smart contracts because there are costs involved in performing the computations necessary to execute a smart contract and to record any state transitions onto the Ethereum blockchain.

There is an important conceptual distinction between ERC–20 tokens, including tokens used for ancillary recordkeeping purposes of Securiteis [sic], and Ether itself. Where Ether is transferred by a transaction that has a recipient address as its destination, token transfers occur within the specific token contract state and have the token smart contract as their destination, not the recipient's address. The token smart contract tracks balances and issues events to the Ethereum blockchain. In a token transfer,[54] no transaction is actually sent to the recipient of the token. Instead, the recipient's address is added to a map within the token smart contract itself. In contrast, a transaction sending Ether to an address changes the state of an address. A transaction transferring a token to an address only changes the state of the token contract, not the state of the recipient address. Thus, an address is not really full of tokens; rather it is the token smart contract that has the addresses and balances associated with each address in it.

6. BSTX Protocol

BSTX Rule 26138 requires that a BSTX listed company's Securities must comply with the Protocol to trade on BSTX. The purpose of this requirement is to ensure that all Securities are governed by the same set of specifications and controls that allow for ownership of Securities to be recorded to the Ethereum blockchain using tokens as an ancillary recordkeeping mechanism.

The Protocol involves three smart contracts. The Asset Smart Contract is the primary smart contract that contains the balances of Securities associated with each address and carries out the functions necessary to reflect changes in ownership. There are two ancillary smart contracts that are called by the Asset Smart Contract in executing transactions. The first of these is the Registry Smart Contract (''Registry''), which contains the list of permissioned (or ''whitelisted'') addresses, and the second is the Compliance Smart Contract, which includes a variable list of additional compliance related rules that the Asset Smart Contract must comply with in executing a transaction. Each of these three smart contracts are described in greater detail below:

(1) *Asset Smart Contract*—The Asset Smart Contract defines and establishes the tokens (*e.g.,* the maximum number of tokens available for a particular issuance) for purposes of the Ethereum blockchain ancillary recordkeeping function and records a list of market participant addresses and the tokens associated with each address.

(2) *Registry Smart Contract*—The Registry Smart Contract (or ''Registry'') defines the permissions available to different types of market participants to perform certain functions. Under the Protocol, there are five different types of market participants connected with the Registry, each with different abilities and permissions (as detailed below):[55] (1) Contract Owner, (2) Custodian, (3) Broker Dealer, (4) Custodial-Account, and (5) Investor. The Registry also contains the list of whitelisted addresses to which tokens may be sent and additional information associated with each address (*e.g.,* whether an address has been suspended).

(3) *Compliance Smart Contract*—The Compliance Smart Contract is the set of rules held in a separate smart contract that a token can be configured to abide by to ensure compliance with applicable laws and regulations (*e.g.,* by restricting a movement of Securities to an address that has not been added to the Registry for purposes of the Ethereum blockchain ancillary recordkeeping mechanism). The Compliance Smart Contract can be modified to add or remove applicable rules in light of changes to applicable regulatory requirements.

Each of these three smart contracts work together to facilitate the ancillary recordkeeping mechanism for Securities using the Ethereum blockchain. The details of the specific functions, configurations, and events under the Protocol are set forth in greater detail in Exhibit 3N.

The Exchange selected the Ethereum blockchain among other possible blockchains that support smart contracts as the blockchain upon which Securities would be built in accordance with the BSTX Protocol for ancillary recordkeeping purposes because of, among other reasons, its widespread use, the public's familiarity with Ethereum, and its smart contract functionality. Ethereum has maintained the second largest market capitalization behind Bitcoin among blockchain-based digital assets for at least two years and is widely recognized by the public.[56] Over 200,000 different ERC–20 tokens have been built on the Ethereum blockchain, demonstrating its wide-spread use and functionality. The Exchange believes that the Ethereum blockchain is able to support all of the necessary functions of the BSTX Protocol to carry out the Security ancillary recordkeeping function. The Exchange also believes that using a widely-known smart contract platform as opposed to a lesser-known smart contract platform may help issuers become more comfortable with the ancillary recordkeeping process as well as allow them to more-readily locate service providers as necessary to assist them in building their Securities in accordance with the BSTX Protocol. As noted, the Exchange may consider the use of other blockchains supporting smart contract functionality in the future, subject to applicable rule filing requirements with the Commission pursuant to Section 19 of the Exchange Act.[57]

G. Obtaining a Whitelisted Wallet Address [58]

Pursuant to proposed Rule 17020(a), a BSTX Participant must, either directly

[53] *See e.g.,* Jesus Najera, Understanding ERC20, Coin Central (Jan. 8, 2018), *available at https://coincentral.com/understanding-erc20/;* Alfonso de la Rocha, *Anatomy of an ERC: An Exhaustive Survey,* Medium (May 7, 2018), *available at https://medium.com/coinmonks/anatomy-of-an-erc-an-exhaustive-survey-8bc1a323b541.*

[54] A ''transfer'' in the context of the BSTX Protocol regarding a token refers to a reallocation of the digital representation of a Security on the Ethereum blockchain as an ancillary recordkeeping mechanism to reflect corresponding changes in ownership of the Security.

[55] There are additional roles that are not technically part of the Registry and are instead specific to certain smart contracts. For example, an ''Issuer'' is an Asset Smart Contract-specific role. Also, an ''Administrator'' is a Compliance Smart Contract-specific role that allows such a user to, for example, freeze the transfer of tokenized assets for purposes of the ancillary recordkeeping function under certain circumstances and modify or add compliance rules to govern a token.

[56] The Commission has also publicly recognized Ethereum and its native currency Ether. *See* William Hinman, Director, Division of Corporation Finance, Digital Asset Transactions: When Howey Met Gary (Plastic) (June 14, 2018) *available at https://www.sec.gov/news/speech/speech-hinman-061418.*

[57] 15 U.S.C. 78s.

[58] In the SIFMA April Comment Letter, SIFMA asked for further detail regarding how a whitelisted wallet address is obtained, how permissioning is determined for the whitelisted wallet and who

or through its carrying firm, establish a wallet address to which its end-of-day Security balances may be recorded by contacting BSTX.[59] A BSTX Participant that is a carrying broker-dealer for other BSTX Participants would be assigned the wallet address with the status of a Custodian, which would allow that BSTX Participant to request wallet addresses on behalf of other BSTX Participants (for which it serves as the carrying broker-dealer) as either a Custodial Account or Broker-Dealer wallet address, as described above. A BSTX Participant that is not a carrying broker-dealer could request a Broker-Dealer wallet address, a Custodial Account wallet address in coordination with its carrying firm, and an Investor wallet address on behalf of a customer that would like its ownership of Securities represented by a tokenized asset to be reflected at its own address for purposes of the Ethereum blockchain as an ancillary recordkeeping mechanism.[60]

Contact information for BSTX for the purpose of establishing a wallet address will be published on the BSTX website. Proposed BSTX Rule 17020(a) requires a BSTX Participant to establish a wallet address by contacting BSTX directly or through its carrying firm acting on its behalf. BSTX expects that this process (*i.e.,* contacting the Exchange and establishing a wallet address) would occur contemporaneously with the application by a market participant to become a BSTX Participant. However, under proposed BSTX Rule 17020(a), a BSTX Participant would have up until five business days from the date that the Exchange approves the application of the BSTX Participant to satisfy the obligation to obtain a wallet address. In the event that a BSTX Participant has not obtained a wallet address prior to the Exchange's approval of its application, the BSTX Participant would become subject to the end-of-day Security balance reporting requirements in proposed BSTX Rules 17020(b) and (c). However, because the BSTX Participant would not yet have a wallet address to which the position balance information could be attributed by a Wallet Manager, the tokenized assets associated with any Security position balances of such BSTX Participant would be attributed to the omnibus wallet address (as described below) until the time the BSTX Participant obtains a wallet address. For the avoidance of doubt, having end-of-day position balance information for a tokenized asset related to a Security attributed to a particular wallet address would not convey ownership of shareholder equity in the issuer to the person or entity with whom such wallet address is associated. BSTX-listed Securities will be cleared and settled in the same manner as other NMS stocks through the facilities of a registered clearing agency, and the official records of ownership would be maintained as discussed above in Part II.E. Therefore, any lack of a wallet address would not affect the official records of ownership of the BSTX-listed Security.

Once a BSTX Participant has been assigned a particular wallet address, the only further obligation of that BSTX Participant is to report its end-of-day Security position balances to BSTX, as described below. Non-BSTX Participants that may trade Securities are not subject to the requirement that they obtain a wallet address prior to trading a Security or to the end-of-day Security balance position reporting requirements. The Exchange will not accept voluntary reports of end-of-day Security balances from non-BSTX Participants, but may consider doing so in the future, subject to any applicable or necessary rule filing requirements with the Commission. The Exchange believes that the proposed requirement in Rule 17020(a) to obtain a wallet address is consistent with the Exchange Act and Section 6(b)(5)[61] in particular because it would help foster cooperation and coordination with persons engaged in regulating and facilitating transactions in Securities by setting forth a process through which BSTX Participants may obtain a wallet address to which their end-of-day Security balances may be recorded to the Ethereum blockchain as an ancillary recordkeeping mechanism. The Exchange believes that the proposed requirement is similar to obtaining a market participant identifier (''MPID'') in that it establishes an identifier that can be attributed to a particular BSTX Participant for reporting purposes. The proposed requirement to obtain a wallet address is the same for all BSTX Participants, and is therefore not unfairly discriminatory, and the Exchange does not propose to charge a fee for obtaining a wallet address.

H. Wallet Manager[62]

As described further below, following the end of a trading day, BSTX Participants (or their carrying firms) will be required to send Security position balance information to BSTX. Based on the information that BSTX receives, BSTX will deliver that information to one or more Wallet Managers who will be responsible for updates to the Security position balances on the Ethereum blockchain by allocating balances among the wallet addresses of BSTX Participants and the omnibus wallet address.

The Exchange would enter into a contractual arrangement with a Wallet Manager as a service provider to the Exchange performing the function described above. The Exchange does not believe that performing the ancillary recordkeeping process would make a Wallet Manager a facility of the Exchange because the Wallet Manager's functions do not meet the definition of ''facility'' under the Exchange Act. Section 3(a)(2) of the Exchange Act provides that ''the term 'facility' when used with respect to an exchange includes its premises, tangible or intangible property whether on the premises or not, any right to the use of such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange (including, among other things, any system of communication to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange), and any right of the exchange to the use of any property or

controls it. SIFMA April Comment Letter at 5. The Exchange notes that BSTX Participants would obtain a whitelisted wallet address by contacting the Exchange as detailed in this Part II.G. As the only source for obtaining wallet addresses, the Exchange would be responsible for permissioning wallet addresses as well. Each wallet address is an alphanumeric string of characters assigned to a particular BSTX Participant for the purposes of ancillary recordkeeping. A BSTX Participant would not have the ability to move tokenized assets to or from its wallet address or otherwise ''control'' the wallet address. The process of reallocating tokenized asset balances among different wallet address is a function performed by the Exchange in coordination with a Wallet Manager(s). Thus, the proposed use of blockchain technology is almost entirely passive for BSTX Participants, but for initially obtaining a wallet address and the end-of-day reporting of balances. The Exchange would be responsible for maintaining wallet addresses and whitelisting for the entire life cycle of a Security and the associated tokenized asset and life cycle of participants' accounts. An unlimited number of addresses may be established for a Security and can be removed as necessary.

[59] Multiple Security issuances can be attributed to a BSTX Participant's wallet address. A BSTX Participant would not need a separate wallet address for each Security issuance that it trades.

[60] A BSTX Participant that is a carrying broker-dealer, and which therefore has a Custodial Account address, could also request Investor wallet addresses on behalf of customers.

[61] 15 U.S.C. 78f(b)(5).

[62] A ''Wallet Manager'' is defined as a party approved by BSTX to operate software compatible with the BSTX Protocol. *See* proposed Rule 17000(a)(31). A Wallet Manager would be a third-party service provider for the Exchange that will help facilitate establishing wallet addresses for BSTX Participants and facilitate updates to the Ethereum blockchain as an ancillary recordkeeping mechanism regarding changes in ownership resulting from trading. Approved Wallet Managers will be listed on the Exchange's website.

service.'' [63] A Wallet Manager is neither property of the Exchange nor does a Wallet Manager provide services for effecting or reporting a transaction taking place on the Exchange. Rather, a Wallet Manager performs the function of updating end-of-day Security position balance information provided by the Exchange as part of an ancillary recordkeeping mechanism. The Ethereum blockchain would not reflect any particular transaction(s) that occurred in the marketplace but would instead record allocations of end-of-day Security position balances—which may result from a variety of activities in the marketplace for the relevant Securities such as trading activity, lending activity, and free-of-payment transfers between DTC accounts. The definition of ''facility'' in Section 3(a) of the Exchange Act is instead focused on ''effecting or reporting a transaction'' as part of the operations of an exchange, namely the bringing together of orders for securities of multiple buyers and sellers using non-discretionary methods under which such orders interact with each other, and the buyers and sellers entering such orders agree to the terms of a trade.[64] Thus, systems of communication to the Exchange used to effect trades or to receive market data would likely be considered facilities of the Exchange, but an end-of-day ancillary recordkeeping reporting process that does not provide any real or near-time information regarding transactions in the market should not.[65] The Commission ''long has recognized that there must be some practical limitations on entities encompassed within the broad definition of the term 'exchange.' '' [66] The ancillary recordkeeping process would have no impact on, or perform a function related to, the bringing together of buyers and sellers' orders, clearance, settlement, market data or routing functions of the exchange (*i.e.,* all of these functions can continue upon any suspension of the ancillary recordkeeping process),[67] and therefore cannot reasonably be considered a ''facility'' of the exchange.

The Exchange intends to enter into a contractual arrangement with at least one Wallet Manager.[68] The Exchange intends to evaluate each potential Wallet Manager's capability to receive information from BSTX related to BSTX Participants' end-of-day Security balances along with its ability to update the Ethereum blockchain upon receipt of such information. Further, the Exchange intends to perform due diligence on potential Wallet Managers, including but not limited to checking the list produced by the U.S. Treasury Department of persons with whom U.S. citizens are prohibited from doing business (''OFAC List''). Finally, the Exchange intends to require each Wallet Manager in its service agreement with the Wallet Manager to agree to comply with all applicable securities laws.[69] The Exchange believes that using the criteria listed above for evaluating potential Wallet Managers may prevent fraudulent and manipulative acts and practices, consistent with Section 6(b)(5) of the Exchange Act.[70] The Exchange believes that requiring every Wallet Manager to act in a manner consistent with applicable securities laws and not be on the OFAC List would help ensure that persons reputed to have committed illegal acts and who violate securities laws, including any such laws meant to prevent fraud and market manipulation, will not operate as Wallet Managers.

I. Coordination Between BSTX, Registered Clearing Agencies, and Wallet Managers

Upon the occurrence of a transaction on BSTX due to the completion of its order matching process,[71] BSTX would generate an execution report, and it would deliver drop copies to its own front-end systems to update the BSTX Participants and to NSCC.[72] Where a BSTX transaction creates a settlement obligation to transfer registered ownership of a Security, clearance and settlement would be performed in accordance with the rules, policies and procedures of a registered clearing agency as described in Part II.E. above. The Wallet Manager would be provided with end-of-day position balance information of BSTX Participants necessary to update the Ethereum blockchain through the end of day reporting mechanism discussed below.

J. Reporting End-of-Day Security Balances To Facilitate Ancillary Recordkeeping

To update the Ethereum blockchain to reflect ownership of Securities as an ancillary recordkeeping mechanism, the Exchange proposes to require that each BSTX Participant, either directly or through its carrying firm, report each business day to BSTX certain end-of-day Security balances in a manner and form acceptable to BSTX.[73] A BSTX Participant that is a participant at DTC would be required to report to BSTX the total number of Securities for each class of Security that is credited to each DTC account of the BSTX Participant.[74] For a BSTX Participant that is not a DTC participant, the BSTX Participant would be required to report the total number of Securities for each class of Security that are credited to the BSTX Participant by its carrying firm.[75] Pursuant to proposed Rule 17020(d), upon receipt of the end-of-day Security balances from BSTX Participants, the Exchange would provide such information to the Wallet Manager(s) to update the Ethereum blockchain as an ancillary recordkeeping mechanism to reflect

[63] 15 U.S.C. 78c(a)(2).

[64] 17 CFR 240.3b–16.

[65] The Commission has not defined the term ''facility.'' *See* Exchange Act Release No. 26708 (Apr. 11, 1989), 54 FR 15429 (Apr. 18, 1989) (noting that the term ''facility'' has not changed since it was originally adopted and that no hearing testimony referred to it because ''the Committee felt that the definition was 'self-explanatory' '').

[66] *Id.*

[67] The Exchange notes that suspension of the ancillary recordkeeping process would not impact trading in the Security. Trading and the clearance and settlement of Securities can operate entirely independently from the ancillary recordkeeping process.

[68] The Exchange expects that it will initially operate with one Wallet Manager, but there is nothing to preclude the use of another Wallet Manager provided the prospective Wallet Manager is capable of operating software compatible with the BSTX Protocol. The Exchange expects that tZERO would operate as the initial Wallet Manager. BOX Exchange LLC, the self-regulatory organization of which BSTX is a facility, neither controls, directly or indirectly, nor is under common control with tZERO. The voting class of equity of the BSTX facility is 50% owned by tZERO and BOX Digital Markets, which is 100% owned by BOX Holdings Group LLC. BOX Exchange LLC does not have direct or indirect ownership interest in BOX Holdings LLC or its subsidiaries. As a result, because BOX Exchange LLC does not exercise control over tZERO or its affiliates, tZERO would not constitute ''property'' of the Exchange for purposes of determining whether it is a facility. In any case, it is the functions of the particular entity that should matter for purposes of determining whether an entity or function is a facility of an exchange rather than whether an entity is affiliated or not with an exchange. *See e.g.,* Exchange Act Release No. 54538 (Sept. 28, 2006), 71 FR 59184 (Oct. 6, 2006) (order approving PHLX's new equity trading system and operation of optional outbound router as a facility of PHLX, where PHLX had no ownership interest in the third party operator).

[69] Pursuant to the Exchange's agreement with the Wallet Manager(s), the Wallet Manager(s) would be required to record balances to the Ethereum blockchain following each trading day. As a result, tokenized assets representing Security balances of BSTX Participants would be updated each trading day, but not on non-trading days (*e.g.,* holidays).

[70] 15 U.S.C. 78f(b)(5).

[71] Order matching would occur through a price-time priority model, as discussed in greater detail below.

[72] The last sale transaction data would also be publicly disseminated pursuant to the transaction reporting plan, which would occur before delivery of drop copies to these parties.

[73] *See* Proposed Rule 17020(b).

[74] *See* Proposed Rule 17020(b)(1). As described above in Part II.E., BSTX would maintain rules that would promote a structure in which Securities would be held in ''street name'' with DTC.

[75] *See* Proposed Rule 17020(b)(2).

updates in Security balances.[76] Proposed Rule 17020(d) would also provide that unreported Security balances will be determined and allocated to an omnibus wallet address for each Security as described further below. The Exchange would determine the number of tokens (which represent Securities) to be allocated to the omnibus wallet address by the Wallet Manager(s) by subtracting the sum of the Security position balances reported for a particular Security by BSTX Participants from the total outstanding number of that particular Security. BSTX expects that each Security would have a dedicated omnibus wallet address that the Wallet Manager(s) would use to allocate the resulting balance to that address.

The Exchange proposes that these end-of-day Security balance reports would be required each business day when DTC is also open for business, but after such time as DTC has completed its end-of-day settlement process.[77] The Exchange believes that once DTC has completed its end-of-day settlement process, DTC participants would be able to determine the number of Securities credited to their DTC account(s) and to other market participants that settle through that DTC participant. Thereafter, BSTX Participants, or their carrying firms, would be able to obtain their Security balance information and report it to BSTX by the end of the day. The Exchange understands that DTC typically makes end-of-day security position reports available to DTC participants at approximately 7:30 p.m. Eastern time. Therefore, the Exchange will notify BSTX Participants via Regulatory Circular of the time after 7:30 p.m. Eastern time by which end-of-day security position balance reports will be required to be provided to BSTX pursuant to BSTX Rule 17020(c).[78] The Exchange will also notify BSTX Participants via Regulatory Circular of the time by which it will provide Security position balance information to the Wallet Manager(s) so that the Wallet Manager(s) will have sufficient time to carry out their contractual obligation to update the Ethereum blockchain as an ancillary recordkeeping mechanism prior to the commencement of trading on BSTX on the next trading day.

The Exchange acknowledges that, in certain circumstances, a BSTX Participant subject to the requirements of proposed Rule 17020 could fail to report end-of-day Security balances to BSTX in a timely manner, inaccurately report such balances, or fail to obtain a wallet address prior to acquiring a position in a Security. Such failures would impair the ability of the Exchange to report complete end-of-day Security balance information regarding a Security to the Wallet Manager(s) who will be responsible for using that information, in turn, to update the Security balance information that is reflected on the Ethereum blockchain. The Exchange notes that BSTX Participants would be required to comply with applicable Exchange Rules, including the requirement to report their end-of-day Security balances, and may be subject to disciplinary action for failing to comply with applicable rules pursuant to proposed Rule Series 24000 (Discipline and Summary Suspension).

As noted above, to account for instances in which a BSTX Participant fails to report or to accurately report its end-of-day Security balance pursuant to proposed Rule 17020, as well as to account for the positions of Security holders who are not BSTX Participants and therefore not subject to the end-of-day Security balance reporting requirement, the Exchange proposes to use an omnibus wallet address to account for such Securities in the ancillary records that would be published on the Ethereum blockchain. Specifically, the Exchange would know the total number of Securities outstanding and would provide information to the Wallet Manager(s) to allow the Wallet Manager(s) to attribute the unreported Security balance (which shall be represented by a token balance on the blockchain) for a given Security to an omnibus wallet address for each Security. For example, assume that on Day 1 there are 1,000 Securities for company XYZ outstanding, 800 are held at DTC in accounts for the benefit of eight BSTX Participants and 200 are otherwise held at DTC. Assume further that BSTX receives timely and accurate end-of-day XYZ Security balance reports from all eight BSTX Participants in respect of 800 XYZ Securities. At the end of Day 1 as part of the end-of-day reporting process, the Exchange would provide information to the Wallet Manager(s) allowing the Wallet Manager(s) to allocate the 800 XYZ tokens (which represent Securities) among the BSTX Participants consistent with their end-of-day Security balance reports and to allocate the remaining balance of 200 to the omnibus wallet address. In this same example, assume a BSTX Participant who holds 100 XYZ Securities failed to report its XYZ Security balance to BSTX. In this case, the Exchange would provide information to the Wallet Manager(s) allowing the Wallet Manager(s) to allocate 300 XYZ tokens (which represent Securities) to the omnibus wallet address for XYZ Security. The omnibus wallet address in this example would thus reflect the sum of XYZ Securities held by non-BSTX Participants who are not subject to the end-of-day Security balance reporting requirement as well as any missing end-of-day Security balance reports among BSTX Participants.[79] In all cases, the

[76] Notably, because the Ethereum blockchain would be updated each day using the end-of-day Security balance reports, and is, in any case, only functioning at this time as an ancillary recordkeeping function, concerns regarding a loss of private keys or disruption to the Ethereum blockchain are fully mitigated. For example, assume a BSTX Participant owns 100 Securities of XYZ at the end of Day 1 and, as a result of trading on Day 2, ends Day 2 with a balance of 200 Securities of XYZ. If the BSTX Participant's wallet address were somehow compromised during the trading day on Day 2 and the 100 tokenized assets representing Securities were moved to another address (which could only be moved to another whitelisted address), this would not substantively impact the functioning of the blockchain as an ancillary recordkeeping tool. At the end of trading on Day 2, the BSTX Participant would report its ownership of 200 Securities of XYZ to BSTX, which would then update the Ethereum blockchain to reflect this end of day balance. The Wallet Manager makes updates to the balances associated with wallet addresses by reallocating tokens (which represent Securities) between wallet addresses, including the omnibus wallet address, so that after each trading day the wallet address account balances reflect the new Security balances reported to BSTX pursuant to Rule 17020. These reallocations based on end-of-day Security balance reports from BSTX Participants are not designed to reflect actual transactions that occurred during the trading day. Rather, the reallocation process focuses on achieving the ends of having the correct number of tokens (which represent Securities) attributed to each wallet address based on the end-of-day Security balance reports. For example, if there were only two transactions in the entire marketplace during the trading day—a sale of 100 Securities from BSTX Participant A to BSTX Participant B and a subsequent sale of 100 Securities from BSTX Participant B to BSTX Participant C—the end of day reallocation process would result in a reallocation of 100 tokens (which represent Securities) from BSTX Participant A to BSTX Participant C, and would consequently not reflect any actual transactions.

[77] *See* Proposed Rule 17020(c).

[78] The Exchange notes that other exchanges use a similar formulation whereby the exact timing details for delivery of information to an exchange are set forth in a regulatory circular. See *e.g.,* EDGX Rule 4.2.02 and BZX Rule 4.2.02 (setting forth a ''Regulatory Data Submission Requirement'' providing that BZX/EDGX members ''shall submit to the Exchange such Exchange-related order, market and transaction data as the Exchange by Regulatory Circular may specify, in such form and on such schedule as the Exchange may require.'').

[79] The omnibus wallet address for each Security could also have greater or fewer tokens (which represent Securities) as a result of a misreport by a BSTX Participant. In the case of an under-report by a BSTX Participant (*e.g.,* owns 100 of XYZ Securities, but reports only 90), the omnibus address for XYZ would have an additional 10 tokens (which represent XYZ Securities) allocated to it. In the case of an over-report (*e.g.,* owns 100 of XYZ Securities, but reports 110), the omnibus

Continued

balances displayed on the Ethereum blockchain would reflect end-of-day Security balances reported to BSTX pursuant to Rule 17020 and an omnibus wallet address for any type of Security for which the sum of the reported positions is less than the number of Securities known by the Exchange to be issued and outstanding. In this way, it is possible that the end-of-day balances published on the Ethereum blockchain may not reflect the precise distribution of a Security among holders of the Security, even among BSTX Participants.[80] The Ethereum blockchain could also reflect information that is not accurate to the extent that BSTX Participants inaccurately report end-of-day Security balances to BSTX. There could conceivably be situations where the number of reported Securities exceeds the number of outstanding Securities of a particular issuance (*e.g.,* if Security XYZ were held entirely by BSTX Participants and one BSTX Participant over-reports). There could also be situations in which the Exchange is unable to communicate end-of-day Security balances to the Wallet Manager(s) or the Wallet Manager(s) is/are unable to update the blockchain. Additionally, it is also possible that there could be a disruption to the website through which token balances may be observed (*i.e.,* Etherscan.io, discussed below), to the Ethereum blockchain itself that prevents the updating of end-of-day balances as an ancillary recordkeeping mechanism, or potentially to the architecture or functioning of a particular Security.[81]

To address the potential for inaccurate reporting by BSTX Participants, the Exchange is proposing Rule 17020(e), which provides that a BSTX Participant shall promptly send a corrected end-of-day Security balance report to the Exchange upon the Participant's discovery that it submitted an inaccurate end-of-day report that has not already been corrected or superseded. Rule 17020(e) would also provide that if the Exchange has reason to believe that the Security balances reported by one or more BSTX Participants may be inaccurate, the Exchange may request additional information regarding the applicable reports and balances from any BSTX Participant. Under the proposed rule, a BSTX Participant shall promptly respond to any additional information requests that the Exchange may make regarding its end-of-day Security balance reports.[82] The Exchange believes that it is important for the protection of investors and in the public interest, consistent with Section 6(b)(5) of the Exchange Act, to establish mechanisms to help ensure the accuracy of end-of-day Security balances by requiring BSTX Participants to promptly correct known errors in their reports and to provide the Exchange with express authority to seek additional information from BSTX Participants where the Exchange has reason to believe to that one more reports may be inaccurate.[83] Similar mechanisms to promote accurate reporting exist for a wide variety of different market participant obligations today, such as the duty of the broker-dealer operator of an NMS stock alternative trading system to promptly correct material errors or omissions discovered in their Form ATS–N and the duty to correct trade reports to FINRA.[84] The Exchange believes that proposed Rule 17020(e) sets forth reasonable processes to help ensure the Security position balances published as token balances on the blockchain are accurate, and that ensuring the accuracy of this information will better facilitate all market participants' ability to evaluate the potential uses of blockchain technology in securities transactions.

In addition to these controls and mechanisms for ensuring the accuracy of reported records, the Exchange may need to implement further measures in situations where the ability to update blockchain records may be affected by exogenous factors, as discussed above. To account for these types of situations, proposed Rule 17020(f) provides that the Exchange may suspend the requirements in paragraphs 17020(a) through (d) regarding any BSTX Participant and/or regarding one or more Securities, as applicable, in its discretion and in any such case the Exchange will provide prompt notice thereof and the reason(s) therefore to BSTX Participants.[85] The Exchange will notify the Commission within two hours of its determination to make any such suspension and the suspension may continue in effect for no more than thirty calendar days from the date the determination is made unless the Exchange has submitted a proposed rule change with the Commission seeking approval of such suspension, in which case the suspension may continue in effect until the Commission approves or disapproves the proposed rule change.[86]

In all such cases involving these types of disruptions relating to the end-of-day Security balance reporting process, there would be no impact on the ability to trade, clear, or settle Security transactions in the ordinary course.[87]

address for XYZ may have 10 additional tokens (which represent XYZ Securities) allocated to it.

[80] The Exchange notes, however, that even in such a case, the total number of shares of the Security outstanding should still be reflected on the blockchain due to unreported balances being attributed to the omnibus wallet address. It is also possible the omnibus wallet address could display the entire outstanding balance of a Security to the extent only non-BSTX Participants held the entire outstanding balance of a particular Security.

[81] This could potentially occur if, for example, the Ethereum Virtual Machine were to suffer a ''51% Attack'' whereby an individual or group acting together gain 51% or more of the computing power, essentially giving the attackers control over the Ethereum blockchain and the ability to disrupt or modify transactions on the Ethereum blockchain. The Exchange believes that this possibility is remote, but the Exchange will nonetheless monitor for such possibilities either directly or by using a vendor, which may include Wallet Managers that agree to perform this function and promptly alert the Exchange to any compromise of the Ethereum blockchain or other type of disruption that might impact the end-of-day Security balance reporting process as an ancillary recordkeeping mechanism (*e.g.,* inability to access Etherscan.io).

[82] This additional information may include asking the BSTX Participant to confirm its Security balances, providing a copy of the information the BSTX Participant used to provide its end-of-day Security balance position report, or other books and records of the BSTX Participant relating to its transactions in one more Securities.

[83] 15 U.S.C. 78f(b)(5). As previously noted, failure to comply with applicable Exchange Rules, including the end-of-day Security balance reporting process could result in disciplinary action against a BSTX Participant. The Exchange would consider a BSTX's Participant's efforts to comply with Rule 17020(e) by promptly submitting a corrected report or responding to additional information requests from the Exchange in determining whether to bring, or the appropriate consequences of, a disciplinary action.

[84] *See* 17 CFR 242.304(a)(2)(i)(C) (requiring correcting amendments to Form ATS and ATS–N ''promptly'' after discovery of incorrect information previously filed); FINRA, Trade Reporting FAQ, Section 311 (Reporting Cancellations, Corrections and Reversals), *https://www.finra.org/filing-reporting/market-transparency-reporting/trade-reporting-faq.*

[85] The particular details included in such notice to BSTX Participants will vary based on the facts and circumstances giving rise to the suspension, but the Exchange expects that such notice would describe: (i) The impacted Security (or Securities); (ii) the nature of the disruption; (iii) the anticipated length of the suspension; and (iv) any changes to BSTX Participants' obligations to report end-of-day Security balances.

[86] *See* proposed Rule 17020(f). The Exchange believes that proposed Rule 17020(f) may foster coordination with persons processing information with respect to securities and is not designed to permit unfair discrimination because such provision will allow the Exchange to suspend certain Rule requirements in events where there may be difficulty coordinating or sharing pertinent information with BSTX Participants and/or Wallet Manager(s). Further, Rule 17020(f) is designed to apply to all market participants equally and to provide notice to affected market participants and regulators of BSTX, in order to allow such individuals and entities to coordinate with the Exchange and react to potential issues as deemed necessary.

[87] The Exchange acknowledges, of course, that certain issues such as a widespread power outage that prevents the Exchange from being able to transmit information to the Wallet Manager(s) could also result in a disruption to trading on BSTX and

This is because the end-of-day Security balance reporting is solely as an ancillary record-keeping mechanism and because the actual trading, clearance, and settlement of Securities would occur in the same manner as other NMS stock.

The Exchange would set forth via Regulatory Circular the precise manner in which Securities should be reported. In general, the report would simply require certain identifying information regarding the BSTX Participant (*e.g.,* name, carrying firm, MPID) and a list of the end-of-day Security position balances of the BSTX Participant.[88]

As a result of this process, the Ethereum blockchain would in the ordinary course reflect for each Security the end-of-day balance associated with each BSTX Participant's wallet address. Wallet addresses are essentially just a string of numbers and characters, and it would not be made public which BSTX Participant is associated with which wallet address or which address is the omnibus wallet address.[89] An observer of balances associated with a particular address would not be able to determine whether a particular address represented, for example, a carrying firm reporting end-of-day balances on behalf of multiple BSTX Participants, an individual BSTX Participant, or the omnibus wallet address. Neither could an observer determine which underlying customer(s) of a BSTX Participant associated with a particular wallet address held the Securities or whether the BSTX Participant owned the Securities proprietarily. In addition, an observer of the token balances related to a particular Security would not be able to tell whether a particular wallet address was long or short the shares.[90] For these reasons, the Exchange believes that the balance information that would be publicly available on the Ethereum blockchain would be sufficiently anonymous to address privacy concerns related to such information. Balance information for the Ethereum blockchain is available at Etherscan.io (''Etherscan''). From Etherscan.io, an observer would be able to search for the name of the particular Security and see the holders of tokens representing the Securities and the associated quantity, as well as other information (*e.g.,* transfers made as a result of the Wallet Manager(s) reallocation process).[91]

The Exchange does not believe that the ancillary records of Security balance information published on the Ethereum blockchain would be likely to cause investor confusion because there is no similar source of information with which an observer of the blockchain data could be confused. That is, the resting position balances related to Security ownership of BSTX Participants and other market participants are not available through another medium (*e.g.,* such as by DTC making such information available) in a manner that could lead an investor to be confused as to whether the Ethereum blockchain or some other source of Security balance information is accurate. Moreover, Security position balance information as recorded on the Ethereum blockchain in token form will not reflect legal ownership of Securities and the identities of BSTX Participants corresponding to each wallet address (as well as the omnibus wallet address) would not be made public. The Exchange believes that the proposed end-of-day Security balance reporting requirement is consistent with the Exchange Act, and Section 6(b)(5)[92] in particular, because it is designed to foster cooperation and coordination with persons engaged in regulating, clearing, settling, and processing information with respect to transactions in Securities and would not unfairly discriminate among BSTX Participants, all of whom are subject to the same reporting requirement. The purpose of the reporting obligation is to allow the Exchange to receive information from BSTX Participants regarding end-of-day balances in Securities so that the Exchange can provide that information to the Wallet Manager(s) and the Wallet Manager(s) can, in turn, use the information to update the Ethereum blockchain as an ancillary recordkeeping mechanism reflecting changes in Security ownership (*i.e.,* the recording of end-of-day balance information). Without this information, all of the outstanding balances regarding a Security would be attributed by the Wallet Manager(s) in tokenized form to the omnibus wallet address rather than allocated to multiple wallet addresses belonging to corresponding BSTX Participants. Accordingly, to the extent that BTSX Participants have end-of-day balances in Securities, the allocation of the appropriate balances to their respective wallet addresses by the Wallet Manager(s) will reflect a relatively more robust use of the functionality of the smart contracts than if the entire outstanding balance of a Security is attributed in tokenized form to the omnibus wallet address. Promoting this more robust use of the functionality of the smart contracts and their ability to allocate and re-allocate Security balances in tokenized form across multiple wallet addresses will enhance the ability of market participants, including the Exchange, to observe and evaluate the capabilities of blockchain technology as an ancillary recordkeeping mechanism. The Exchange notes that under the existing authority of other equity exchanges, the exchange is able to request that exchange members/participants furnish to the exchange records pertaining to transactions executed on or through the exchange in a time and manner required by such exchange.[93] Accordingly, BSTX believes that the proposed end-of-day Security balance reporting requirement would be consistent with authority that the Commission has already approved regarding furnishment of records by members of exchanges.

The Exchange recognizes that, while the ancillary recordkeeping mechanism will provide additional transparency into Security holdings, there are limitations in what the Ethereum

potentially the declaration of a halt in trading of the Security by the Exchange.

[88] Pursuant to the BSTX Listing Rules, BSTX will allow listing of three types of Securities: Equity Securities, preferred Securities, and warrant Securities. These three types of Securities will have similar end-of-day reporting processes; each BSTX Participant will be required to provide end-of-day Security position balance information to BSTX related to each Security issuance based on such BSTX Participant's DTC account balance. The BSTX Listing Rules also discuss paired Securities, which are Securities that may be transferred and traded only in combination with one another as a single economic unit. For paired Securities, BSTX expects that BSTX Participants, when submitting position balance information to BSTX, will specify the end-of-day balances for each constituent Security that comprises a paired Security.

[89] The Wallet Manager(s) would have information regarding Security balance information associated with a particular BSTX Participant. However, as noted in Part II.H, a condition of serving as a Wallet Manager would include, among other things, a representation to comply with the federal securities laws, including trading on the basis of material non-public information.

[90] This is because the end-of-day ancillary recordkeeping process captures only end-of-day balances as reported by DTC to BSTX Participants or their carrying firms. Thus, if a BSTX Participant borrowed Securities and the borrowed Securities were moved to its DTC account (or the DTC account of its carrying firm on its behalf), the borrowed Securities would appear to be a long position in the Security, when in fact the BSTX Participant was taking a short position.

[91] This process can be done presently with ERC–20 tokens or other digital assets built on Ethereum.

[92] 15 U.S.C. 78f(b)(5).

[93] *See e.g.,* BOX Rule 10000(a) and (b), Cboe BZX Rule 4.2, and IEX Rule 4.540. Broker-dealers are also subject to daily or real-time reporting obligations in a variety of other contexts. For example, pursuant to the FINRA Rule 7000 Series. *See e.g.,* FINRA Rule 7230A(b) (noting that ''Participants shall transmit trade reports to the System for transactions in Reportable Securities as soon as practicable but no later than 10 seconds after execution . . .''). Trades in municipal securities are generally required within 15 minutes of the time of trade. *See* MSRB Rule G–14(a)(ii).

blockchain will reflect with regard to end-of-day Security balances as an ancillary recordkeeping mechanism given that all non-BSTX Participants' balances will be aggregated and reflected in an omnibus wallet address for each Security.[94] In addition, the end-of-day token balances (which represent Securities) may be inaccurate or unavailable,[95] such as when a BSTX Participant misreports its balance or under circumstances in which BSTX is unable to send the balances to the Wallet Manager or the Wallet Manager is unable to update the Ethereum blockchain, as discussed above. For these reasons, among others, the Exchange believes that initially using blockchain technology as an ancillary recordkeeping mechanism pursuant to which the Securities represented on the blockchain in tokenized form would not convey legal ownership is the appropriate way to explore the potential benefits of blockchain technology consistent with the protection of investors and the public interest.[96] In the event of any disruption to the blockchain, the architecture of the Security (and its tokenized representation), or to the end-of-day Security balance reporting process, there would be no impact on the ability of market participants to trade Securities or current balances of Securities actually held by each market participant through the facilities of DTC, which the Exchange believes furthers the protection of investors and the public interest, consistent with Section 6(b)(5) of the Exchange Act.[97] Moreover, the Exchange believes that the public has an interest in exploring the use of new technology, such as blockchain technology, and that such technology may be able to help perfect the mechanism of a free and open market and a national market system, consistent with Section 6(b)(5) of the Exchange Act.[98] Finally, the Exchange believes that use of anonymized wallet addresses to track end-of-day balances may prevent fraudulent and manipulative acts and practices, consistent with Section 6(b)(5) of the Exchange Act,[99] because obscuring the identities of the wallet address owners may make it difficult to misuse any private information associated with these wallet addresses. The Exchange believes that the proposal is reasonably designed to introduce blockchain technology in a gradual way and in coordination and cooperation with the industry, the Commission, and the existing regulatory framework.[100]

K. Trading Securities on Other National Securities Exchanges and Implications Related to End-of-Day Reporting

Securities would be eligible for trading on other national securities exchanges that extend unlisted trading privileges (''UTP'') to them. As described above in Part II.E, Securities would be held in ''street name'' at DTC, have a CUSIP number, and would clear and settle through the facilities of a clearing agency registered with the SEC (*i.e.,* NSCC and DTC respectively). As a result, Securities would be able to trade on other exchanges and OTC in the same manner as other NMS stock. Accordingly, other exchanges would be able to extend unlisted trading privileges to Securities in accordance with Commission rules. The end-of-day Security position balance reporting by BSTX Participants and the publication of such balance information on the blockchain does not impact the ability of Securities to trade on other exchanges or OTC.

The Exchange proposes to include certain rules that contemplate the trading of Securities that may be listed on other national securities exchanges.[101] Since there are currently no other national securities exchanges trading Securities, these rules would be implemented in anticipation of other exchanges eventually listing and trading their own Securities. BSTX recognizes that another exchange trading Securities, or the equivalent thereof, may require BSTX to adopt certain rules specific to such other exchange in order to extend unlisted trading privileges to the other exchange's Securities consistent with Rule 12f–5.[102]

The Exchange reiterates that the proposed ancillary recordkeeping process is entirely separate from the functioning and requirements of Regulation NMS, as discussed above in II.C. Securities may trade away from BSTX in a manner identical to all other NMS stocks.

However, to the extent another exchange sought to adopt its own ancillary recordkeeping mechanism for BSTX-listed Securities, the Exchange believes there are multiple ways that this could be done. The Exchange cannot predict whether an exchange would want to establish an ancillary recordkeeping mechanism with respect

[94] The Exchange does not believe that imposing the end-of-day Security reporting requirement on BSTX Participants is unfairly discriminatory or burdens competition because all market participants are free to choose whether to become a BSTX Participant or not and there is no limitation imposed by the Exchange on the ability to trade Securities on other markets. Market participants that voluntarily choose to become BSTX Participants must comply with the rules of the Exchange, but they remain free to become a member of another exchange that supports trading of Securities or to purchase the Securities OTC. The Exchange further notes that it believes the end-of-day Security balance reporting process would not impose a substantial burden on BSTX Participants, because it would not require significant resources or time.

[95] The Exchange notes that, pursuant to the end-of-day reporting process as provided in Rule 17020 and as explained in further detail above, in all cases the Exchange would provide Security balance information to the Wallet Manager based on reports provided by BSTX Participants, and in no case will the Exchange knowingly provide inaccurate information to the Wallet Manager. The Exchange believes that inaccuracies in end-of-day Security balances should not be routine, and has adopted a number of mechanisms as safeguards against potential inaccuracies, including a duty to promptly correct an inaccurate report, authority for the Exchange to request additional information, suspension of the reporting process, and potential disciplinary action against BSTX Participants who do not meet these requirements. See Proposed Rule 17020(e) and (f). Nevertheless, the Exchange has described here potential scenarios where potential inaccuracies could theoretically occur in the interest of full transparency. Ultimately, any reporting regime depends on the accuracy of the information reported to the reporting authority, including reporting regimes administered by the Commission such as large trader reporting, ATS quarterly transaction volume data, and security-based swap reporting. See *e.g.,* 17 CFR 13h–1(b)(1)(iii) (requiring prompt filing of a Form 13H filing at the end of each calendar quarter if any information in a Form 13H becomes inaccurate for any reason); Exchange Act Release No. 74244, 80 FR 15464 (March 19, 2015) (''any system for transaction reporting must accommodate the possibility that certain data elements may be incorrectly reported.'').

[96] 15 U.S.C. 78f(b)(5).

[97] *Id.* The Exchange notes that the incidences of blockchain disruption or balance reporting issues would be mitigated by its proposals in Rules 17020 (e) and (f).

[98] 15 U.S.C. 78f(b)(5).

[99] *Id.*

[100] In the SIFMA April Letter, SIFMA asked about the implications of having end-of-day balance positions publicly available and whether the reporting system can be ''gamed'' by a BSTX Participant falsely reporting large holdings. SIFMA April Letter at 5. The Exchange notes that knowingly reporting a false number of Securities to the Exchange would be a direct violation of proposed Rule 17020, violate just and equitable principles of trade, and would be subject to disciplinary action by the Exchange. Nevertheless, if a BSTX Participant did try to ''game'' the ancillary recordkeeping process by, as SIFMA suggests, over- or under-reporting a quantity, it would not have any impact on the ability of the Securities to trade, clear or settle. Further, as described above, the balance information would not be useful to inform a market participant's trading in Securities because an observer of the blockchain would not know which market participant is associated with each wallet address, whether it is a DTC Participant reporting on behalf of multiple different BSTX participants, whether the position is long or short, and whether the position is for a customer or a proprietary position of the BSTX Participant. *See supra* notes 94 and 96 and accompanying text. Accordingly, it is unclear what purpose would be served or incentive there would be for a BSTX Participant to try to ''game'' the ancillary recordkeeping process. Attempting to do so offers no discernable advantage while at the same time exposing a BSTX Participant to disciplinary action.

[101] *See e.g.,* proposed Rule 25040(e).

[102] 17 CFR 240.12f–5.

to BSTX-listed Securities, what model another exchange might choose, and how or whether such a structure would interact with the Exchange's end-of-day reporting structure. The Exchange expresses no view on the merits of any such hypothetical proposal other than to note that there is no limitation proposed here that would prevent another exchange from participating in the Exchange's ancillary recordkeeping process or establishing some alternative or complementary process. One possible way another exchange could structure its end-of-day Security balance reporting, would be for the exchange to adopt rules stating that it will collect end-of-day Security balance information from its members based on the balance in each participant's DTC account and then such exchange could send that information to BSTX to deliver to a Wallet Manager for posting to the Ethereum blockchain. No development of blockchain technology, smart contract functionality, or other similar technology would be required.[103] An exchange could also support trading in BSTX-listed Securities without implementing such requirements. An exchange not wishing to report end-of-day balance positions directly to BSTX could instead engage its own version of a wallet manager that could communicate with BSTX's Waller Manager(s) to facilitate updates to the Ethereum blockchain.[104] A third potential variation might be for an exchange to design its own reporting process and technology to facilitate ancillary recordkeeping, with no nexus to the BSTX reporting structure.[105] The Exchange notes that it has no authority to bind another exchange to any particular reporting structure and is not proposing anything that would limit an exchange's ability to establish a similar, different, or integrated reporting structure. As noted above and elsewhere in this proposal, the Exchange's ancillary recordkeeping mechanism is not a function of Regulation NMS as it exists today, and this proposal should not be read to impose conditions on transactions or persons other than BSTX Participants. Securities clear and settle in the same manner as other NMS stock and therefore an exchange that chooses to extend UTP to Securities may trade them in the same manner as any other NMS stock without any end-of-day or blockchain reporting structure.

Market participants that wish to trade Securities and choose to become BSTX Participants or participants of another exchange that chooses to adopt some ancillary recordkeeping process would subject themselves to either BSTX's or the other exchange's ancillary reporting process or both. Of course, any market participant doing this would have to opt for participation in the relevant exchange, and any costs or compliance burden would be set forth in the rules of the relevant exchange.[106] Any market participant that would not want to perform the reporting obligations could avoid doing so by simply choosing to not become a BSTX Participant or participant of any other exchange imposing end-of-day Security balance reporting requirements on its members.

L. Benefits of a Security

As described above, the proposed BSTX Rules contemplate the use of smart contract functionality to record end-of-day Security position balance information in tokenized form to the Ethereum blockchain as an ancillary recordkeeping mechanism. The Exchange's proposal thereby represents an ancillary pairing of blockchain technology with the existing equities market infrastructure, in a manner consistent with Section 6(b)(5) and other relevant provisions of the Exchange Act, as described herein. The Commission has stated that it is ''mindful of the benefits of increasing use of new technologies for investors and the markets, and has encouraged experimentation and innovation . . .'' [107] stating further that ''[i]nformation and communications technologies are critical to healthy and efficient primary and secondary markets.'' [108] Regarding the judgment of whether the benefits of certain technologies are meritorious, the Commission has explained its view that ''[t]he market will ultimately prove the worth of technology—whether the benefits to the industry and its investors of developing and using new services are greater than the associated costs.'' [109] Consistent with these statements, the Exchange believes that promoting use of the functionality of smart contracts and their ability to allocate and re-allocate Security balances in tokenized form across multiple addresses in connection with end-of-day Security position balance information of BSTX Participants will allow market participants to observe and increase their familiarity with the capabilities and potential benefits of blockchain technology in a context that parallels current equity market infrastructure and thereby advance and protect the public's interest in the use and development of new data processing techniques that may create opportunities for more efficient, effective and safe securities markets.[110] As noted, because the

[103] By way of analogy, this is because an exchange that adopts such a reporting structure would be in a position similar to a BSTX Participant, in that it would simply be delivering end-of-day security balance totals to BSTX (or a Wallet Manager). Therefore, just as with BSTX Participants who need not develop any particular blockchain reporting technology pursuant to end-of-day reporting, an exchange that chose to send end-of-day Security balance reports to BSTX (or a Wallet Manager that BSTX used to update the Ethereum blockchain) would not need to develop any blockchain technology.

[104] Because the ancillary recordkeeping process proposed by the Exchange is not part of Regulation NMS or designed to facilitate compliance with Regulation NMS, it is unclear that it would be necessary for BSTX and such other exchange(s) to file a NMS plan with respect to coordinating ancillary recordkeeping mechanisms. A NMS plan is defined under the Exchange Act as any joint SRO plan in connection with: ''(i) the planning, development, operation or regulation of a national market system (or a subsystem thereof) or one or more facilities thereof; or (ii) the development and implementation of procedures and/or facilities designed to achieve compliance by a self-regulatory organizations and their members with any section of this Regulation NMS . . .'' 17 CFR 242.600(b)(44). Nevertheless, to the extent the Commission believed a NMS plan would be necessary to facilitate the coordination of ancillary recordkeeping processes, the Exchange would gladly welcome any such opportunity as it would promote more complete end-of-day Security balance records by including more market participants in the process. No other exchange has yet contacted the Exchange to express interest in establishing a coordinated ancillary recordkeeping process, but the Exchange would be pleased to engage other exchanges in this regard.

[105] An exchange need not even necessarily use blockchain technology to record end-of-day position balance reports of its members. Such a recordkeeping process would not be able to leverage the smart contract functionality built into BSTX-listed issuers' shares pursuant to the BSTX Protocol, but there is nothing in principle that would prevent another exchange from using its own systems or technology to create ancillary records of its members' Security balances. In such a case, the records published by the other exchange would reflect those of its members while the Etherum blockchain would reflect the balances of BSTX Participants. These would be separate sets of ancillary records.

[106] A market participant that chooses to become a BSTX Participant would only need to obtain a wallet address from the Exchange and comply with the end-of-day Security balance reporting requirement pursuant to proposed Rule 17020. There is no technological investment needed by BSTX Participants under the proposal related to the use of distributed ledger technology.

[107] Securities and Exchange Commission, The Impact of Recent Technological Advances on the Securities Markets (Sep. 1997), available at: *https://www.sec.gov/news/studies/techrp97.htm.*

[108] *Id.*

[109] *Id.*

[110] Report of the Senate Committee on Banking, Housing & Urban Affairs, S. Rep. No. 94–75, at 8 (1975) (expressing Congress' finding that new data processing and communications systems create the opportunity for more efficient and effective markets). While the Exchange believes that its proposal represents an introductory step in pairing the benefits of blockchain technology with the current equity market infrastructure, other market participants and FINRA have recognized additional

Continued

blockchain and Security balances recorded on the Ethereum blockchain in tokenized form do not reflect legal ownership of the actual securities of BSTX-listed issuers, any disruption to the Ethereum blockchain, the Security architecture, or the end-of-day reporting process would have no impact on the ability of Securities to trade on BSTX or otherwise, which the Exchange believes furthers the protection of investors and the public interest, consistent with Section 6(b)(5) of the Exchange Act.[111]

III. Proposed BSTX Rules

The discussion in this Part III addresses the proposed BSTX Rules that would be adopted as Rule Series 17000 through 28000.

A. General Provisions of BSTX and Definitions (Rule 17000 Series)

The Exchange proposes to adopt as its Rule 17000 Series (General Provisions of BSTX) a set of general provisions relating to the trading of Securities and other rules governing participation on BSTX. Proposed Rule 17000 sets forth the defined terms used throughout the BSTX Rules. The majority of the proposed definitions are substantially similar to defined terms used in other equities exchange rulebooks, such as with respect to the term ''customer.''[112] The Exchange proposes to set forth new definitions for certain terms to specifically identify systems, agreements, or persons as they relate to BSTX and as distinct from other Exchange systems, agreements, or persons that may be used in connection with the trading of other options on the Exchange.[113] The Exchange also proposes to define certain unique terms relating to the trading of Securities, including the term ''Security'' itself[114] and ''Wallet Manager.''[115] The term ''Wallet Manager'' is defined to provide context to the wallet address whitelisting and end-of-day Security balance reporting processes used to update the Ethereum blockchain as an ancillary recordkeeping mechanism.[116]

In addition to setting forth proposed definitions used throughout the proposed Rules, the Exchange proposes to specify in proposed Rule 17010 (Applicability) that the Rules set forth in the Rule 17000 Series to Rule 28000 Series apply to the trading, listing, and related matters pertaining to the trading of Securities. Proposed Rule 17010(b) provides that, unless specific Rules relating to Securities govern or unless the context otherwise requires, the provisions of any Exchange Rule (*i.e.,* including Exchange Rules in the Rule 100 through 16000 Series) shall be applicable to BSTX Participants.[117] This is intended to make clear that BSTX Participants are subject to all of the Exchange's Rules that may be applicable to them, notwithstanding that their trading activity may be limited solely to trading Securities. The Exchange believes that the proposed definitions set forth in Rule 17000 are consistent with Section 6(b)(5) of the Exchange Act[118] because they protect investors and the public interest by setting forth clear definitions that help BSTX Participants understand and apply Exchange Rules. Without clearly defining terms used in the Exchanges Rules and providing clarity as to the Exchange Rules that may apply, market participants could be confused as to the application of certain rules, which could cause harm to investors.

Proposed Rule 17020 sets forth the requirements to obtain a whitelisted wallet address from BSTX, and the end-of-day Security balance reporting, which are discussed in greater detail above in Parts II.G through L.

B. Participation on BSTX (Rule 18000 Series)

The Exchange proposes to adopt as its Rule 18000 Series (Participation on BSTX), three rules setting forth certain requirements relating to participation on BSTX. Proposed Rule 18000 (BSTX Participation) establishes ''BSTX Participants'' as a new category of Exchange participation for effecting transactions on the BSTX System, provided they: (i) Complete the BSTX Participant Application, Participation Agreement, and User Agreement;[119] (ii) be an existing Options Participant or become a Participant of the Exchange pursuant to the Rule 2000 Series; and (iii) provide such other information as required by the Exchange.[120] Proposed Rule 18010 (Requirements for BSTX Participants) sets forth certain requirements for BSTX Participants including requirements that each BSTX Participant comply with Rule 15c3–1 under the Exchange Act, comply with applicable books and records requirements, and be a member of a registered clearing agency or clear Security transactions through another BSTX Participant that is a member/participant of a registered clearing agency.[121] Finally, proposed Rule 18020

potential benefits to blockchain technology in various applications related to the securities markets. FINRA has stated ''[o]ne of the proposed benefits of [blockchain technology] is the ability to offer a timestamped, sequential, audit trail of transaction records. This may provide regulators and other interested parties (*e.g.,* internal audit, public auditors) with the opportunity to leverage the technology to view the complete history of a transaction where it may not be available today and enhance existing records related to securities transactions.'' Financial Industry Regulatory Authority, *Distributed Ledger Technology: Implications of Blockchain for the Securities Industry* (January 2017), *available at: https://www.finra.org/sites/default/files/FINRA_Blockchain_Report.pdf.* Further, Paxos Trust Company echoed similar themes in connection with its receipt of no-action relief from the Commission staff, and explained in its request letter certain benefits of blockchain technology including ''greater data accuracy and transparency, advanced security, and increased levels of availability and operational efficiency[.]'' the Exchange believes such benefits may be generally relevant to future potential applications of blockchain technology. *See* Letter from Jeffrey S. Mooney, Division of Trading and Markets, Securities and Exchange Commission to Charles Cascarilla and Daniel Burstein, Paxos Trust Company, LLC re: Clearing Agency Registration Under Section 17A(b)(1) of the Securities Exchange Act of 1934 (October 28, 2019), *available at: https://www.sec.gov/divisions/marketreg/mr-noaction/2019/paxos-trust-company-102819-17a.pdf.*

[111] 15 U.S.C. 78f(b)(5).

[112] Proposed Rule 17000(a)(16) defines the term ''customer'' to not include a broker or dealer, which parallels the same definition in other exchange rulebooks. *See e.g.,* IEX Rule 1.160(j). Similarly, the Exchange proposes to define the term ''Regular Trading Hours'' as the time between 9:30 a.m. and 4:00 p.m. Eastern Time. *See* proposed Rule 17000(a)(28) *cf.* IEX Rule 1.160(gg) (defining ''Regular Market Hours'' in the same manner).

[113] For example, the Exchange proposes to define the term ''BSTX'' to mean the facility of the Exchange for executing transaction in Securities, the term ''BSTX Participant'' to mean a Participant or Options Participant (as those terms are defined in the Exchange's Rule 100 Series) that is authorized to trade Securities, and the term ''BSTX System'' to mean the automated trading system used by BSTX for the trading of Securities. *See* proposed Rule 17000(a)(8), (11), and (14).

[114] Proposed Rule 17000(a)(30) provides that the term ''Security'' means a NMS stock, as defined in Rule 600(b)(47) of the Exchange Act, trading on the BSTX System and for which ancillary Ethereum blockchain records are maintained under the BSTX Rules. The proposed definition further specifies that references to a ''security'' or ''securities'' in the Rules may include Securities.

[115] Proposed Rule 17000(a)(31) defines the term ''Wallet Manager'' as a party approved by BSTX to operate software compatible with the BSTX Protocol. *See also supra* Sections II.G and H. for a discussion of the role of a Wallet Manager.

[116] *See supra* note 62.

[117] Proposed Rule 17010 further specifies that to the extent the provisions of the Rules relating to the trading of Securities contained in Rule 17000 Series to Rule 28000 Series are inconsistent with any other provisions of the Exchange Rules, the Rules relating to Security trading shall control.

[118] 15 U.S.C. 78f(b)(5).

[119] The BSTX Participant Application, Participation Agreement, and User Agreement are attached as Exhibits 3A, 3B, and 3C respectively.

[120] Proposed Rule 18000 also sets forth the Exchange's review process regarding BSTX Participation Agreements and certain limitations on the ability to transfer BSTX Participant status (*e.g.,* in the case of a change of control). In addition proposed Rule 18000(b)(2) provides that a BSTX Participant shall continue to abide by all applicable requirements of the Rule 2000 Series, which would include, for example, IM–2040–5, which specifies continuing education requirements of Exchange Participants and their associated persons.

[121] Proposed Rule 18010(b) is similar to the rules of existing exchanges. *See e.g.,* IEX Rule 2.160(c). Proposed Rule 18010(a) is also similar to the rules

(Associated Persons) provides that associated persons of a BSTX Participant are bound by the Rules of the Exchange to the same extent as each BSTX Participant.

The Exchange believes that the proposed Rule 18000 Series (Participation on BSTX) is consistent with Section 6(b)(5) of the Exchange Act [122] because these proposed rules are designed to promote just and equitable principles of trade, and protect investors and the public interest by setting forth the requirements to become a BSTX Participant and specifying that associated persons of a BSTX Participant are bound by Exchange Rules. Under proposed Rule 18000, a BSTX Participant must first become an Exchange Participant pursuant to the Exchange Rule 2000 Series which the Exchange believes would help assure that BSTX Participants meet the appropriate standards for trading on BSTX in furtherance of the protection of investors.[123]

C. Business Conduct for BSTX Participants (Rule 19000 Series)

The Exchange proposes to adopt as its Rule 19000 Series (Business Conduct for BSTX Participants), twenty two rules relating to business conduct requirements for BSTX Participants that are substantially similar to business conduct rules of other exchanges.[124] The proposed Rule 19000 Series would specify business conduct requirements with respect to: (i) Just and equitable principles of trade; [125] (ii) adherence to law; [126] (iii) use of fraudulent devices; [127] (iv) false statements; [128] (v) know your customer; [129] (vi) fair dealing with customers; [130] (vii) suitability; [131] (viii) the prompt receipt and delivery of securities; [132] (ix) charges for services performed; [133] (x) use of information obtained in a fiduciary capacity; [134] (xi) publication of transactions and quotations; [135] (xii) offers at stated prices; [136] (xiii) payments involving publications that influence the market price of a security; [137] (xiv) customer confirmations; [138] (xv) disclosure of a control relationship with an issuer of Securities; [139] (xvi) discretionary accounts; [140] (xvii) improper use of customers' securities or funds and a prohibition against guarantees and sharing in accounts; [141] (xviii) the extent to which sharing in accounts is permissible; [142] (xix) communications with customers and the public; [143] (xx) gratuities; [144] (xxi) telemarketing; [145] and (xxii) mandatory systems testing.[146] The Exchange notes that the proposed financial responsibility rules are virtually identical to those of other national securities exchanges other than changes to defined terms and certain other provisions that would not apply to the trading of Securities on the BSTX System.[147]

The Exchange believes that the proposed Rule 19000 Series (Business Conduct) is consistent with Section 6(b)(5) of the Exchange Act [148] because these proposed rules are designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, and protect investors and the public interest by setting forth appropriate standards of conduct applicable to BSTX Participants in carrying out their business activities. For example, proposed Rule 19000 (Just and Equitable Principles of Trade) and 19010 (Adherence to Law) would prohibit BSTX Participants from engaging in acts or practices inconsistent with just and equitable principles of trade or that would violate

of existing exchanges. *See e.g.,* IEX Rule 1.160(s) and Cboe BZX Rule 17.2(a).

[122] 15 U.S.C. 78f(b)(5).

[123] The Exchange notes that the approach of requiring members of a facility of an exchange to first become members of the exchange is consistent with the approach used by another national securities exchange. *See* Cboe BZX Rule 17.1(b)(3) (requiring that a Cboe BZX options member be an existing member or become a member of the Cboe BZX equities exchange pursuant to the Cboe BZX Chapter II Series).

[124] *See* Cboe BZX Chapter 5 rules. *See also* IEX Rule 5.150 with respect to proposed Rule 21040 (Prevention of the Misuse of Material, Non-Public Information).

[125] Proposed Rule 19000 (Just and Equitable Principles of Trade) provides that no BSTX Participant, including its associated persons, shall engage in acts or practices inconsistent with just and equitable principles of trade.

[126] Proposed Rule 19010 (Adherence to Law) generally requires BSTX Participants to adhere to applicable laws and regulatory requirements.

[127] Proposed Rule 19020 (Use of Fraudulent Devices) generally prohibits BSTX Participants from effecting a transaction in any security by means of a manipulative, deceptive or other fraudulent device or contrivance.

[128] Proposed Rule 19030 (False Statements) generally prohibits BSTX Participants and their associated persons from making false statements or misrepresentations in communications with the Exchange.

[129] Proposed Rule 19040 (Know Your Customer) requires BSTX Participants to comply with FINRA Rule 2090 as if such rule were part of the Exchange Rules.

[130] Proposed Rule 19050 (Fair Dealing with Customers) generally requires BSTX Participants to deal fairly with customers and specifies certain activities that would violate the duty of fair dealing (*e.g.,* churning or overtrading in relation to the objectives and financial situation of a customer).

[131] Proposed Rule 19060 (Suitability) provides that BSTX Participants and their associated persons shall comply with FINRA Rule 2111 as if such rule were part of the Exchange Rules.

[132] Proposed Rule 19070 (Prompt Receipt and Delivery of Securities) would generally prohibit a BSTX Participant from accepting a customer's purchase order for a security until it can determine that the customer agrees to receive the securities against payment.

[133] Proposed Rule 19080 (Charges for Services Performed) generally requires that charges imposed on customers by broker-dealers shall be reasonable and not unfairly discriminatory.

[134] Proposed Rule 19090 (Use of Information Obtained in a Fiduciary Capacity) generally restricts the use of information as to the ownership of securities when acting in certain capacities (*e.g.,* as a trustee).

[135] Proposed Rule 19100 (Publication of Transactions and Quotations) generally prohibits a BSTX Participant from disseminating a transaction or quotation information unless the BSTX Participant believes it to be bona fide.

[136] Proposed Rule 19110 (Offers at Stated Prices) generally prohibits a BSTX Participant from offering to transact in a security at a stated price unless it is in fact prepared to do so.

[137] Proposed Rule 19120 (Payments Involving Publications that Influence the Market Price of a Security) generally prohibits direct or indirect payments with the aim of disseminating information that is intended to effect the price of a security.

[138] Proposed Rule 19130 (Customer Confirmations) requires that BSTX Participants comply with Rule 10b–10 of the Exchange Act. 17 CFR 240.10b–10.

[139] Proposed Rule 19140 (Disclosure of Control Relationship with Issuer) generally requires BSTX Participants to disclose any control relationship with an issuer of a security before effecting a transaction in that security for the customer.

[140] Proposed Rule 19150 (Discretionary Accounts) generally provides certain restrictions on BSTX Participants handling of discretionary accounts, such as by effecting excessive transactions or obtained authorization to exercise discretionary powers.

[141] Proposed Rule 19160 (Improper Use of Customers' Securities or Funds and Prohibition against Guarantees and Sharing in Accounts) generally prohibits BSTX Participants from making improper use of customers securities or funds and prohibits guarantees to customers against losses.

[142] Proposed Rule 19170 (Sharing in Accounts; Extent Permissible) generally prohibits BSTX Participants and their associated persons from sharing directly or indirectly in the profit or losses of the account of a customer unless certain exceptions apply such as where an associated person receives prior written authorization from the BSTX Participant with which he or she is associated.

[143] Proposed Rule 19180 (Communications with Customers and the Public) generally provides that BSTX Participants and their associated persons shall comply with FINRA Rule 2210 as if such rule were part of the Exchange Rules.

[144] Proposed Rule 19200 (Gratuities) requires BSTX Participants to comply with the requirements set forth in BOX Exchange Rule 3060 (Gratuities).

[145] Proposed Rule 19210 (Telemarketing) requires that BSTX Participants and their associated persons comply with FINRA Rule 3230 as if such rule were part of the Exchange's Rules.

[146] Proposed Rule 19220 (Mandatory Systems Testing) requires that BSTX Participants comply with Exchange Rule 3180 (Mandatory Systems Testing).

[147] For example, the Exchange is not proposing to adopt a rule contained in other exchanges' business conduct rules relating to disclosures that broker-dealers give to their customers regarding the risks of effecting securities transactions during times other than during regular trading hours (*e.g.,* higher volatility, possibly lower liquidity) because executions may only occur during regular trading hours on the BSTX System. *See e.g.,* IEX Rule 3.290, Cboe BZX Rule 3.21.

[148] 15 U.S.C. 78f(b)(5).

applicable laws and regulations. Similarly, proposed Rule 19050 (Fair Dealing with Customers) would require that BSTX Participants deal fairly with their customers and proposed Rule 19030 (False Statements) would generally prohibit BSTX Participants, or their associated persons from making false statements or misrepresentations to the Exchange. The Exchange believes that requiring that BSTX Participants comply with the proposed business conduct rules in the Rule 19000 Series would further the protection of investors and the public interest by promoting high standards of commercial honor and integrity. In addition, each of the rules in the proposed Rule 19000 Series (Business Conduct) is substantially similar to supervisory rules of other exchanges.[149]

D. Financial and Operational Rules for BSTX Participants (Rule 20000 Series)

The Exchange proposes to adopt as its Rule 20000 Series (Financial and Operational Rules), ten rules relating to financial and operational requirements for BSTX Participants that are substantially similar to financial and operational rules of other exchanges.[150] The proposed Rule 20000 Series would specify financial and operational requirements with respect to: (i) Maintenance and furnishing of books and records; [151] (ii) financial reports; [152] (iii) net capital compliance; [153] (iv) early warning notifications pursuant to Rule 17a–11 under the Exchange Act; [154] (v) authority of the Chief Regulatory Officer to impose certain restrictions; [155] (vi) margin; [156] (vii) day-trading margin; [157] (viii) customer account information; [158] (ix) maintaining records of customer complaints; [159] and (x) disclosure of financial condition.[160]

The Exchange believes that the proposed Rule 20000 (Financial and Operational Rules) Series is consistent with Section 6(b)(5) of the Exchange Act [161] because these proposed rules are designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, and protect investors and the public interest by subjecting BSTX Participants to certain recordkeeping, disclosure, and related requirements designed to ensure that BSTX Participants conduct themselves in a financially responsible manner. For example, proposed Rule 20000 would require BSTX Participants to comply with existing Exchange Rule 1000, which sets forth certain recordkeeping responsibilities and the obligation to furnish these to the Exchange upon request so that the Exchange can appropriately monitor the financial condition of a BSTX Participant and its compliance with applicable regulatory requirements. Similarly, proposed Rule 20050 would set forth the margin requirements that BSTX Participants must retain with respect to customers trading in a margin account to ensure that BSTX Participants are not extending credit to customers in a manner that might put the financial condition of the BSTX Participant in jeopardy. Each of the proposed rules in the Rule 20000 Series (Financial and Operational Rules) is substantially similar to existing rules of other exchanges or incorporates an existing rule of the Exchange or another self-regulatory organization (''SRO'') by reference.

E. Supervision (Rule 21000 Series)

The Exchange proposes to adopt as its Rule 21000 Series (Supervision), six rules relating to certain supervisory requirements for BSTX Participants that are substantially similar to supervisory rules of other exchanges.[162] The Proposed Rule 21000 Series would specify supervisory requirements with respect to: (i) Enforcing written procedures to appropriately supervise the BSTX Participant's conduct and compliance with applicable regulatory requirements; [163] (ii) designation of an individual to carry out written supervisory procedures; [164] (iii) maintenance and keeping of records carrying out the BSTX Participant's written supervisory procedures; [165] (iv) review of activities of each of a BSTX Participant's offices, including periodic examination of customer accounts to detect and prevent irregularities or abuses; [166] (v) the prevention of the misuse of material non-public information; [167] and (vi) implementation of an anti-money laundering (''AML'') compliance program.[168] These rules are designed to ensure that BSTX Participants are able to appropriately supervise their business activities, review and maintain records with respect to such supervision, and enforce specific procedures relating insider-trading and AML.

The Exchange believes that the proposed Rule 21000 (Supervision) Series is consistent with Section 6(b)(5) of the Exchange Act [169] because these proposed rules are designed to prevent fraudulent and manipulative acts and

[149] *See supra* note 134.

[150] *See* Cboe BZX Chapter 6 rules and IEX Chapter 5 rules.

[151] Proposed Rule 20000 (Maintenance, Retention and Furnishing of Books, Records and Other Information) requires that BSTX Participants comply with current Exchange Rule 1000 (Maintenance, Retention and Furnishing of Books, Records and Other Information) and that BSTX Participants shall submit to the Exchange order, market and transaction data as the Exchange may specify by Information Circular.

[152] Proposed Rule 20010 (Financial Reports) provides that BSTX Participants shall comply with the requirements of current Exchange Rule 10020 (Financial Reports).

[153] Proposed Rule 20020 (Capital Compliance) provides that each BSTX Participant subject to Rule 15c3–1 under the Exchange Act (17 CFR 240.15c3–1) shall comply with such rule and other financial and operational rules contained in the proposed Rule 20000 series.

[154] 17 CFR 240.17a–11. Proposed Rule 20030 (''Early Warning'' Notification) provides that BSTX Participants subject to the reporting or notifications requirements of Rule 17a–11 under the Exchange Act (17 CFR 240.17a–11) or similar ''early warning'' requirements imposed by other regulators shall provide the Exchange with certain reports and financial statements.

[155] Proposed Rule 20040 (Power of CRO to Impose Restrictions) generally provides that the Exchange's Chief Regulatory Officer may impose restrictions and conditions on a BSTX Participant subject to the early warning notification requirements under certain circumstances.

[156] Proposed Rule 20050 (Margin) sets forth the required margin amounts for certain securities held in a customer's margin account.

[157] Proposed Rule 20060 (Day Trading Margin) sets forth additional requirements with respect to customers that engage in day trading.

[158] Proposed Rule 20070 (Customer Account Information) requires that BSTX Participants comply with FINRA Rule 4512 as if such rule were part of the Exchange Rules and further clarifies certain cross-references within FINRA Rule 4512.

[159] Proposed Rule 20080 (Record of Written Customer Complaints) requires that BSTX Participants comply with FINRA Rule 4513 as if such rule were part of the Exchange Rules.

[160] Proposed Rule 20090 (Disclosure of Financial Condition) generally requires that BSTX Participants make available certain information regarding the BSTX Participant's financial condition upon request of a customer.

[161] 15 U.S.C. 78f(b)(5).

[162] *See* Cboe BZX Chapter 5 rules. *See also* IEX Rule 5.150 with respect to proposed Rule 21040 (Prevention of the Misuse of Material, Non-Public Information).

[163] Proposed Rule 21000 (Written Procedures).

[164] Proposed Rule 21010 (Responsibility of BSTX Participants) would also require that a copy of a BSTX's written supervisory procedures be kept in each office and makes clear that final responsibility for proper supervision rests with the BSTX Participant.

[165] Proposed Rule 21020 (Records).

[166] Proposed Rule 21030 (Review of Activities).

[167] Proposed Rule 21040 (Prevention of the Misuse of Material, Non-Public Information) generally requires BSTX Participants to enforce written procedures designed to prevent misuse of material non-public information and sets forth examples of conduct that would constitute a misuse of material, non-public information.

[168] Proposed Rule 21050 (Anti-Money Laundering Compliance Program). The Exchange already has rules with respect to Exchange Participants enforcing an AML compliance program set forth in Exchange Rule 10070 (Anti-Money Laundering Compliance Program), so proposed Rule 21050 specifies that BSTX Participants shall comply with the requirements of that pre-existing rule.

[169] 15 U.S.C. 78f(b)(5).

practices, promote just and equitable principles of trade, and protect investors and the public interest by ensuring that BSTX Participants have appropriate supervisory controls in place to carry out their business activities in compliance with applicable regulatory requirements. For example, proposed Rule 21000 (Written Procedures) would require BSTX Participants to enforce written procedures which enable them to supervise the activities of their associated persons and proposed Rule 21010 (Responsibility of BSTX Participants) would require a BSTX Participant to designate a person in each office to carry out written supervisory procedures. Requiring appropriate supervision of a BSTX Participant's business activities and associated persons would promote compliance with the federal securities laws and other applicable regulatory requirements in furtherance of the protection of investors and the public interest.[170] In addition, each of the rules in the proposed Rule 21000 Series (Supervision) is substantially similar to supervisory rules of other exchanges.[171]

F. Miscellaneous Provisions (Rule 22000 Series)

The Exchange proposes to adopt as its Rule 22000 Series (Miscellaneous Provisions), six rules relating to a variety of miscellaneous requirements applicable to BSTX Participants that are substantially similar to rules of other exchanges.[172] These miscellaneous provisions relate to: (i) Comparison and settlement requirements;[173] (ii) failures to deliver and failures to receive;[174] (iii) forwarding of proxy and other issuer-related materials;[175] (iv) commissions;[176] (v) regulatory services agreements;[177] and (vi) transactions involving Exchange employees.[178] These rules are designed to capture additional regulatory requirements applicable to BSTX Participants, such as setting forth their obligation to deliver proxy materials at the request of an issuer and to incorporate by reference Rule 200–203 of Regulation SHO.[179]

The Exchange believes that the proposed Rule 22000 (Miscellaneous Provisions) Series is consistent with Section 6(b)(5) of the Exchange Act[180] because these proposed rules are designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, and protect investors and the public interest by ensuring that BSTX Participants comply with additional regulatory requirements, such as Rule 203 of Regulation SHO[181] as provided in proposed Rule 22010 (Failure to Deliver and Failure to Receive), in connection with their participation on BSTX. For example, proposed Rule 22030 (Commissions) prohibits BSTX Participants from charging fixed rates of commissions for transactions on the Exchange consistent with Section 6(e)(1) of the Exchange Act.[182] Similarly, proposed Rule 22050 (Transactions involving Exchange Employees) sets forth certain requirements and prohibitions relating to a BSTX Participant providing certain financial services to an Exchange employee, which the Exchange believes helps prevent potentially fraudulent and manipulative acts and practices and furthers the protection of investors and the public interest.

G. Trading Practice Rules (Rule 23000 Series)

The Exchange proposes to adopt as its Rule 23000 Series (Trading Practice Rules), 14 rules relating to trading practice requirements for BSTX Participants that are substantially similar to trading practice rules of other exchanges.[183] The proposed Rule 23000 series would specify trading practice requirements related to: (i) Market manipulation; (ii) fictitious transactions; (iii) excessive sales by a BSTX Participant; (iv) manipulative transactions; (v) dissemination of false information; (vi) prohibition against trading ahead of customer orders; (vii) joint activity; (viii) influencing data feeds; (ix) trade shredding; (x) best execution; (xi) publication of transactions and changes; (xii) trading ahead of research reports; (xiii) front running of block transactions; and (xiv) a prohibition against disruptive quoting and trading activity. The purpose of the trading practice rules is to set forth standards and rules relating to the trading conduct of BSTX Participants, primarily with respect to prohibiting forms of market manipulation and specifying certain obligations broker-dealers have to their customers, such as the duty of best execution. For example, proposed Rule 23000 (Market Manipulation) sets forth a general prohibition against a BSTX Participant purchasing a security at successively higher prices or sales of a security at successively lower prices, or to otherwise engage in activity for the purpose of creating or inducing a false, misleading or artificial appearance of activity in such security.[184] Proposed Rule 23010 (Fictitious Transactions) similarly prohibits BSTX Participants from fictitious transaction activity, such as executing a transaction which involves no beneficial change in ownership, and proposed Rule 23020 (Excessive Sales by a BSTX Participant) prohibits a BSTX Participant from executing purchases or sales in any security trading on the Exchange for any account in which it has an interest, which are excessive in view of the BSTX Participant's financial resources or in view of the market for such security.[185] Proposed Rule 23060 (Joint

[170] *Id.*

[171] *See supra* note 172.

[172] *See* Cboe BZX Chapter 13 rules. *See also* IEX Rule 6.180 with respect to proposed Rule 22050 (Transactions Involving BOX Employees).

[173] Proposed Rule 22000 (Comparison and Settlement Requirements) provides that a BSTX Participant that is a member of a registered clearing agency shall implement comparison and settlement procedures as may be required under the rules of such entity. The proposed rule would further provide that, notwithstanding this general provision, the Board may extend or postpone the time of delivery of a BSTX transaction whenever the Board determines that it is called for by the public interest, just and equitable principles of trade or to address unusual conditions. In such a case, delivery will occur as directed by the Board.

[174] Proposed Rule 22010 (Failure to Deliver and Failure to Receive) provides that borrowing and deliveries must be effected in accordance with Rule 203 of Regulation SHO (17 CFR 242.203) and incorporates Rules 200–203 of Regulation SHO by reference into the rule (17 CFR §§ 242.200–203).

[175] Proposed Rule 22020 (Forwarding of Proxy and Other Information; Proxy Voting) generally provides that BSTX Participants shall forward proxy materials when requested by an issuer and sets forth certain conditions and limitations for BSTX Participants to give a proxy to vote stock that is registered in its name.

[176] Proposed Rule 22030 (Commissions) provides that the Exchange Rules or practices shall not be construed to allow a BSTX Participant or its associated persons to agree or arrange for the charging of fixed rates commissions for transactions on the Exchange.

[177] Proposed Rule 22040 (Regulatory Service Agreement) provides that the Exchange may enter into regulatory services agreements with other SROs to assist in carrying out regulatory functions, but the Exchange shall retain ultimate legal responsibility for, and control of, its SRO responsibilities.

[178] Proposed Rule 22040 (Transactions Involving Exchange Employees) sets forth conditions and limitations on a BSTX Participant providing loans or supporting the account of an Exchange employee (*e.g.,* promptly obtaining and implementing an instruction from the employee to provide duplicate account statement to the Exchange) in order to mitigate any potential conflicts of interest that might arise from such a relationship.

[179] 17 CFR §§ 242.200–203.

[180] 15 U.S.C. 78f(b)(5).

[181] 17 CFR 242.203.

[182] 15 U.S.C. 78f(e)(1).

[183] *See* Cboe BZX Chapter 12 rules.

[184] Proposed Rule 23030 (Manipulative Transactions) specifies further prohibitions relating to potential manipulation by prohibiting BSTX Participants from, among other things, participating or having any direct or indirect interest in the profits of a manipulative operation or knowingly managing or financing a manipulative operation.

[185] Other proposed rules relating to potential manipulation include: (i) Rule 23040

Continued

Activity) prohibits a BSTX Participant from directly or indirectly holding any interest or participation in any joint account for buying or selling a security traded on the Exchange unless reported to the Exchange with certain information provided and proposed Rule 23090 (Best Execution) reaffirms BSTX Participants best execution obligations to their customers.[186]

Proposed Rule 23050 (Prohibition against Trading Ahead of Customer Orders) is substantially similar to FINRA 5320 and rules adopted by other exchanges,[187] and generally prohibits BSTX Participants from trading ahead of customer orders unless certain enumerated exceptions are available and requires BSTX Participants to have a written methodology in place governing execution priority to ensure compliance with the Rule. The Exchange proposes to adopt each of the exceptions to the prohibition against trading ahead of customer orders as provided in FINRA Rule 5320 other than the exception related to trading outside of normal market hours, since trading on the Exchange would be limited to regular trading hours.

The Exchange proposes to adopt the order handling procedures requirement in proposed Rule 23050(i) consistent with the rules of other exchanges.[188] Specifically, proposed Rule 23050(i) would provide that a BSTX Participant must make every effort to execute a marketable customer order that it receives fully and promptly and must cross customer orders when they are marketable against each other consistent with the proposed Rule.

The Exchange proposes to adopt a modified version of the exception set forth in FINRA Rule 5320.06 relating to minimum price improvement standards as proposed in Rule 23050(h). Under proposed Rule 23050(h), BSTX Participants would be permitted to execute an order on a proprietary basis when holding an unexecuted limit order in that same security without being required to execute the held limit order provided that they give price improvement of $0.01 to the unexecuted held limit order. While FINRA Rule 5320.06 sets forth alternate, lower price improvement standards for securities priced below $1, the Exchange proposes to adopt a uniform price improvement requirement of $0.01 for securities traded on the BSTX System consistent with the Exchange's proposed uniform minimum price variant of $0.01 set forth in proposed Rule 25030.

In addition, the Exchange proposes to adopt an exception for bona fide error transactions as proposed in Rule 25030(g) which would allow a BSTX Participant to trade ahead of a customer order if the trade is to correct a bona fide error, as defined in the rule. This proposed exception is nearly identical to similar exceptions of other exchanges[189] except that other exchange rules also provide an exception whereby firms may submit a proprietary order ahead of a customer order to offset a customer order that is in an amount other than a round lot (*i.e.,* 100 shares). The Exchange is not adopting an exception for odd-lot orders under these circumstances because the minimum unit of trading for Securities pursuant to proposed Rule 25020 is one Security. The Exchange believes that there may be a notable amount of trading in amounts of less than 100 Securities (*i.e.,* trading in odd-lot amounts), and the Exchange accordingly does not believe that it is appropriate to allow BSTX Participants to trade ahead of customer orders just to offset an odd-lot customer order.

The Exchange believes that the proposed Rule 23000 Series relating to trading practice rules is consistent with Section 6(b)(5) of the Exchange Act[190] because these proposed rules are designed to prevent fraudulent and manipulative acts and practices that could harm investors and to promote just and equitable principles of trade. The proposed rules in the Rule 23000 Series are substantially similar to the rules of other exchanges and generally include a variety of prohibitions against types of trading activity or other conduct that could potentially be manipulative, such as prohibitions against market manipulation, fictitious transactions, and the dissemination of false information. The Exchange has proposed to exclude certain provisions from, or make certain modifications to, comparable rules of other SROs, as detailed above, in order to account for certain unique aspects related to the proposed trading of Securities. The Exchange believes that it is consistent with applicable requirements under the Exchange Act to exclude these provisions and exceptions because they set forth requirements that would not apply to BSTX Participants trading in Securities and are not necessary for the Exchange to carry out its functions of facilitating Security transactions and regulating BSTX Participants.

H. Disciplinary Rules (Rule 24000 Series)

With respect to disciplinary matters, the Exchange proposes to adopt Rule 24000 (Discipline and Summary Suspension), which provides that the provisions of the Exchange Rule 11000 Series (Summary Suspension), 12000 Series (Discipline), 13000 Series (Review of Certain Exchange Actions), and 14000 Series (Arbitration) of the Exchange Rules shall be applicable to BSTX Participants and trading on the BSTX System. The Exchange already has Rules pertaining to discipline and suspension of Exchange Participants that it proposes to extend to BSTX Participants and trading on the BSTX System. The Exchange also proposes to adopt as Rule 24010 a minor rule violation plan with respect to transactions on BSTX.[191]

Proposed Rule 24000 incorporates by reference existing rules that have already been approved by the Commission.

I. Trading Rules and the BSTX System (Rule 25000 Series)

1. Rule 25000–Access To and Conduct on the BSTX Marketplace

The Exchange proposes to adopt Rule 25000 (Access to and Conduct on the BSTX Marketplace) to set forth rules relating to access to the BSTX System and certain conduct requirements applicable to BSTX Participants. Specifically, proposed Rule 25000 provides that only BSTX Participants, including their associated persons, that are approved for trading on the BSTX

(Dissemination of False Information), which generally prohibits, consistent with Exchange Rule 3080, BSTX Participants from spreading information that is false or misleading; (ii) Rule 23070 (Influencing Data Feeds), which generally prohibits transactions to influence data feeds; (iii) Rule 23080 (Trade Shredding), which generally prohibits conduct that has the intent or effect of splitting any order into multiple smaller orders for the primary purpose of maximizing remuneration to the BSTX Participant; (iv) Rule 23110 (Trading Ahead of Research Reports), which generally prohibits BSTX Participants from trading based on non-public advance knowledge of a research report and requires BSTX Participants to enforce policies and procedures to limit information flow from research personnel to trading personnel that might trade on such information; (v) Rule 23120 (Front Running Block Transactions), which incorporates FINRA Rule 5270 as though it were part of the Exchange's Rules; and (vi) Rule 23130 (Disruptive Quoting and Trading Activity Prohibited), which incorporates Exchange Rule 3220 by reference.

[186] In addition, proposed Rule 23100 (Publication of Transactions and Changes) provides that the Exchange will disseminate transaction information to appropriate data feeds, BSTX participants must provide information necessary to facilitate the dissemination of such information, and that an Exchange official shall be responsible for approving corrections to any reports transmitted over data feeds.

[187] *See e.g.,* Cboe BZX Rule 12.6.

[188] *See e.g.,* Cboe BZX Rule 12.6.07.

[189] *See e.g.,* Cboe BZX Rule 12.5.05.

[190] 15 U.S.C. 78f(b)(5).

[191] The proposed additions to the Exchange's minor rule violation plan pursuant to proposed Rule 24010 are discussed below in Part IV.

System shall effect any transaction on the BSTX System. Proposed Rule 25000(b) generally requires that a BSTX Participant maintain a list of authorized traders that may obtain access to the BSTX System on behalf of the BSTX Participant, have procedures in place reasonably designed to ensure that all authorized traders comply with Exchange Rules and to prevent unauthorized access to the BSTX System, and to provide the list of authorized traders to the Exchange upon request. Proposed Rule 25000(c) and (d) restate provisions that are already set forth in Exchange Rule 7000, generally providing that BSTX Participants shall not engage in conduct that is inconsistent with the maintenance of a fair and orderly market or the ordinary and efficient conduct of business, as well as conduct that is likely to impair public confidence in the operations of the Exchange. Examples of such prohibited conduct include failure to abide by a determination of the Exchange, refusal to provide information requested by the Exchange, and failure to adequately supervise employees. Proposed Rule 25000(f) provides the Exchange with authority to suspend or terminate access to the BSTX System under certain circumstances.

The Exchange believes that proposed Rule 25000 is consistent with Section 6(b)(5) of the Exchange Act [192] because it is designed to protect investors and the public interest and promote just and equitable principles of trade by ensuring that BSTX Participants would not allow for unauthorized access to the BSTX System and would not engage in conduct detrimental to the maintenance of fair and orderly markets.

2. Rule 25010—Days/Hours

Proposed Rule 25010 sets forth the days and hours during which BSTX would be open for business and during which transactions may be effected on the BSTX System. Under the proposed rule, transactions may be executed on the BSTX System between 9:30 a.m. and 4:00 p.m. Eastern Time. The proposed rule also specifies certain holidays BSTX would be not be open (*e.g.,* New Year's Day) and provides that the Chief Executive Officer, President, or Chief Regulatory Officer of the Exchange, or such person's designee who is a senior officer of the Exchange, shall have the power to halt or suspend trading in any Securities, close some or all of BSTX's facilities, and determine the duration of any such halt, suspension, or closing, when such person deems the action necessary for the maintenance of fair and orderly markets, the protection of investors, or otherwise in the public interest.

The Exchange believes that proposed Rule 25010 is designed to protect investors and the public interest, consistent with Section 6(b)(5) of the Exchange Act,[193] by setting forth the days and hours that trades may be effected on the BSTX System and by providing officers of the Exchange with the authority to halt or suspend trading when such officers believe that such action is necessary or appropriate to maintain fair and orderly markets or to protect investors or in the public interest.

3. Rule 25020—Units of Trading

Proposed Rule 25020 sets forth the minimum unit of trading on the BSTX System, which shall be one Security. The Exchange believes that proposed Rule 25020 is consistent with Section 6(b)(5) of the Exchange Act [194] because it fosters cooperation and coordination of persons engaged in facilitating transactions in securities by specifying the minimum unit of trading of Securities on the BSTX System. In addition, other exchanges similarly provide that the minimum unit of trading is one share for their market and/or for certain securities.[195]

4. Rule 25030—Minimum Price Variant

Proposed Rule 25030 provides the minimum price variant for Securities shall be $0.01. The Exchange believes that proposed Rule 25030 is consistent with Section 6(b)(5) of the Exchange Act because it fosters cooperation and coordination of persons engaged in facilitating transactions in securities by specifying the minimum price variant for Securities and promotes compliance with Rule 612 of Regulation NMS.[196] Under Rule 612 of Regulation NMS, the Exchange is, among other things, prohibited from displaying, ranking or accepting from any person a bid or offer or order in an NMS stock in an increment smaller than $0.01 if that bid or offer or order is priced equal to or greater than $1.00 per share. Where a bid or offer or order is priced less than or equal to $1.00 per share, the minimum acceptable increment is $0.0001. Proposed Rule 25030 sets a uniform minimum price variant for all Securities of $0.01 irrespective of whether the Security is trading below $1.00.

5. Rule 25040—Opening the Marketplace

Proposed Rule 25040 sets forth the opening process for the BSTX System for BSTX-listed Securities and non-BSTX-listed securities. For BSTX-listed Securities, the Exchange proposes to allow for order entry to commence at 8:30 a.m. ET during the Pre-Opening Phase. Proposed Rule 25040(a) provides that orders will not execute during the Pre-Opening Phase, which lasts until regular trading hours begin at 9:30 a.m. ET.[197] Similar to how the Exchange's opening process works for options trading, BSTX would disseminate a theoretical opening price (''TOP'') to BSTX Participants, which is the price at which the opening match would occur at a given moment in time.[198] Under the proposed rule, the Exchange will also broadcast other information during the Pre-Opening Phase. Specifically, in addition to the TOP, the Exchange would disseminate pursuant to proposed Rule 25040(a)(3): (i) ''Paired Securities,'' which is the quantity of Securities that would execute at the TOP; (ii) the ''Imbalance Quantity,'' which is the number of Securities that may not be matched with other orders at the TOP at the time of dissemination; and (iii) the ''Imbalance Side,'' which is the buy/sell direction of any imbalance at the time of dissemination (collectively, with the TOP, ''Broadcast Information'').[199] Broadcast Information will be recalculated and disseminated every time a new order is received or cancelled and where such event causes the TOP or Paired Securities to change. With respect to priority during the opening match for all Securities, consistent with proposed Rule 25080 (Execution and Price/Time Priority), among multiple orders at the same price, execution priority during the opening match is determined based on the time the order was received by the BSTX System.

Consistent with the manner in which the Exchange opens options trading, the BSTX System would determine a single price at which a BSTX-listed Security will be opened by calculating the optimum number of Securities that

[192] 15 U.S.C. 78f(b)(5).

[193] 15 U.S.C. 78f(b)(5).

[194] 15 U.S.C. 78f(b)(5).

[195] *See e.g.,* IEX Rule 11.180.

[196] 17 CFR 242.611.

[197] As a result, orders marked IOC submitted during the Pre-Opening Phase will be rejected by the BSTX System. *See* proposed Rule 25040(a)(7).

[198] The TOP can only be calculated where the BSTX Book is crossed during the Pre-Opening Phase. *See* proposed Rule 25040(a)(2).

[199] Pursuant to proposed Rule 25040(a)(3), any orders which are at a better price (*i.e.,* bid higher or offer lower) than the TOP will be shown only as a total quantity on the BSTX Book at a price equal to the TOP.

could be matched at a price, taking into consideration all the orders on the BSTX Book.[200] Proposed Rule 25040(a)(5) provides that the opening match price is the price which results in the matching of the highest number of Securities. If two or more prices would satisfy this maximum quantity criteria, the price leaving the fewest resting Securities in the BSTX Book will be selected at the opening price and where two or more prices would satisfy the maximum quantity criteria and leave the fewest Securities in the BSTX Book, the price closest to the previous day's closing price will be selected.[201] Unexecuted trading interest during the opening match will move to the BSTX Book and will preserve price time priority.[202] When the BSTX System cannot determine an opening price of a BSTX-listed Security at the start of regular trading hours, BSTX would nevertheless open the Security for trading and move all trading interest received during the Pre-Opening Phase to the BSTX Book.[203]

For initial public offerings of Securities (''Initial Security Offerings''), the process will be generally the same as regular market openings. However, in advance of an Initial Security Offering auction (''Initial Security Offering Auction''), the Exchange shall announce a ''Quote-Only Period'' that shall be between fifteen (15) and thirty (30) minutes plus a short random period prior to the Initial Security Offering Auction.[204] The Quote-Only Period may be extended in certain cases.[205] As with regular market openings the Exchange would disseminate Broadcast Information at the commencement of the Quote Only Period, and Broadcast Information would be re-calculated and disseminated every time a new order is received or cancelled and where such event causes the TOP price or Paired Securities to change.[206] In the event of any extension to the Quote-Only Period or a trading pause, the Exchange will notify market participants regarding the circumstances and length of the extension.[207] Orders will be matched and executed at the conclusion of the Quote-Only Period, rather than at 9:30 a.m. Eastern Time.[208] Following the initial cross at the end of the Quote-Only Period wherein orders will execute based on price/time priority consistent with proposed Rule 25080, the Exchange will transition to normal trading pursuant to proposed Rule 25040(a)(6).[209]

The Exchange also proposes a process for reopening trading following a Limit Up-Limit Down Halt or trading pause (''Halt Auctions''). For Halt Auctions, the Exchange proposes that in advance of reopening, the Exchange shall announce a Quote-Only Period that shall be five (5) minutes prior to the Halt Auction.[210] This Quote-Only Period may be extended in certain circumstances.[211] The Exchange proposes to disseminate the same Broadcast Information as it does for an Initial Security Offering Auction and would similarly provide notification of any extension to the quote-only period as with an Initial Security Offering Auction.[212] The transition to normal trading would also occur in the same manner as Initial Security Offering Auctions, as described above.[213]

The Exchange also proposes to adopt certain contingency procedures in proposed Rule 25040(d) that would provide that when a disruption occurs that prevents the execution of an Initial Security Offering Auction the Exchange will publicly announce the Quote-Only Period for the Initial Security Offering Auction, and the Exchange will then cancel all orders on the BSTX Book and disseminate a new scheduled time for the Quote-Only Period and opening match.[214] Similarly, when a disruption occurs that prevents the execution of a Halt Auction, the Exchange will publicly announce that no Halt Auction will occur, and all orders in the halted Security on the BSTX Book will be canceled after which the Exchange will open the Security for trading without an auction.[215]

The opening process with respect to non-BSTX-listed securities is set forth in proposed Rule 25040(e). Pursuant to that Rule, BSTX Participants who wish to participate in the opening process may submit orders and quotes for inclusion in the BSTX Book, but such orders and quotes cannot execute until the termination of the Pre-Opening Phase (''Opening Process''). Orders that are canceled before the Opening Process will not participate in the Opening Process. The Exchange will attempt to perform the Opening Process and will match buy and sell orders that are executable at the midpoint of the NBBO.[216] Generally, the price of the Opening Process will be at the midpoint of the first NBBO subsequent to the first two-sided quotation published by the listing exchange after 9:30:00 a.m. Eastern Time. Pursuant to proposed Rule 25040(e)(4), if the conditions to establish the price of the Opening Process set forth above do not occur by 9:45:00 a.m. Eastern Time, orders will be handled in time sequence, beginning with the order with the oldest time stamp, and will be placed on the BSTX Book cancelled, or executed in accordance with the terms of the order. A similar process will occur for re-opening a non-BSTX-listed security subject to a halt.[217] The proposed opening process for Securities listed on another exchange serves as a placeholder in anticipation of other exchanges eventually listing and trading Securities, or the equivalent thereof, given that there are no other exchanges currently trading Securities. The

[200] *See* proposed Rule 25040(a)(4)(ii).

[201] With respect to an initial public offering of a Security where there is no previous day's closing price, the opening price will be the price assigned to the Security by the underwriter for the offering, referred to as the ''Initial Security Offering Reference Price.'' *See* Proposed Rule 25040(a)(5)(ii)(3).

[202] *See* proposed Rule 25040(a)(6).

[203] *Id.*

[204] *See* proposed Rule 25040(b)(1).

[205] Such cases are when: (i) There is no TOP; (ii) the underwriter requests an extension; (iii) the TOP moves the greater of 10% or fifty (50) cents in the fifteen (15) seconds prior to the initial cross; or (iv) in the event of a technical or systems issue at the Exchange that may impair the ability of BSTX Participants to participate in the Initial Security Offering or of the Exchange to complete the Initial Security Offering. *See* proposed Rule 25040(b)(2).

[206] *See* proposed Rule 25040(b)(3).

[207] *See* proposed Rule 25040(b)(4). The Exchange also proposes that if a trading pause is triggered by the Exchange or if the Exchange is unable to reopen trading at the end of the trading pause due to a systems or technology issue, the Exchange will immediately notify the single plan processor responsible for consolidation of information for the security pursuant to Rule 603 of Regulation NMS under the Securities Exchange Act of 1934. *Id.*

[208] *See* proposed Rule 25040(b)(5).

[209] As with the regular opening process, orders marked IOC submitted during the Pre-Opening Phase of an Initial Security Offering Auction would be rejected. *See* proposed Rule 25040(b)(6).

[210] *See* proposed Rule 25040(c)(1). Orders marked IOC submitted during the Quote-Only Period would be rejected.

[211] *See* proposed Rule 25040(c)(2). The Quote-Only Period shall be extended for an additional five (5) minutes should a Halt Auction be unable to be performed due to the absence of a TOP (''Initial Extension Period''). After the Initial Extension Period, the Exchange proposes that the Quote-Only Period shall be extended for additional five (5) minute periods should a Halt Auction be unable to be performed due to absence of a TOP (''Additional Extension Period'') until a Halt Auction occurs. Under the proposed Rule, the Exchange shall attempt to conduct a Halt Auction during the course of each Additional Extension Period. *Id.*

[212] *See* proposed Rule 25040(c)(3)–(5).

[213] *Id.*

[214] *See* proposed Rule 25040(d)(1).

[215] *See* proposed Rule 25040(d)(2). The Exchange notes that these contingency procedures are substantially similar to those of another exchange (*see e.g.,* IEX Rule 11.350(c)(4)) and are designed to ensure that the Exchange has appropriate mechanisms in place to address possible disruptions that may arise in an Initial Security Offering Auction or Halt Auction, consistent with the protection of investors and the public interest pursuant to Section 6(b)(5) of the Exchange Act. 15 U.S.C. 78f(b)(5).

[216] *See* proposed Rule 25040(e)(2).

[217] *See* proposed Rule 25040(e)(5).

proposed process for opening Securities listed on another exchange is similar to existing exchange rules governing the opening of trading of a security listed on another exchange.[218]

Consistent with Section 6(b)(5) of the Exchange Act,[219] the Exchange believes that the proposed process for opening trading in BSTX-listed Securities and Securities listed on other exchanges will promote just and equitable principles of trade and will help perfect the mechanism of a free and open market by establishing a uniform process to determine the opening price of Securities.[220] Proposed Rule 25040 provides a mechanism by which BSTX Participants may submit orders in advance of the start of regular trading hours, perform an opening cross, and commence regular hours trading in Securities listed on BSTX or otherwise. Where an opening cross is not possible in a BSTX-listed Security, the Exchange will proceed by opening regular hours trading in the Security anyway, which is consistent with the manner in which other exchanges open trading in securities.[221] With respect to initial public offerings of Securities and openings after a Limit Up-Limit Down halt or trading pause, BSTX proposes to use a process with features similar to its normal opening process. There are a variety of different ways in which an exchange can open trading in securities, including with respect to an initial public offering of a Security, and the Exchange believes that proposed Rule 25040 provides a simple and clear method for opening transactions that is consistent with the protection of investors and the public interest.[222]

Additionally, proposed Rule 25040 applies to all BSTX Participants in the same manner and is therefore not designed to permit unfair discrimination among BSTX Participants.

6. Rule 25050—Trading Halts

BSTX proposes to adopt rules relating to trading halts[223] that are substantially similar to other exchange rules adopted in connection with the NMS Plan to Address Extraordinary Market Volatility (''LULD Plan''), with certain exceptions that reflect Exchange functionality. BSTX intends to join the LULD Plan prior to the commencement of trading Securities. Below is an explanation of BSTX's approach to certain categories of orders during a trading halt:

- *Short Sales*—BSTX cancels all orders on the book during a halt and rejects any new orders, so rules relating to the repricing of short sale orders during a trading halt that certain other exchanges have adopted have been omitted.
- *Pegged Orders*—BSTX would not support pegged orders, at least initially, so rules relating to pegged orders during a trading halt have been omitted.
- *Routable Orders*—Pursuant to proposed Rule 25130, the BSTX System will reject any order or quotation that would lock or cross a protected quotation of another exchange (rather than routing such order or quotation), and therefore rules relating to handling of routable orders during a trading halt have been omitted.
- *Limit Orders*—Because BSTX would cancel resting order interest and reject incoming orders during a trading halt, specific rules relating to the repricing of limit-priced interest that certain other exchanges have adopted have been omitted.[224]
- *Auction Orders, Market Orders, and FOK Orders*—BSTX would not support these order types, at least initially, so rules relating to these order types during a trading halt have been omitted.[225]

Pursuant to proposed Rule 25050(d), the Exchange would cancel all resting orders in a non-BSTX listed security subject to a trading halt, reject any incoming orders in that Security, and will only resume accepting orders following a broadcast message to BSTX Participants indicating a forthcoming re-opening of trading.[226]

BSTX believes that it is in the public interest and furthers the protection of investors, consistent with Section 6(b)(5) of the Exchange Act[227] to provide for a mechanism to halt trading in Securities during periods of extraordinary market volatility consistent with the LULD Plan. However, the Exchange has excluded rules relating to order types and other aspects of the LULD Plan that would not be supported by the Exchange, such as market orders and auction orders. The Exchange has also reserved the right in proposed Rule 25050(f) to halt or suspend trading in other circumstances where the Exchange deems it necessary to do so for the protection of investors and in the furtherance of the public interest.

The Exchange believes that canceling resting order interest during a trading halt and rejecting incoming orders received during the trading halt is consistent with Section 6(b)(5) of the Exchange Act[228] because it is not designed to permit unfair discrimination among BSTX Participants. The orders and trading interest of all BSTX Participants would be canceled in the event of a trading halt and each BSTX Participant would be required to resubmit any orders they had resting on the order book.

7. Rule 25060—Order Entry

Proposed Rule 25060 sets forth the manner in which BSTX Participants may enter orders to the BSTX System. The BSTX System would initially only support limit orders.[229] Orders that do not designate a limit price would be rejected.[230] The BSTX System would also only support two time-in-force (''TIF'') designations initially: (i) DAY; and (ii) immediate or cancel (''IOC''). DAY orders will queue during the Pre-

[218] *See e.g.,* Cboe BZX Rule 11.24.

[219] 15 U.S.C. 78f(b)(5).

[220] The Exchange has not proposed to operate a closing auction at this time. As a result, the closing price of a Security on BSTX would be the last regular way transaction occurring on BSTX, which the Exchange believes is a simple and fair way to establish the closing price of a Security that does not permit unfair discrimination among customers, issuers, or broker-dealers consistent with Section 6(b)(5) of the Exchange Act. *Id.* This proposed process is consistent with the overall proposed simplified market structure for BSTX, which does not include a variety of order types offered by other exchanges such as market-on-close and limit-on-close orders. The Exchange believes that a simplified market structure, including the proposed manner in which a closing price would be determined, promotes the public interest and the protection of investors consistent with Section 6(b)(5) of the Exchange Act through reduced complexity. *Id.*

[221] *See e.g.,* BOX Rule 7070.

[222] The Exchange notes that its proposed opening, Initial Security Offering Auction, and Halt Auction processes are substantially similar to those of another exchange. *See* Cboe BZX Rule 11.23. The key differences between the Exchange's proposed processes and those of the Cboe BZX exchange are that the Exchange has substantially fewer order types, which make its opening process less complex, and that the Exchange does not proposes to use order auction collars to limit the price at which a Security opens. The Exchange does not believe that auction collars are necessary at this time because there are a variety of other mechanisms in place to prevent erroneous orders and the execution of an opening cross at an erroneous price (*e.g.,* market access controls pursuant to Rule 15c3–5 and the ability of an underwriter to request an extension to the Quote-Only Period in an Initial Security Offering Auction).

[223] The Exchange notes that rules on opening trading for non-BSTX-listed security are set forth in proposed Rule 25040(e).

[224] *See e.g.,* Cboe BZX 11.18(e)(5)(B).

[225] IOC orders will be handled pursuant to proposed Rule 25050(g)(5).

[226] Trading would resume pursuant to proposed Rule 25040(e)(5). *See* proposed Rule 25050(g)(7).

[227] 15 U.S.C. 78f(b)(5).

[228] *Id.*

[229] The BSTX System will also accept incoming Intermarket Sweep Orders (''ISO'') pursuant to proposed Rule 25060(c)(2). ISOs must be limit orders, are ineligible for routing, may be submitted with a limit price during Regular Trading Hours, and must have a time-in-force of IOC. Proposed Rule 25060(c)(2) is substantially similar to rules of other national securities exchanges. *See e.g.,* Cboe BZX Rule 11.9(d).

[230] Proposed Rule 25060(c)(1).

Opening Phase, may trade during regular market hours, and, if unexecuted at the close of the trading day (4:00 p.m. ET), are canceled by the BSTX System.[231] All orders are given a default TIF of DAY. BSTX Participants may also designate orders as IOC, which designation overrides the default TIF of DAY. IOC orders are not accepted by the BSTX System during the Pre-Opening Phase. During regular trading hours, IOC orders will execute in whole or in part immediately upon receipt by the BSTX System. The BSTX System will not support modification of resting orders. To change the price or quantity of an order resting on the BSTX Book, a BSTX Participant must cancel the resting order and submit a new order, which will result in a new time stamp for purposes of BSTX Book priority. In addition, all orders on BSTX will be displayed, and the BSTX System will not support hidden orders or undisplayed liquidity, as set forth in proposed Rule 25100.

Consistent with Section 6(b)(5) of the Exchange Act,[232] the Exchange believes that the proposed order entry rules will promote just and equitable principles of trade and help perfect the mechanism of a free and open market by establishing the types of orders and modifiers that all BSTX Participants may use in entering orders to the BSTX System. Because these order types and TIFs are available to all BSTX Participants, the proposed rule does not unfairly discriminate among market participants, consistent with Section 6(b)(5) of the Exchange Act. The proposed rule sets forth a very simple exchange model whereby there is only one order type—limit orders—and two TIFs. Upon the initial launch of BSTX, there will be no hidden orders, price sliding, pegged orders, or other order type features that add complexity. The Exchange believes that creating a simplified exchange model is designed to protect investors and is in the public interest because it reduces complexity, thereby helping market participants better understand how orders would operate on the BSTX System.

8. Rule 25070—Audit Trail

Proposed Rule 25070 (Audit Trail) is designed to ensure that BSTX Participants provide the Exchange with information to be able to identify the source of a particular order and other information necessary to carry out the Exchange's oversight functions. The proposed rule is substantially similar to existing BOX Rule 7120 but eliminates certain information unique to orders for options contracts (*e.g.,* exercise price) because Securities are equity securities. The proposed rule also provides that BSTX Participants that employ an electronic order routing or order management system that complies with Exchange requirements will be deemed to comply with the Rule if the required information is recorded in an electronic format. The proposed rule also specifies that order information must be kept for no less than three years and that where specific customer or account number information is not provided to the Exchange, BSTX Participants must maintain such information on their books and records.

The Exchange believes that proposed Rule 25070 is designed to protect investors and the public interest, consistent with Section 6(b)(5) of the Exchange Act,[233] because it will provide the Exchange with information necessary to carry out its oversight role. Without being able to identify the source and terms of a particular order, the Exchange's ability to adequately surveil its market, with or through another SRO, for trading inconsistent with applicable regulatory requirements would be impeded. In order to promote compliance with Rule 201 of Regulation SHO, proposed Rule 25080(b)(3) provides that when a short sale price test restriction is in effect, the execution price of the short sale order must be higher than (*i.e.,* above) the best bid, unless the sell order is marked ''short exempt'' pursuant to Regulation SHO.

9. Rule 25080—Execution and Price Time Priority

Proposed Rule 25080 governs the execution of orders on the BSTX System, providing a price-time priority model. The proposed rule provides that orders of BSTX Participants shall be ranked and maintained in the BSTX Book according to price-time priority, such that within each price level, all orders shall be organized by the time of entry. The proposed rule further provides that sell orders may not execute a price below the best bid in the marketplace and buy orders cannot execute at a price above the best offer in the marketplace. Further, the proposed rule ensures compliance with Regulation SHO, Regulation NMS, and the LULD Plan, in a manner consistent with the rulebooks of other national securities exchanges.[234]

The Exchange believes that proposed Rule 25080 is consistent with Section 6(b)(5) of the Exchange Act[235] because it is designed to promote just and equitable principles of trade and foster cooperation and coordination with persons facilitating transactions in securities by setting forth the order execution priority scheme for Security transactions. Numerous other exchanges similarly operate a price-time priority structure for effecting transactions. The proposed rule also does not permit unfair discrimination among BSTX Participants because all BSTX Participants are subject to the same price-time priority structure. In addition, the Exchange believes that specifying in proposed Rule 25080(b)(3) that execution of short sale orders when a short sale price test restriction is in effect must occur at a price above the best bid unless the order is market ''short exempt,'' is consistent with the Exchange Act because it is intended promote compliance with Regulation SHO in furtherance of the protection of investors and the public interest.

10. Rule 25090—BSTX Risk Controls

Proposed Rule 25090 sets forth certain risk controls applicable to orders submitted to the BSTX System. The proposed risk controls are designed to prevent the submission and execution of potentially erroneous orders. Under the proposed rule, the BSTX System will reject orders that exceed a maximum order size, as designated by each BSTX Participant. The Exchange, however may set default values for this control. The proposed rule also provides a means by which all of a BSTX Participant's orders will be canceled in the event that the BSTX Participant loses its connection to the BSTX System. Proposed Rule 25090(c) provides a risk control that prevents incoming limit orders from being accepted by the BSTX System if the order's price is more than a designated percentage away from the National Best Bid or Offer in the marketplace. Proposed Rule 25090(d) provides a maximum order rate control whereby the BSTX System will reject an incoming order if the rate of orders received by the BSTX System exceeds a designated threshold. With respect to both of these risk controls (price protection for limit orders and maximum order rate), BSTX Participants may designate the appropriate thresholds, but the Exchange may also provide default values and mandatory minimum levels.

The Exchange believes the proposed risk controls in Rule 25090 are consistent with Section 6(b)(5) of the Exchange Act[236] because they are

[231] Proposed Rule 25060(d)(1).

[232] 15 U.S.C. 78f(b)(5).

[233] 15 U.S.C. 78f(b)(5).

[234] *See e.g.,* Cboe BZX Rule 11.13(a)(2)–(3) governing regular trading hours.

[235] 15 U.S.C. 78f(b)(5).

[236] 15 U.S.C. 78f(b)(5).

designed to help prevent the execution of potentially erroneous orders, which furthers the protection of investors and the public interest. Among other things, erroneous orders can be disruptive to the operation of an exchange marketplace, can lead to temporary price dislocations, and can hinder price formation. The Exchange believes that offering configurable risk controls to BSTX Participants, along with default values where a BSTX Participant has not designated its desired controls, will protect investors by reducing the number of erroneous executions on the BSTX System and will remove impediments to and perfect the mechanism of a free and open market system. The proposed risk controls are also similar to existing risk controls provided by the Exchange to Options Participants.

11. Rule 25100—Trade Execution, Reporting, and Dissemination of Quotations

Proposed Rule 25100 provides that the Exchange shall collect and disseminate last sale information for transactions executed on the BSTX system. The proposed rule further provides that the aggregate of the best-ranked non-marketable Limit Order(s), pursuant to Rule 25080, to buy and the best-ranked non-marketable Limit Order(s) to sell in the BSTX Book shall be collected and made available to quotation vendors for dissemination. Proposed Rule 25100 further provides that the BSTX System will operate as an ''automated market center'' within the meaning of Regulation NMS and will display ''automated quotations'' at all times except in the event of a system malfunction.[237] In addition, the proposed Rule specifies that the Exchange shall identify all trades executed pursuant to an exception or an exemption of Regulation NMS. The Exchange will disseminate last sale and quotation information pursuant to Rule 602 of Regulation NMS and will maintain connectivity to the securities information processors for dissemination of quotation information.[238] BSTX Participants may obtain access to this information through the securities information processors.

Proposed Rule 25100(d) provides that executions that occur as a result of orders matched against the BSTX Book, pursuant to Rule 25080, shall clear and settle pursuant to the rules, policies, and procedures of a registered clearing agency. Rule 25100(e) obliges BSTX Participants, or a clearing member/participant clearing on behalf of a BSTX Participant to honor trades effected on the BSTX System on the scheduled settlement date, and the Exchange shall not be liable for the failure of BSTX Participants to satisfy these obligations.[239]

The Exchange believes that proposed Rule 25100 is consistent with Section 6(b)(5) of the Exchange Act[240] because it will foster cooperation and coordination with persons processing information with respect to, and facilitating transactions in securities by requiring the Exchange to collect and disseminate quotation and last sale transaction information to market participants. BSTX Participants will need last sale and quotation information to effectively trade on the BSTX System, and proposed Rule 25100 sets forth the requirement for the Exchange to provide this information as well as the information to be provided. The proposed rule is similar to rules of other exchanges relating to the dissemination of last sale and quotation information. The Exchange believes that requiring BSTX Participants (or firms clearing trades on behalf of other BSTX Participants) to honor their trade obligations on the settlement date is consistent with the Exchange Act because it will foster cooperation with persons engaged in clearing and settling transactions in Securities, consistent with Section 6(b)(5) of the Exchange Act.[241]

12. Rule 25110—Clearly Erroneous

Proposed Rule 25110 sets forth the manner in which BSTX will resolve clearly erroneous executions that might occur on the BSTX System and is substantially similar to comparable clearly erroneous rules on other exchanges. Under proposed Rule 25100, transactions that involve an obvious error such as price or quantity, may be canceled after review and a determination by an officer of BSTX or such other employee designee of BSTX (''Official'').[242] BSTX Participants that believe they submitted an order erroneously to the Exchange may request a review of the transaction, and must do so within thirty (30) minutes of execution and provide certain information, including the factual basis for believing that the trade is clearly erroneous, to the Official.[243] Under proposed Rule 25100(c), an Official may determine that a transaction is clearly erroneous if the price of the transaction to buy (sell) that is the subject of the complaint is greater than (less than) the ''Reference Price''[244] by an amount that equals or exceeds specified ''Numerical Guidelines.''[245] The Official may consider additional factors in determining whether a transaction is clearly erroneous, such as whether trading in the security had recently halted or overall market conditions.[246] Similar to other exchanges 'clearly erroneous rules, the Exchange may determine that trades are clearly erroneous in certain circumstances such as during a system disruption or malfunction, on a BSTX Officer's (or senior employee designee) own motion, during a trading halt, or with respect to a series of transactions over multiple days.[247] Under proposed Rule 25110(e)(2), BSTX Participants affected by a determination by an Official may appeal this decision to the Chief Regulatory Officer of BSTX, provided such appeal is made within thirty (30) minutes after the party making the appeal is given notice of the initial

[237] 17 CFR 242.600(b)(4) and (5). The general purpose of an exchange being deemed an ''automated trading center'' displaying ''automated quotations'' relates to whether or not an exchange's quotations may be considered protected under Regulation NMS. *See* Exchange Act Release No. 51808, 70 FR 37495, 37520 (June 29, 2005). Other trading centers may not effect transactions that would trade through a protected quotation of another trading center. The Exchange believes that it is useful to specify that it will operate as an automated trading center at this time to make clear to market participants that it is not operating a manual market with respect to Securities.

[238] 17 CFR 242.602.

[239] These proposed provisions are substantially similar to those of exchanges. *See e.g.,* Nasdaq Rule 4627 and IEX Rule 10.250.

[240] 15 U.S.C. 78f(b)(5).

[241] *Id.*

[242] A transaction made in clearly erroneous error and canceled by both parties or determined by the Exchange to be clearly erroneous will be removed from the Consolidated Tape. Proposed Rule 25110(a).

[243] Proposed Rule 25110(b). The Official may also consider certain ''outlier'' transactions on a case by case basis where the request for review is submitted after 30 minutes but no longer than sixty (60) minutes after the transaction. Proposed Rule 2511(d).

[244] The Reference Price will be equal to the consolidated last sale immediately prior to the execution(s) under review except for in circumstances, such as, for example, relevant news impacting a security or securities, periods of extreme market volatility, sustained illiquidity, or widespread system issues, where use of a different Reference Price is necessary for the maintenance of a fair and orderly market and the protection of investors and the public interest. Proposed Rule 25110(c)(1).

[245] The proposed Numerical Guidelines are 10% where the Reference Price ranges from $0.00 to $25.00, 5% where the Reference Price is greater than $25.00 up to and including $50.00, and 3% where the Reference Price ranges is greater than $50. Proposed Rule 25110(c)(1).

[246] Proposed Rule 25110(c)(1).

[247] *See* proposed Rule 25110(f)–(j). These provisions are virtually identical to similar provisions of other exchanges' clearly erroneous rules other than by making certain administrative edits (*e.g.,* replacing the term ''security'' with ''Security'').

determination being appealed.[248] The Chief Regulatory Officer's determination shall constitute final action by the Exchange on the matter at issue pursuant to proposed Rule 25110(e)(2)(ii).

The Exchange believes that proposed Rule 25110 is consistent with Section 6(b)(5) of the Exchange Act,[249] because it would promote just and equitable principles of trade, remove impediments to, and perfect the mechanism of, a free and open market and a national market system by setting forth the process by which clearly erroneous trades on the BSTX System may be identified and remedied. Proposed Rule 25110 would apply equally to all BSTX Participants and is therefore not designed to permit unfair discrimination among BSTX Participants, consistent with Section 6(b)(5) of the Exchange Act.[250] The proposed rule is substantially similar to the clearly erroneous rules of other exchanges.[251] For example, proposed Rule 25110 does not include provisions related to clearly erroneous transactions for routed orders because orders for Securities will not route to other exchanges.[252] Securities would also only trade during regular trading hours (*i.e.,* 9:30 a.m. ET to 4:00 p.m. ET), so provisions from comparable exchange rules relating to clearly erroneous executions occurring outside of regular trading hours have been excluded. Proposed Rule 25110 also excludes provisions from comparable clearly erroneous rules of certain other exchanges relating to clearly erroneous executions in: (i) Leverage ETF/ETNs; and (ii) unlisted trading privileges securities that are subject to an initial public offering.[253]

The Exchange believes that its proposed process for BSTX Participants to appeal clearly erroneous execution determinations made by an Exchange Official pursuant to proposed Rule 25110 to the Chief Regulatory Officer of BSTX is consistent with Section 6(b)(5) of the Exchange Act[254] because it promotes just and equitable principles of trade and fosters cooperation and coordination with persons regulating, settling, and facilitating transactions in securities by providing a clear and expedient process to appeal determinations made by an Official. BSTX Participants benefit from having a quick resolution to potentially clearly erroneous executions and giving the Chief Regulatory Officer discretion to decide any appeals of an Official's determination provides an efficient means to resolve potential appeals that applies equally to all BSTX Participants and therefore does not permit unfair discrimination among BSTX Participants, consistent with Section 6(b)(5) of the Exchange Act. The Exchange notes that, with respect to options trading on the Exchange, the Exchange's Chief Regulatory Officer similarly has sole authority to overturn or modify obvious error determinations made by an Exchange Official and that such determination constitutes final Exchange action on the matter at issue.[255] In addition, proposed Rule 25110(e)(2)(iii) provides that any determination made by an Official or the Chief Regulatory Officer of BSTX under proposed Rule 25110 shall be rendered without prejudice as to the rights of the parties to the transaction to submit their dispute to arbitration. Accordingly, there is an additional safeguard in place for BSTX Participants to seek further review of the Exchange's clearly erroneous determination.

To the extent Securities become tradeable on other national securities exchanges or other changes arise that may necessitate changes to proposed Rule 25110 to conform more closely with the clearly erroneous execution rules of other exchanges, the Exchange intends to implement changes as necessary through a proposed rule change filed with the Commission pursuant to Section 19 of the Exchange Act[256] at such future date.

13. Rule 25120—Short Sales

Proposed Rule 25120 sets forth certain requirements with respect to short sale orders submitted to the BSTX System that is virtually identical to similar rules on other exchanges.[257] Specifically, proposed Rule 25120 requires BSTX Participants to appropriately mark orders as long, short, or short exempt and provides that the BSTX System will not execute or display a short sale order not marked short exempt with respect to a ''covered security''[258] at a price that is less than or equal to the current national best bid if the price of that security decreases by 10% or more, as determined by the listing market for the covered security, from the covered security's closing price on the listing market as of the end of Regular Trading Hours on the prior day (the ''Trigger Price''). The proposed rule further specifies the duration of the ''Short Sale Price Test'' and that the BSTX System shall determine whether a transaction in a covered security has occurred at a Trigger Price and shall immediately notify the responsible single plan processor.[259]

The Exchange believes that proposed Rule 25120 is consistent with Section 6(b)(5) of the Exchange Act,[260] because it would promote just and equitable principles of trade and further the protection of investors and the public interest by enforcing rules consistent with Regulation SHO. Pursuant to Regulation SHO, broker-dealers are required to appropriately mark orders as long, short, or short exempt,[261] and trading centers are required to establish, maintain, and enforce written policies and procedures reasonably designed to, among other things, prevent the execution or display of a short sale order of a covered security at a price that is less than or equal to the current national best bid if the price of that covered security decreases by 10% or more from its closing price on the

[248] Determinations by an Official pursuant to proposed Rule 25110(f) relating to system disruptions or malfunctions may not be appealed if the Official made a determination that the nullification of transactions was necessary for the maintenance of a fair and orderly market or the protection of invests and the public interest. Proposed Rule 25110(d)(2).

[249] 15 U.S.C. 78f(b)(5).

[250] *Id.*

[251] *See e.g.,* Cboe BZX Rule 11.17. Similar to other exchanges' comparable rules, proposed Rule 25110 provides BSTX with the ability to determine clearly erroneous trades that result from a system disruption or malfunction, a BSTX Official acting on his or her own motion, trading halts, multi-day trading events, multi-stock events involving five or more (but less than twenty) securities whose executions occurred within a period of five minutes or less, multi-stock events involving twenty or more securities whose executions occurred within a period of five minutes or less, and securities subject to the LULD Plan.

[252] Other exchange clearly erroneous rules reference removing trades from the Consolidated Tape. Because Security transactions will be reported pursuant to a separate transaction reporting plan, proposed Rule 25110 eliminates references to the ''Consolidated Tape'' and provides that clearly erroneous Security transactions will be removed from ''all relevant data feeds disseminating last sale information for Security transactions.'' *See* proposed Rule 25110(a).

[253] The Exchange notes that not all equities exchanges have a provision with respect to trade nullification for UTP securities that are the subject of an initial public offering. *See* IEX Rule 11.270. With respect to leveraged ETFs/ETNs, the Exchange does not expect to support trading of such products at this time, so the Exchange does not believe it is necessary to include provisions related to them.

[254] 15 U.S.C. 78f(b)(5).

[255] *See* BOX Rule 7170(n).

[256] 15 U.S.C. 78s.

[257] *See e.g.,* IEX Rule 11.290.

[258] Proposed Rule 25120(b) provides that the terms ''covered security,'' ''listing market,'' and ''national best bid'' shall have the same meaning as in Rule 201 of Regulation SHO. 17 CFR 242.201(a).

[259] Proposed Rule 25120(d). The proposed rule further provides in paragraph (d)(1) that if a covered security did not trade on BSTX on the prior trading day, BSTX's determination of the Trigger Price shall be based on the last sale price on the BSTX System for that Security on the most recent day on which the Security traded.

[260] 15 U.S.C. 78f(b)(5).

[261] 17 CFR 242.200(g).

primary listing market on the prior day.[262] Proposed Rule 25120 is designed to promote compliance with Regulation SHO, is nearly identical to similar rules of other exchanges, and would apply equally to all BSTX Participants.

14. Rule 25130—Locking or Crossing Quotations in NMS Stocks

Proposed Rule 25130 sets forth provisions related to locking or crossing quotations. The proposed rule is substantially similar to the rules of other national securities exchanges.[263] Proposed Rule 25130 is designed to promote compliance with Regulation NMS and prohibits BSTX participants from engaging in a pattern or practice of displaying quotations that lock or cross a protected quotation unless an exception applies. The Exchange notes that there may be no other national securities exchanges trading Securities upon the launch of BSTX that may be displaying protected quotations. Notwithstanding that there may be no other away markets displaying a protected quotation when trading on BSTX commences, the Exchange proposes in Rule 25130(d) that the BSTX System will reject any order or quotation that would lock or cross a protected quotation of another exchange at the time of entry.

The Exchange believes proposed Rule 25130 is consistent with Section 6(b)(5) of the Exchange Act [264] because it is designed to promote just and equitable principles of trade and foster cooperation and coordination with persons facilitating transactions in securities by ensuring that the Exchange prevents display of quotations that lock or cross any protected quotation in an NMS stock, in compliance with applicable provisions of Regulation NMS.

15. Rule 25140—Clearance and Settlement: Anonymity

Proposed Rule 25140 provides that each BSTX Participant must either (1) be a member of a registered clearing agency that uses a CNS system, or (2) clear transactions executed on the Exchange through another Participant that is a member of such a registered clearing agency. The Exchange would maintain connectivity and access to the UTC of NSCC for transmission of executed transactions. The proposed Rule requires a Participant that clears through another participant to obtain a written agreement, in a form acceptable to the Exchange, that sets out the terms of such arrangement. The proposed Rule also provides that BSTX transaction reports shall not reveal contra party identities and that transactions would be settled and cleared anonymously. In certain circumstances, such as for regulatory purposes, the Exchange may reveal the identity of a Participant or its clearing firm such as to comply with a court order.

The Exchange believes that proposed Rule 25140 is consistent with Section 6(b)(5) of the Exchange Act [265] because it would foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities. Proposed Rule 25140 is similar to rules of other exchanges relating to clearance and settlement.[266]

J. Market Making on BSTX (Rule 25200 Series)

The BSTX Market Making Rules (Rules 25200–25240) provide for registration and describe the obligations of Market Makers on the Exchange. The proposed Market Making Rules also provide for registration and obligations of Designated Market Makers (''DMMs'') in a given Security, allocation of a DMM to a particular Security, and parameters for business combinations of DMMs.

Proposed Rule 25200 sets forth the basic registration requirement for a BSTX Market Maker by noting that a Market Maker must enter a registration request to BSTX and that such registration shall become effective on the next trading day after the registration is entered, or, in the Exchange's discretion, the registration may become effective the day that it is entered (and the Exchange will provide notice to the Market Maker in such cases). The proposed Rule further provides that a BSTX Market Maker's registration shall be terminated by the Exchange if the Market Maker fails to enter quotations within five business days after the registration becomes effective.[267]

Proposed Rule 25210 sets forth the obligations of Market Makers, including DMMs. Under the proposed Rule, a BSTX Participant that is a Market Maker, including a DMM, is generally required to post two-sided quotes during the regular market session for each Security in which it is registered as a Market Maker.[268] The Exchange proposes that such quotes must be entered within a certain percentage, called the ''Designated Percentage,'' of the National Best Bid (Offer) price in such Security (or last sale price, in the event there is no National Best Bid (Offer)) on the Exchange.[269] The Exchange proposes that the Designated Percentage would be 30%.[270] The Exchange notes that the proposed Designated Percentage is substantially similar to the corresponding Designated Percentage for NYSE American market makers with respect to Tier 2 NMS stocks (as defined under the LULD plan).[271] The Exchange believes that the proposed Designated Percentage for quotation obligations of Market Makers would be sufficient to ensure that there is adequate liquidity sufficiently close to the National Best Bid or Offer (''NBBO'') in Securities and to ensure fair and orderly markets. The Exchange notes that pursuant to proposed Rule 25210(a)(1)(iii), there is nothing to preclude a Market Maker from entering trading interest at price levels that are closer to the NBBO, so Market Makers have the ability to quote must closer to the NBBO than required by the Designated Percentage requirement if they so choose.

The Exchange proposes in Rule 25210(a)(4) that, in the event that price movements cause a Market Maker or DMM's quotations to fall outside of the National Best Bid (Offer) (or last sale price in the event there is no National Best Bid (Offer)) by a given percentage, with such percentage called the ''Defined Limit,'' in a Security for which they are a Market Maker, the Market Maker or DMM must enter a new bid or offer at not more than the Designated Percentage away from the National Best Bid (Offer) in that Security. The Exchange proposes that the Defined Limit shall be 31.5%.[272] Under the proposed Rules, a Market Maker's quotations must be firm and automatically executable for their size, and, to the extent the Exchange finds that a Market Maker has a substantial or continued failure to meet its quotation obligations, such Market Maker may face disciplinary action from the Exchange.[273] Under the proposed

[262] 17 CFR 242.201(b)(1).

[263] *See* IEX Rule 25130.

[264] 15 U.S.C. 78f(b)(5).

[265] 15 U.S.C. 78f(b)(5).

[266] *See e.g.* IEX Rule 11.250.

[267] Proposed Rule 25200 is substantially similar to IEX Rule 11.150.

[268] *See* proposed Rule 25210(a)(1).

[269] *See* proposed Rule 25210(a)(1)(ii)(A).

[270] *See* proposed Rule 25210(a)(1)(ii)(B).

[271] *See* NYSE American Rule 7.23E(a)(1)(B)(iii) (providing that, other than during certain time periods around the market open and close, the Designated Percentage for Tier 2 NMS stocks priced below $1.00 is 30% and for Tier 2 NMS stocks priced above $1.00 is 28%).

[272] *See* proposed Rule 25210(a)(1)(ii)(3).

[273] *See* proposed Rule 25210(b) and (c). Pursuant to proposed Rule 25310(d), a BSTX Market Maker, other than a DMM, may apply for a temporary withdrawal from its Market Maker status provided

Continued

Market Maker and DMM Rules, Market Makers and DMMs' two-sided quotation obligations must be maintained for a quantity of a ''normal unit of trading'' which is defined as one Security.[274] The Exchange believes that Securities may initially trade in smaller increments relative to other listed equities and that reducing the two-sided quoting increment from one round lot (*i.e.,* 100 shares) to one Security will be sufficient to meet liquidity demands and would make it easier for Market Makers and DMMs to meet their quotation obligations, which in turn incentivize more Market Maker participation.

The Exchange notes that proposed Rule 25210 is substantially similar to NYSE American Rule 7.23E, with the exceptions of: (i) The modified normal unit of trading, Designated Percentage, and Defined Limit (as discussed above); (ii) specifying that the minimum quotation increment shall be $0.01; and (iii) specifying that Market Maker quotations must be firm for their displayed size and automatically executable. The Exchange believes that the additional specifications with respect to the minimum quotation increment and firm quotation requirement will add additional clarity to the expectations of Market Makers on the Exchange.

Proposed Rule 25220 sets forth the registration requirements for a DMM. Under proposed Rule 25220, a DMM must be a registered Market Maker and be approved as a DMM in order to receive an allocation of Securities pursuant to proposed Rule 25230, which is described below.[275] For Securities in which a Participant serves as a DMM, it must meet the same obligations as if it were a Market Maker and must also maintain a bid or offer at the National Best Bid and Offer at least 25% of the day measured across all Securities in which such Participant serves as DMM.[276] The proposed Rule provides, among other things, that a there will be no more than one DMM per Security and that a DMM must maintain information barriers between the trading unit operating as a DMM and the trading unit operating as a BSTX Market Maker in the same Security (to the extent applicable).[277] The Rule further provides a process by which a DMM may temporarily withdraw from its DMM status, which is similar to the same process for a BSTX Market Maker[278] and similar to the same process for DMMs on other exchanges.[279] The Exchange notes that proposed Rule 25220 is substantially similar to NYSE American Rule 7.24E with the exception that the Exchanges proposes to add a provision stating that the Exchange is not required to assign a DMM if the Security has an adequate number of BSTX Market Makers assigned to such Security. The purpose of this requirement is to acknowledge the possibility that a Security need not necessarily have a DMM provided that each Security has been assigned at least three active Market Makers at initial listing and two Market Makers for continued listing, consistent with proposed Rule 26106 (Market Maker Requirement), which is discussed further below.

In proposed Rule 25230, the Exchange proposes to set forth the process by which a DMMs are allocated and reallocated responsibility for a particular Security. Proposed Rule 25230(a) sets forth the basic eligibility criteria for a when a Security may be allocated to a DMM, providing that this may occur when the Security is initially listed on BSTX, when it is reassigned pursuant to Rule 25230, or when it is currently listed without a DMM assigned to the Security.[280] Proposed Rule 2530(a) also specifies that a DMM's eligibility to participate in the allocation process is determined at the time the interview is scheduled by the Exchange and specifies that a DMM must meet with the quotation requirements set forth in proposed Rule 25220(c) (DMM obligations). The proposed Rule further specifies how the Exchange will handle several situations in which the DMM does not meet its obligations, such as, for example, by issuing an initial warning advising of poor performance if the DMM fails to meet its obligations for a one-month period.[281]

Proposed Rule 25230(b) sets forth the manner in which a DMM may be selected and allocated a Security. Under proposed Rule 25230(b), an issuer may select its DMM directly, delegate the authority to the Exchange to selects its DMM, or may opt to proceed with listing without a DMM, in which case a minimum of three non-DMM Market Makers at initial listing and two non-DMM Market Makers for continued listing must be assigned to its Security consistent with proposed Rule 26106. Proposed Rule 25230(b) further sets forth provisions relating to the interview between the issuer and DMMs, the Exchange selection by delegation, and a requirement that a DMM serve as a DMM for a Security for at least one year unless compelling circumstances exist for which the Exchange may consider a shorter time period. Each of these provisions is substantially similar to corresponding provisions in NYSE American Rule 7.25E(b)(1)–(3), with the exception that the Exchange may shorten the one year DMM commitment period in compelling circumstances.[282] Proposed Rule 25230(b) further sets forth specific provisions related to a variety of different issuances and types of securities, including spin-offs or related companies, warrants, rights, relistings, equity Security listing after preferred Security, listed company mergers, target Securities, and closed-end management investment companies.[283] Each of these provisions is substantially similar to corresponding provisions in NYSE American Rule 7.25E(b)(4)–(11).

Proposed Rule 25230(c) sets forth the reallocation process for a DMM in a manner that is substantially similarly to corresponding provisions in NYSE American Rule 7.25E(c). Generally, under the proposed Rule, an issuer may request a reallocation to a new DMM and Exchange staff will review this request, along with any DMM response letter, and eventually make a determination.[284] Proposed Rule 25230(d), (e), and (f), set forth provisions governing an allocation freeze, allocation sunset, and criteria for applicants that are not currently DMMs

it meets certain conditions such a demonstrating legal or regulatory requirements that necessitate its temporary withdrawal.

[274] *See* proposed Rule 25210(a)(1).

[275] *See* proposed 25220(b). DMMs would be approved by the Exchange pursuant to an application process an [sic].

[276] *See* proposed Rule 25220(c).

[277] *See* proposed Rule 25220(b).

[278] *See* proposed Rule 25210(d).

[279] *See e.g.,* NYSE American Rule 7.24E(b)(4).

[280] As previously noted, pursuant to proposed Rule 26106, a Security may, in lieu of having a DMM assigned to it, have a minimum of three non-DMM Market Makers at initial listing and two non-DMM Market Makers for continued listing to be eligible for listing on the Exchange. Consequently, a Security might not have a DMM when it initially begins trading on BSTX, but may acquire a DMM later.

[281] *See* proposed Rule 25230(a)(4). The proposed handling of these scenarios where a DMM does not meet its obligations is substantially similar to parallel requirements in NYSE American Rule 7.25E(a)(4).

[282] The Exchange believes that providing the Exchange with flexibility to shorten the one year commitment period is appropriate to accommodate unforeseen events or circumstances that might arise with respect to a DMM, such as a force majeure event, preventing a DMM from being able to carry out its functions.

[283] *See* proposed Rule 25230(b)(4)–(11).

[284] In addition, proposed Rule 25230(c)(2) sets forth provisions that allow for the Exchange's CEO to immediately initiate a reallocation proceeding upon written notice to the DMM and the issuer when the DMM's performance in a particular market situation was, in the judgment of the Exchange, so egregiously deficient as to call into question the Exchange's integrity or impair the Exchange's reputation for maintaining an efficient, fair, and orderly market.

to be eligible to be allocated a Security as a DMM respectively. Each of these provisions are likewise substantially similar to corresponding provisions in NYSE American Rule 7.25E(d)–(f).

Finally, proposed Rule 25240 sets forth the DMM combination review policy. The proposed Rule, among other things, defines a proposed combination among DMMs, requires that DMMs provide a written submission to the Office of the Corporate Secretary of the Exchange and specifies, among other things, the items to be disclosed in the written submission, the criteria that the Exchange will use to evaluate a proposed combination, and the timing for a decision by the Exchange, subject to the Exchange's right to extend such time period. The Exchange notes that proposed Rule 25240 is substantially similar to NYSE American Rule 7.26E.

The Exchange believes that the proposed Market Making Rules set forth in the Rule 25200 Series are consistent with Section 6(b)(5) of the Exchange Act [285] because they are designed 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. The Exchange notes that the proposed Rules are substantially similar to the market making rules of other exchanges, as detailed above,[286] and that all BSTX Participants are eligible to become a Market Maker or DMM provided they comply with the proposed requirements.[287] The proposed Market Maker Rules set forth the quotation and related expectations of BSTX Market Makers which the Exchange believes will help ensure that there is sufficient liquidity in Securities. Although the corresponding NYSE American rules upon which the proposed Rules are based provide for multiple tiers and classes of stocks that were each associated with a different Designated Percentage and Defined Limit, the Exchange has collapsed all such classes in to one category and provided a single Designated Percentage of 30% and Defined Limit of 31.5% for all Security trading on BSTX. The Exchange believes that simplifying the Rules in this manner can reduce the potential for confusion and allows for easier compliance and will still adequately serve the liquidity needs of investors of Security investors, which the Exchange believes promotes the removal of impediments to and perfection of the mechanism of a free and open market and a national market system, consistent with Section 6(b)(5) of the Exchange Act.[288]

The Exchange has also proposed that the minimum quotation size of Market Makers will be one Security. As noted above, the Exchange believes that Securities may initially trade in smaller increments relative to other listed equities and that reducing the two-sided quoting increment from one round lot (*i.e.,* 100 shares) to one Security would be sufficient to meet liquidity demands and would make it easier for Market Makers and DMMs to meet their quotation obligations, which in turn incentivize more Market Maker participation. The Exchange believes that adopting quotation requirements and parameters that are appropriate for the nature and types of securities that will trade on the Exchange will promote the protection of investors and the public interest by assuring that the Exchange Rules are appropriately tailored to its market.

K. BSTX Listing Rules (Rule 26000 and 27000 Series)

The BSTX Listing Rules, which include the Rule 26000 and 27000 Series, have been adapted from, and are substantially similar to, Parts 1–12 of the NYSE American LLC Company Guide.[289] Except as described below, each proposed Rule in the BSTX 26000 and 27000 series is substantially similar to a Section of the NYSE American Company Guide.[290] Below is further detail.

- The BSTX Listing Rules (26100 series) are based on the NYSE American Original Listing Requirements (Sections 101–146).[291]
- The BSTX Original Listing Procedures (26200 series) are based on the NYSE American Original Listing Procedures (Sections 201–222).
- The BSTX Additional Listings Rules (26300 series) are based on the NYSE American Additional Listings Sections (Sections 301–350).
- The BSTX Disclosure Policies (26400 series) are based on the NYSE American Disclosure Policies (Sections 401–404).
- The BSTX Dividends and Splits Rules (26500 series) are based on the NYSE American Dividends and Stock Splits Sections (Sections 501–522).
- The BSTX Accounting; Annual and Quarterly Reports Rules (26600 series) are based on the NYSE American Accounting; Annual and Quarterly Reports Sections (Sections 603–624).
- The BSTX Shareholders' Meetings, Approval and Voting of Proxies Rules (26700 series) are based on the NYSE American Shareholders' Meetings, Approval and Voting of Proxies Sections (Sections 701–726).[292]
- The BSTX Corporate Governance Rules (26800 series) are based on the NYSE American Corporate Governance Sections (Sections 801–809).
- The BSTX Additional Matters Rules (26900 series) are based on the NYSE American Additional Matters Sections (Sections 920–994).
- The BSTX Suspension and Delisting Rules (27000 series) are based on the NYSE American Suspension and Delisting Sections (Sections 1001–1011).
- The BSTX Guide to Filing Requirements (27100 series) are based on the NYSE American Guide to Filing Requirements (Section 1101).
- The BSTX Procedures for Review of Exchange Listing Determinations (27200 series) are based on the NYSE American Procedures for Review of Exchange Listing Determinations (Sections 1201–1211).

Notwithstanding that the proposed BSTX Listing Rules are substantially similar to those of other exchanges, BSTX proposes certain additions or modifications to these rules specific to its market. For example, BSTX proposes to add definitions that apply to the proposed BSTX Listing Rules. The definitions set forth in proposed Rule 26000 are designed to facilitate understanding of the BSTX Listing Rules by market participants. Increased

[285] 15 U.S.C. 78f(b)(5).

[286] *See* NYSE American Rule 7, Section 2.

[287] In this regard, the Exchange believes the proposed Market Making Rules are not designed to permit unfair discrimination between BSTX Participants, consistent with Section 6(b)(5) of the Exchange Act. 15 U.S.C. 78f(b)(5).

[288] 15 U.S.C. 78f(b)(5).

[289] All references to various ''Sections'' in the discussion of these Listing Rules refer to the various Sections of the NYSE American Company Guide.

[290] The Exchange notes that while the numbering of BSTX's Listing Rules generally corresponds to a Section of the NYSE American LLC Company Guide, BSTX did not integrate certain Sections of the NYSE American Company Guide that the Exchange deemed inapplicable to its operations, such as with respect to types of securities which the Exchange is not proposing to make eligible for listing (*e.g.,* foreign issuers, other than those from Canada). Further, the Exchange formulated a small amount of new rules to reflect requirements relating to the use of blockchain technology as an ancillary recordkeeping mechanism, as described more fully herein. The Exchange also proposes to modify cross-references in the proposed Listing Rules to accord with its Rules.

[291] Pursuant to proposed Rule 26135, all securities initially listing on BSTX, except securities which are book-entry only, must be eligible for a Direct Registration Program operated by a clearing agency registered under Section 17A of the Exchange Act. 15 U.S.C. 78q–1.

[292] The Exchange notes that the proposed fees for certain items in the proposed Listing Rules (*e.g.,* proxy follow-up mailings) are the same as those charged by NYSE American. *See e.g.,* proposed IM–26722–8 *cf.* NYSE American Section 722.80.

clarity may serve to remove impediments to and perfect the mechanism of a free and open market and a national market system and may also foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, consistent with Section 6(b)(5) of the Exchange Act.[293]

With respect to initial listing standards, which begin at proposed Rule 26101, the Exchange proposes to adopt listing standards that are substantially similar to the NYSE American listing rules.[294] The Exchange believes that adopting listing rules similar to those in place on other national securities exchanges will facilitate more uniform standards across exchanges, which helps foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, consistent with Section 6(b)(5) of the Exchange Act.[295] Market participants that are already familiar with NYSE American's listing standards will already be familiar with most of the substance of the proposed listing rules. The Exchange also believes that adopting proposed listing standards that closely resemble those of NYSE American may also foster competition among listing exchanges for companies seeking to publicly list their securities. The Exchange is proposing an addition (relative to the NYSE American listing rules) to the initial listing standards for preferred Securities.[296] Specifically, the Exchange proposes an additional standard for preferred Securities to list on the Exchange based on NASDAQ Rule 5510.[297] The Exchange believes a proposed rule providing an additional initial listing standard for preferred Securities consistent with a similar provision of NASDAQ would expand the possible universe of issuances that would be eligible to list on the Exchange to include preferred Securities. The Exchange believes that such a rule would help remove impediments to and perfect the mechanism of a free and open market and a national market system, consistent with Section 6(b)(5) of the Exchange Act by giving issuers an additional means by which it could list a different type of security (*i.e.,* a preferred Security) and investors the opportunity to trade in such preferred Securities.[298] Further, consistent with the public interest, rules that provide more opportunity for listings may promote competition among listing exchanges and capital formation for issuers.

In certain instances, BSTX proposes to add additional provisions not currently provided for in the NYSE American LLC Company Guide that are specific to Securities. For example, pursuant to proposed Rule 26230(a) (Security Architecture Responsibility and Audit), prior to approving a Security for trading on BSTX, the Exchange would conduct an audit of the Security's architecture to ensure compliance with the BSTX Protocol as outlined in Rule 26138.[299] The purpose of this requirement is to ensure that the design and structure of a prospective BSTX-listed company's Security is compatible with the BSTX Protocol for purposes of facilitating updates to the blockchain as an ancillary recordkeeping mechanism. The Exchange may use third party service providers that have demonstrated sufficient technical expertise in blockchain technology and an understanding of the BSTX Protocol to conduct this audit on behalf of the Exchange. To the extent an issuer looking to list its shares on BSTX as Securities failed the audit by BSTX of its Security architecture, the issuer would not meet the requirements of BSTX's listing rules and would therefore not be permitted to list its shares on BSTX until it successfully passed the Security audit.[300]

Further, the Exchange proposes that Rule 26230(b) would provide that a listed company (*i.e.,* issuer) remains responsible for ensuring that its Security remains compatible with the BSTX Protocol and accurately reflects the number of shares outstanding. The Exchange recognizes that, in certain circumstances, it may be necessary for a listed company to modify certain aspects of the smart contract corresponding to a Security. For example, in the case of a stock split, a listed company may need to increase the total supply of Securities as programmed into its Security smart contract. Proposed Rule 26230(b) would provide that notice of any such modification of the smart contract corresponding to a Security (*e.g.,* to increase the total supply) must be provided to the Exchange at least five calendar days in advance of implementation to allow the Exchange to audit the proposed modification.[301] While the Exchange believes that five calendar days will provide sufficient time for it to ensure that a Security is appropriately updated in advance of any implementation, the Exchange recognizes that there could conceivably be circumstances in which a change takes longer than expected to implement. Accordingly, the Exchange proposes that Rule 26230(b) would also provide that, to the extent additional time is needed to appropriately implement the modification, the Exchange may exercise its authority to suspend the ancillary recordkeeping process pursuant to Rule 17020(f). The Exchange notes that the primary circumstances under which a modification to a smart contract corresponding to a Security may be necessary is where there is a change to the total supply of the Security, which could occur in the case of a stock split, a reverse stock split, a buy-back, or a dividend in kind. The Exchange notes that any delay in the implementation of a change to a smart contract that

[293] 15 U.S.C. 78f(b)(5).

[294] *See* NYSE American Section 101. The Exchange understands that the Commission has extended relief to NYSE American with respect to certain quantitative listing standards that do not meet the thresholds of SEC Rule 3a51–1. 17 CFR 240.3a51–1. Initial listings of securities that do not meet such thresholds and are not subject to the relief provided to NYSE American would qualify as ''penny stocks'' and would be subject to additional regulation. BSTX notes that it is not seeking relief related to SEC Rule 3a51–1 and therefore has clarified proposed Rule 26101(a)(2) to ensure that issuers have at least one year of operating history. BSTX will also require new listings pursuant to proposed Rule 26102 to have a public distribution of 1 million Securities, 400 public Security holders, and a minimum market price of $4 per Security. These provisions meet the requirements in SEC Rule 3a51–1 and are consistent with the rules of other national securities exchanges. *See e.g.,* Nasdaq Rule 5510. The quantitative thresholds specified in Rule 26102 are also reflected in the Sample Underwriter's Letter that is Exhibit 3M to this proposal. In addition, the Exchange notes that proposed Rule 26140, which governs the additional listing requirements of a company that is affiliated with the Exchange, is based on similar provisions in NYSE American Rule 497 and IEX 14.205.

[295] 15 U.S.C. 78f(b)(5).

[296] *See* proposed Rule 26103.

[297] *See* proposed Rule 26103(b)(2). Preferred Security Distribution Standard 2 requires that a preferred Security listing satisfy the following conditions: Minimum bid price of at least $4 per Security; at least 10 Round Lot holders; at least 200,000 Publicly Held Securities; and Market Value of Publicly Held Securities of at least $3.5 million.

[298] 15 U.S.C. 78f(b)(5).

[299] Proposed Rule 26230 further provides that an applicant that is denied pursuant to this section may appeal the decision via the process outlined in the Rule 27200 Series.

[300] The Exchange expects that some issuers may choose to use an outside vendor to help build their Security in a manner that complies with the BSTX Protocol. The BSTX Protocol is open-source, so there is no need to use any particular vendor over another. The Exchange understands that there are numerous technology companies that offer these services, and issuers would be free to select one of their choosing.

[301] The Exchange expects that it will work with issuers to help ensure that their Securities comply with the BSTX Protocol. However, as with all Exchange Rules, failure to comply could result in potential suspension and delisting in accordance with the Rule 27000 Series.

corresponds to a Security shall in no way impact the record date or ex-dividend date for any dividend, distribution, or other action. The Exchange believes that proposed Rule 26230 would foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, consistent with Section 6(b)(5) of the Exchange Act,[302] because it facilitates the ancillary recordkeeping mechanism for BSTX-listed Securities which is a first step toward the potential integration of blockchain technology to securities transactions. Without ensuring that BSTX-listed companies' Securities are compatible with the BSTX Protocol, the use of blockchain technology as an ancillary recordkeeping mechanism could be impaired.

With respect to the definitions in proposed Rule 26000, these are designed to facilitate understanding of the BSTX Listing Rules by market participants. The Exchange believes that allowing market participants to better understand and interpret the BSTX Listing Rules removes impediments to and perfects the mechanism of a free and open market and a national market system, and may also foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, consistent with Section 6(b)(5) of the Exchange Act.[303]

The Exchange also proposes certain enhancements to the notice requirements for listed companies to communicate to BSTX related to record dates and defaults.[304] The Exchange believes that these additional disclosure and communication obligations can help BSTX in monitoring for listed company compliance with applicable rules and regulations; such additional disclosure obligations are 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, consistent with Section 6(b)(5) of the Exchange Act.[305]

The Exchange's proposed Rules provide additional flexibility for listed companies in choosing how liquidity would be provided in their listings by allowing listed companies to meet either the DMM Requirement or Active Market Maker Requirement for initial listing and continued trading.[306] Pursuant to proposed Rule 26205, a company may choose to be assigned a DMM by the Exchange or to select its own DMM.[307] Alternatively, a company may elect, or the Exchange may determine, that, in lieu of a DMM, a minimum of three (3) market makers would be assigned to the Security at initial listing; such requirement may be reduced to two (2) market makers following the initial listing, consistent with proposed Rule 26106. The Exchange believes that such additional flexibility would promote the removal of impediments to and perfection of the mechanism of a free and open market and a national market system, consistent with Section 6(b)(5) of the Exchange Act.[308] The Commission has previously approved exchange rules providing for three market makers to be assigned to a particular security upon initial listing and only two for continued listing.[309] In accordance with these previously approved rules, the Exchange believes proposed Rule 26205 would ensure fair and orderly markets and would facilitate the provision of sufficient liquidity for Securities.

The Exchange also proposes a number of other non-substantive changes from the baseline NYSE American listing rules, such as to eliminate references to the concept of a ''specialist,'' since BSTX will not have a specialist,[310] or references to certificated equities, since Securities will be uncertificated equities.[311] As another example, NYSE American Section 623 requires that three copies of certain press releases be sent to the exchange, while the Exchange proposes only that a single copy of such press release be shared with the Exchange.[312] In addition, the Exchange proposes to adopt Rule 26720 in a manner that is substantially similar to NYSE American Section 720, but proposes to modify the internal citations to ensure consistency with its proposed Rulebook.[313] In its proposed Rules, the

[302] 15 U.S.C. 78f(b)(5).

[303] *Id.*

[304] *See* Proposed Rule 26502, which requires, among other things, a listing company to give the Exchange at least ten days' notice in advance of a record date established for any other purpose, including meetings of shareholders.

[305] 15 U.S.C. 78f(b)(5).

[306] *See* proposed Rule 26205. BSTX-listed Securities must meet the criteria specified in proposed Rule 26106, which provides that unless otherwise provided, all Securities listed pursuant to the BSTX Listing Standards must meet one of the following requirements: (1) The DMM Requirement whereby a DMM must be assigned to a given Security; or (2) the Active Market Maker Requirement which states that (i) for initial inclusion the Security must have at least three registered and active Market Makers, and (ii) for continued listing, a Security must have at least two registered and active Market Makers, one of which may be a Market Maker entering a stabilizing bid.

[307] Exchange personnel responsible for managing the listing and onboarding process will be responsible for determining to which DMM a Security will be assigned. As provided in proposed Rule 26205, the Exchange makes every effort to see that each Security is allocated in the best interests of the company and its shareholders, as well as that of the public and the Exchange. Similarly, the Exchange anticipates that these same personnel will be responsible for answering questions relating to the Exchange's listing rules pursuant to proposed Rule 26994 (New Policies). The Exchange notes that certain provisions in the NYSE American Listing Manual contemplate a ''Listing Qualifications Analyst'' that would perform a number of these functions. The Exchange is not proposing to adopt provisions that specifically contemplate a ''Listing Qualifications Analyst,'' but expects to have personnel that will perform the same basic functions, such as advising issuers and prospective issuers with respect to the BSTX Listing Rules.

[308] 15 U.S.C. 78f(b)(5).

[309] *See e.g.,* IEX Rule 14.206.

[310] *See e.g.,* NYSE American Section 513(f), noting that open orders to buy and open orders to sell on the books of a specialist on an ex rights date are reduced by the cash value of the rights. Proposed Rule 26340(f) deletes this provision because BSTX will not have specialists. Similarly, because BSTX will not have specialists, the Exchange is not proposing to adopt a parallel rule to NYSE American Section 516, which specifies that certain types of orders are to be reduced by a specialist when a security is quoted ex-dividend, ex-distribution or ex-rights are set forth in NYSE American Rule 132.

[311] *See e.g.,* NYSE American Section 117 including a clause relating to paired securities for which ''the stock certificates of which are printed back-to-back on a single certificate''). Similarly, the Exchange has proposed to replace certain references to the ''Office of General Counsel'' contained in certain NYSE American Listing Rule (*see e.g.,* Section 1205) with references to the Exchange's ''Legal Department'' to accommodate differences in BSTX's organizational structure. *See* proposed Rule 27204. As another example, proposed Rule 27205 refers to the Exchange's ''Hearing Committee'' as defined in Section 6.08 of the Exchange's By-Laws to similarly accommodate organizational differences between the Exchange and NYSE American.

[312] *See* proposed Rule 26623.

[313] Specifically, proposed Rule 26720 would provide that participants must comply with Rules 26720 through 26725 and BSTX's Rule 22020 (Forwarding of Proxy and Other Issuer-Related Materials; Proxy Voting). NYSE American Section 726, upon which proposed Rule 26720 is based, includes cross-references to NYSE American's corresponding rules to proposed Rules 26720 through 26725, and also includes cross-references to NYSE American Rules 578 through 585, for which the Exchange is not proposing corresponding rules. These NYSE American rules for which the Exchange is not proposing to adopt a parallel rule relate to certain requirements specific to proxy voting (*e.g.,* requiring that a member state the actual number of shares for which a proxy is given—NYSE American Rule 578) or, in some cases, relate to certificated securities (*e.g.,* NYSE American Rule 579), which would be inapplicable to the Exchange since it proposes to only list uncertificated securities. The Exchange believes that it does not need to propose to adopt parallel rules corresponding to NYSE American Rules 578–585 at

Continued

Exchange has not included certain form letters related to proxy rules that are included in the NYSE American rules;[314] instead, these forms will be included in the BSTX Listing Supplement.[315] The Exchange is not proposing to adopt provisions relating to future priced securities at this time.[316] In addition, the Exchange is not proposing to allow for listing of foreign companies, other than Canadian companies,[317] or to allow for issuers to transfer their existing securities to BSTX.[318] Similarly, the Exchange is not proposing at this time to support Security debt securities, so the Exchange has not proposed to adopt certain provisions from the NYSE American Listing Manual related to bonds/debt securities[319] or the trading of units.[320] The Exchange believes that the departures from the NYSE American rules upon which the proposed Rules are based, as described above, are non-substantive (*e.g.,* by not including provisions relating to instruments that will not trade on the Exchange), would apply to all issuers in the same manner and are therefore not designed to permit unfair discrimination, consistent with Section 6(b)(5) of the Exchange Act.[321]

The Exchange proposes in Rule 26507 to prohibit the issuance of fractional Securities and to provide that cash must be paid in lieu of any distribution or part of a distribution that might result in fractional interests in Securities.[322] The Exchange believes that disallowing fractional shares reduces complexity. By extension, the requirement to provide cash in lieu of fractional shares simplifies the process related to share transfer and tracking of share ownership. The Exchange believes that this simplification promotes just and equitable principles of trade, fosters cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, removes impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, protects investors and the public interest, consistent with Section 6(b)(5) of the Exchange Act.[323]

Proposed BSTX Rule 26130 (Original Listing Applications) would require listing applicants to furnish a legal opinion that the applicant's Security is a security under applicable United States securities laws. Such a requirement provides assurance to the Exchange that Security trading relates to appropriate asset classes. The Exchange believes that this Rule promotes just and equitable principles of trade and, in general, protects investors and the public interest, consistent with Section 6(b)(5) of the Exchange Act.[324]

The Exchange proposes to adopt corporate governance listing standards as its Rule 26800 series that are substantially similar to the corporate governance listing standards set forth in Part 8 of the NYSE American Listing Manual. However, it includes certain clarifications, most notably that certain proposed provisions are not intended to restrict the number of terms that a director may serve[325] and that, if a limited partnership is managed by a general partner rather than a board of directors, the audit committee requirements applicable to the listed entity should be satisfied by the general partner.[326] The Exchange also notes that, unlike the current NYSE American rules upon which the proposed Rules are based, the proposed Rules on corporate governance do not include provisions on asset-backed securities and foreign issues (other than those from Canada), since the Exchange does not proposed to allow for such foreign issuers to list on BSTX at this time.

The Exchange proposes to adopt additional listing rules as its Rule 26900 series that are substantially similar to the corporate governance listing standards set forth in Part 9 of the NYSE American Listing Manual. The only significant difference from the baseline NYSE American rules is that the proposed BSTX Rules do not include provisions related to certificated securities, since Securities listed on BSTX will be uncertificated.

The Exchange proposes to adopt suspension and delisting rules as its Rule 27000 series that are substantially similar to the corporate governance listing standards set forth in Parts 10, 11, and 12 of the NYSE American Listing Manual. The proposed rules do not include concepts from the baseline NYSE American rules regarding foreign, fixed income securities, or other non-equity securities because the Exchange is not proposing to allow for listing of such securities at this time.[327]

The Exchange believes that the proposals in the Rule 26800 to Rule 27000 Series, which are based on the rules of NYSE American with the differences explained above, are designed to foster cooperation and coordination with persons engaged in facilitating transactions in securities, remove impediments to and perfect the mechanism of a free and open market

this time and notes that other listing exchanges do not appear have corresponding versions of these NYSE American Rules. *See e.g.,* Cboe BZX Rules. The Exchange believes that proposed Rule 26720 and the Exchange's other proposed Rules governing proxies, including those referenced in proposed Rule 26720, are sufficient to govern BSTX Participants' obligations with respect to proxies.

[314] The forms found in NYSE American Section 722.20 and 722.40 will be included in the BSTX Listing Supplement.

[315] The BSTX Listing Supplement would contain samples of letters containing the information and instructions required pursuant to the proxy rules to be given to clients in the circumstances indicated in the appropriate heading. These are intended to serve as examples and not as prescribed forms. Participants would be permitted to adapt the form of these letters for their own purposes provided all of the required information and instructions are clearly enumerated in letters to clients. Pursuant to proposed Rule 26212, the BSTX Listing Supplement would also include a sample application for original listing, which the Exchange has included as Exhibit 3G. In addition, proposed Rule 26350 states that the BSTX Listing Supplement will include a sample cancellation notice; the Exchange expects such notice to be substantially in the same form as NYSE American's sample notice in NYSE American Section 350. Other examples of items that would appear in the BSTX Listing Supplement include certain certifications to be completed by the CEO of listed companies pursuant to proposed Rule 26810(a) and (c), and forms of letters to be sent to clients requesting voting instructions and other letters relating to proxy votes pursuant to proposed IM–26722–2 and IM–26722–4. The Exchange expects that these proposed materials in the BSTX Listing Supplement will be substantially similar to the corresponding versions of such samples used by NYSE American. The purpose of putting these sample letters and other information into the BSTX Listing Supplement rather than directly in the rules is to improve the readability of the Rules.

[316] *See e.g.,* NYSE American Section 101, Commentary .02. The Exchange is also not proposing to adopt a parallel provision to NYSE American Section 950 (Explanation of Difference between Listed and Unlisted Trading Privileges) because the Exchange believes that such provision is not necessary and contains extraneous historical details that are not particularly relevant to the trading of Securities. The Exchange notes that numerous other listing exchanges do not have a similar provision to NYSE American Section 950. *See e.g.,* IEX Listing Rules.

[317] *See* proposed Rule 26109. Because the Exchange does not propose to allow foreign issuers of Securities, it does not propose to adopt a parallel provision to NYSE American Section 110 and other similar provisions relating to foreign issuers—*e.g.,* NYSE American Section 801(f).

[318] Consequently, the Exchange does not propose to adopt a parallel provision to NYSE American Section 113 at this time.

[319] *See e.g.,* NYSE American Sections 1003(b)(iv) and (e).

[320] *See e.g.,* NYSE American Sections 106(f), 401(i), and 1003(g).

[321] 15 U.S.C. 78f(b)(5).

[322] The Exchange also proposes certain conforming changes in Rule 26503 (Form of Notice) to reiterate that fractional interests in Securities are not permitted by the Exchange.

[323] 15 U.S.C. 78f(b)(5).

[324] *Id.*

[325] *See* proposed Rule 26802(d).

[326] *See* proposed Rule 26801(b).

[327] As with all sections of the proposed rules, references to ''securities'' have been changed to ''Securities'' where appropriate and, in the Rule 27000 series, certain references have been conformed from the baseline NYSE American provisions to account for the differences in governance structure and naming conventions of BSTX.

and a national market system, and, in general to protect investors and the public interest. Further, the differences in the proposals compared to the analogous NYSE American provisions appropriately reflect the differences between the two exchanges. The Exchange believes that ensuring that its systems are appropriately described in the BSTX Rules facilitates market participants' review of such Rules, which serves to remove impediments to and perfect the mechanism of a free and open market and a national market system by ensuring that market participants can easily navigate, understand and comply with the Exchange's rulebook. Therefore, the Exchange believes its proposals are consistent with Section 6(b)(5) of the Exchange Act.[328]

L. Fees (Rule 28000 Series)

The Exchange proposes to set forth as its Rule 28000 Series (Fees) the Exchange's authority to prescribe reasonable dues, fees, assessments or other charges as it may deem appropriate.[329] As provided in proposed Rule 28000 (Authority to Prescribe Dues, Fees, Assessments and Other Charges), these fees may include membership dues, transaction fees, communication and technology fees, regulatory fees, and other fees, which will be equitably allocated among BSTX Participants, issuers, and other persons using the Exchange's facilities.[330] Proposed Rule 28010 (Regulatory Revenues) generally provides that any revenues received by the Exchange from fees derived from its regulatory function or regulatory fines will not be used for non-regulatory purposes or distributed to the stockholder, but rather, shall be applied to fund the legal and regulatory operations of the Exchange (including surveillance and enforcement activities).

The Exchange believes that the proposed Rule 28000 Series (Fees) is consistent with Sections 6(b)(5) of the Exchange Act because these proposed rules are designed to protect investors and the public interest by setting forth the Exchange's authority to assess fees on BSTX Participants, which would be used to operate the BSTX System and surveil BSTX for compliance with applicable laws and rules. The Exchange believes that the proposed Rule 28000 Series (Fees) is also consistent with Sections 6(b)(3) of the Exchange Act[331] because the proposed Rules specify that all fees assessed by the Exchange shall be equitably allocated among BSTX Participants, issuers and other persons using the Exchange's facilities. The Exchange notes that the proposed Rule 28000 Series is substantially similar to the existing rules of another exchange.[332] The Exchange intends to submit a proposed rule change to the Commission setting forth the proposed fees relating to trading on BSTX in advance of the launch of BSTX.

IV. Minor Rule Violation Plan

The Exchange's disciplinary rules, including Exchange Rules applicable to ''minor rule violations,'' are set forth in the Rule 12000 Series of the Exchange's current Rules. Such disciplinary rules would apply to BSTX Participants and their associated persons pursuant to proposed Rule 24000. The Exchange's Minor Rule Violation Plan (''MRVP'') specifies those uncontested minor rule violations with sanctions not exceeding $2,500 that would not be subject to the provisions of Rule 19d–1(c)(1) under the Exchange Act[333] requiring that an SRO promptly file notice with the Commission of any final disciplinary action taken with respect to any person or organization.[334] The Exchange's MRVP includes the policies and procedures set forth in Exchange Rule 12140 (Imposition of Fines for Minor Violations).

The Exchange proposes to amend its MRVP and Rule 12140 to include proposed Rule 24010 (Penalty for Minor Rule Violations). The Rules included in proposed Rule 24010 as appropriate for disposition under the Exchange's MRVP are: (a) Rule 20000 (Maintenance, Retention and Furnishing of Records); (b) Rule 25070 (Audit Trail); (c) Rule 25210(a)(1) (Two-Sided Quotation Obligations of BSTX Market Makers); and Rule 25120 (Short Sales). The rules included in proposed Rule 12140 are the same as the rules included in the MRVPs of other exchanges.[335] Upon implementation of this proposal, the Exchange will include the enumerated trading rule violations in the Exchange's standard quarterly report of actions taken on minor rule violations under the MRVP. The quarterly report includes: The Exchange's internal file number for the case, the name of the individual and/or organization, the nature of the violation, the specific rule provision violated, the sanction imposed, the number of times the rule violation has occurred, and the date of disposition. The Exchange's MRVP, as proposed to be amended, is consistent with Sections 6(b)(1), 6(b)(5) and 6(b)(6) of the Exchange Act,[336] which require, in part, that an exchange have the capacity to enforce compliance with, and provide appropriate discipline for, violations of the rules of the Commission and of the exchange. In addition, because amended Rule 12140 will offer procedural rights to a person sanctioned for a violation listed in proposed Rule 24010, the Exchange will provide a fair procedure for the disciplining of members and associated persons, consistent with Section 6(b)(7) of the Exchange Act.[337]

This proposal to include the rules listed in Rule 24010 in the Exchange's MRVP is consistent with the public interest, the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act, as required by Rule 19d–1(c)(2) under the Exchange Act,[338] because it should strengthen the Exchange's ability to carry out its oversight and enforcement responsibilities as an SRO in cases where full disciplinary proceedings are unsuitable in view of the minor nature of the particular violation. In requesting the proposed change to the MRVP, the Exchange in no way minimizes the importance of compliance with Exchange Rules and all other rules subject to the imposition of fines under the MRVP. However, the MRVP provides a reasonable means of addressing rule violations that do not

[328] 15 U.S.C. 78f(b)(5).

[329] As described above, recording information to the Ethereum blockchain requires payment of gas by the individual or entity who desires to post such a record. The payment of gas will be performed by the Wallet Manager as a service provider to the Exchange carrying out the function of updating the Ethereum blockchain as an ancillary recordkeeping mechanism. The Exchange does not plan to charge a fee to cover the costs associated with gas and updating the Ethereum blockchain. The Exchange also notes that gas costs are typically negligible and anticipates actual monthly gas expenditures to be of a de minims amount.

[330] Proposed Rule 28000 further provides authority for the Exchange to charge BSTX Participants a regulatory transaction fee pursuant to Section 31 of the Exchange Act (15 U.S.C. 78ee) and that the Exchange will set forth fees pursuant to publicly available schedule of fees.

[331] 15 U.S.C. 78f(b)(5).

[332] *See* Cboe BZX Rules 15.1 and 15.2.

[333] 17 CFR 240.19d–1(c)(1).

[334] The Commission adopted amendments to paragraph (c) of Rule 19d–1 to allow SROs to submit for Commission approval plans for the abbreviated reporting of minor disciplinary infractions. *See* Exchange Act Release No. 21013 (June 1, 1984), 49 FR 23828 (June 8, 1984). Any disciplinary action taken by an SRO against any person for violation of a rule of the SRO which has been designated as a minor rule violation pursuant to such a plan filed with and declared effective by the Commission will not be considered ''final'' for purposes of Section 19(d)(1) of the Exchange Act if the sanction imposed consists of a fine not exceeding $2,500 and the sanctioned person has not sought an adjudication, including a hearing, or otherwise exhausted his administrative remedies.

[335] *See e.g.,* IEX Rule 9.218 and Cboe BZX Rule 8.15.01.

[336] 15 U.S.C. 78f(b)(1), 78f(b)(5) and 78f(b)(6).

[337] 15 U.S.C. 78f(b)(7).

[338] 17 CFR 240.19d–1(c)(2).

rise to the level of requiring formal disciplinary proceedings, while providing greater flexibility in handling certain violations. The Exchange will continue to conduct surveillance with due diligence and make a determination based on its findings, on a case-by-case basis, whether a fine of more or less than the recommended amount is appropriate for a violation under the MRVP or whether a violation requires a formal disciplinary action.

V. Amendments to Existing BOX Rules

Due to the new BSTX trading facility and the introduction of trading in Securities, a type of equity security, on the Exchange, the Exchange proposes to amend those Exchange Rules that would apply to BSTX Participants, but that currently only contemplate trading in options. Therefore, the Exchange is seeking to amend the following Exchange Rules, each of which is set forth in Exhibit 5B:

• *Rule 100(a) (Definitions) ''Options Participant'' or ''Participant'':* The Exchange proposes to change the definition of ''Options Participant or Participant'' to ''Participant'' to reflect Options Participants and BSTX Participants and to amend the definition as follows: ''The term 'Participant' means a firm, or organization that is registered with the Exchange pursuant to the Rule 2000 Series for purposes of participating in trading on a facility of the Exchange and includes an 'Options Participant' and 'BSTX Participant.' ''

• *Rule 100(a) (Definitions) ''Options Participant'':* The Exchange proposes to add a definition of ''Options Participant'' that would be defined as follows: ''The term 'Options Participant' is a Participant registered with the Exchange for purposes of participating in options trading on the Exchange.'' [339]

• *Rule 2020(g)(2) (Participant Eligibility and Registration):* The Exchange proposes to delete subsection (g)(2) and replace it with the following: ''(2) persons associated with a Participant whose functions are related solely and exclusively to transactions in municipal securities; (3) persons associated with a Participant whose functions are related solely and exclusively to transactions in commodities; (4) persons associated with a Participant whose functions are related solely and exclusively to transactions in securities futures, provided that any such person is appropriately registered with a registered futures association; and (5) persons associated with a Participant who are restricted from accessing the Exchange and that do not engage in the securities business of the Participant relating to activity that occurs on the Exchange.'' [340]

• *Rule 2060 (Revocation of Participant Status or Association with a Participant):* The Exchange proposes to amend Rule 2060 to refer to ''securities transactions'' rather than ''options securities transactions.''

• *Rule 3180(a) (Mandatory Systems Testing):* The Exchange proposes to amend subsection (a)(1) of Rule 3180 to also include BSTX Participants, in addition to the categories of Market Makers and OFPs.

• *Rule 7130(a)(2)(v) Execution and Price/Time Priority:* The Exchange proposes to update the cross reference to Rule 100(a)(58) to refer to Rule 100(a)(59), which defines the term ''Request for Quote'' or ''RFQ'' under the Rules after the proposed renumbering.

• *Rule 7150(a)(2) (Price Improvement Period):* The Exchange proposes to amend Rule 7150(a)(2) to update the cross reference to the definition of a Professional in Rule 100(a)(51) to instead refer to Rule 100(a)(52), which is where that term would be defined in the Rules after the proposed renumbering.

• *Rule 7230 (Limitation of Liability):* The Exchange proposes to amend the references in Rule 7230 to ''Options Participants'' to simply ''Participants.''

• *Rule 7245(a)(4) (Complex Order Price Improve Period):* The Exchange proposes to update the cross reference to Rule 100(a)(51) to refer to Rule 100(a)(52), which defines the term ''Professional'' after the proposed renumbering.

• *IM–8050–3:* The Exchange proposes to update the cross reference to Rule 100(a)(55) to refer to Rule 100(a)(56), which defines the term ''quote'' or ''quotation'' after the proposed renumbering.[341]

• *Rule 11010(a) ''Investigation Following Suspension'':* The Exchange proposes to amend subsection (a) of Rule 11010 to remove the reference to ''in BOX options contracts'' and to modify the word ''position'' with the word ''security'' as follows: ''. . . the amount owing to each and a complete list of each open long and short security position maintained by the Participant and each of his or its Customers.''

• *Rule 11030 (Failure to Obtain Reinstatement):* The Exchange proposes to amend Rule 11030 to replace the reference to ''Options Participant'' to simply ''Participant.''

• *Rule 12030(a)(1) (Letters of Consent):* The Exchange proposes to amend subsection (a)(1) of Rule 12030 to replace the reference to ''Options Participant'' to simply ''Participant.''

• *Rule 12140 (Imposition of Fines for Minor Rule Violations):* The Exchange proposes to amend Rule 12140 to replace references to ''Options Participant'' to simply ''Participant.'' In addition, the Exchange proposes to add paragraph (f) to Rule 12140, to incorporate the aforementioned modifications to the Exchange's MRVP. New paragraph (f) of Rule 12140 would provide: ''(f) Transactions on BSTX. Rules and penalties relating to trading on BSTX that are set forth in Rule 24010 (Penalty for Minor Rule Violations).''

The Exchange believes that the proposed amendments to the definitions set forth in Rule 100 are consistent with Section 6(b)(5) of the Exchange Act [342] because they protect investors and the public interest by setting forth clear definitions that help BOX and BSTX Participants understand and apply Exchange Rules. Without defining terms used in the Exchange Rules clearly, market participants could be confused as to the application of certain rules, which could cause harm to investors.

The Exchange believes that the proposed amendments to the other Exchange Rules detailed above are consistent with Section 6(b)(5) of the Exchange Act [343] because the proposed rule change is designed to foster cooperation and coordination with persons engaged in facilitating transactions in securities, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest. The Exchange believes that the proposed rule change would remove impediments to and perfect the mechanism of a free and open market and a national market system by ensuring that market participants can easily navigate, understand and comply with the Exchange's rulebook. The

[339] In addition, as a result of these new defined terms, the Exchange proposes to renumber definitions set forth in Rule 100(a) to keep the definitions in alphabetically order.

[340] In addition to revising Rule 2020(g)(2) to broaden it to include securities activities beyond just options trading, the Exchange proposes to add greater specificity to define persons that are exempt from registration, consistent with the approach adopted by other exchanges. *See e.g.,* IEX Rule 2.160(m).

[341] Current Exchange Rule 100(a)(55) defines the term ''Quarterly Options Series,'' but the intended reference in IM–8050–3 was the definition of ''quote'' or ''quotation.'' The term ''quote'' or ''quotation'' is currently defined in Rule 100(a)(56), but is proposed to be renumbered as Rule 100(a)(57).

[342] 15 U.S.C. 78f(b)(5).

[343] *Id.*

Exchange believes that the proposed rule change enables the Exchange to continue to enforce the Exchange's rules. The Exchange notes that none of the proposed changes to the current Exchange rulebook would materially alter the application of any of those Rules, other than by extending them to apply to BSTX Participants and trading on the BSTX System. As such, the proposed amendments would foster cooperation and coordination with persons engaged in facilitating transactions in securities and would remove impediments to and perfect the mechanism of a free and open market and a national exchange system. Further, the Exchange believes that, by ensuring the rulebook accurately reflects the intention of the Exchange's rules, the proposed rule change reduces potential investor or market participant confusion.

VI. Forms To Be Used in Connection With BSTX

In connection with the operation of BSTX, the Exchange proposes to use a series of new forms to facilitate becoming a BSTX Participant and for issuers to list their Securities. These forms have been attached hereto as Exhibits 3A—3N. Each are described below.

A. BSTX Participant Application

Pursuant to proposed Rule 18000(b), in order to become a BSTX Participant, an applicant must complete a BSTX Participant Application, which is attached as Exhibit 3A. The proposed BSTX Participant Application requires the applicant to provide certain basic information such as identifying the applicants name and contact information, Designated Examining Authority, organizational structure, and Central Registration Depository (''CRD'') number. The BSTX Participant Application also requires applicants to provide additional information including certain beneficial ownership information, the applicant's current Form BD, an organization chart, a description of how the applicant receives orders from customers, how it will send orders to BSTX, and a copy of written supervisory procedures and information barrier procedures.

In addition, the BSTX Participant Application allows applicants to indicate whether they are applying to be a BSTX Market Maker or a Designated Market Maker. Applicants wishing to become a BSTX Market Maker or Designated Market Maker must provide certain additional information including a list of each of the applicant's trading representatives (including a copy of each representative's Form U4), a copy of the applicant's written supervisory procedures relating to market making, a description of the source and amount of the applicant's capital, and information regarding the applicant's other business activities and information barrier procedures.

B. BSTX Participant Agreement

Pursuant to Exchange Rule 18000(b), to transact business on BSTX, prospective BSTX Participants must complete a BSTX Participant Agreement. The BSTX Participant Agreement is attached as Exhibit 3B. The BSTX Participant Agreement provides that a BSTX Participant must agree with the Exchange as follows:

1. Participant agrees to abide by the Rules of the Exchange and applicable bylaws, as amended from time to time, and all circulars, notices, interpretations, directives and/or decisions adopted by the Exchange.
2. Participant acknowledges that BSTX Participant and its associated persons are subject to the oversight and jurisdiction of the Exchange.
3. Participant authorizes the Exchange to make available to any governmental agency or SRO any information it may have concerning the BSTX Participant or its associated persons, and releases the Exchange from any and all liability in furnishing such information.
4. Participant acknowledges its obligation to update any and all information contained in any part of the BSTX Participant's application, including termination of membership with another SRO.

These provisions of the BSTX Participant Agreement and others therein are generally designed to reflect the Exchange's SRO obligations to regulate BSTX Participants. Accordingly, these provisions contractually bind a BSTX Participant to comply with Exchange rules, acknowledge the Exchange's oversight and jurisdiction, authorize the Exchange to disclose information regarding the Participant to any governmental agency or SRO and acknowledge the obligation to update any and all Application contained in the Participant's application.

C. BSTX User Agreement

In order to become a BSTX Participant, prospective participants must also execute a BSTX User Agreement pursuant to proposed Rule 18000(b). The BSTX User Agreement, attached as Exhibit 3C, includes provisions related to the term of the agreement, compliance with exchange rules, right and obligations under the agreement, changes to BSTX, proprietary rights under the agreement, use of information received under the relationship, disclaimer of warranty, limitation of liability, indemnification, termination and assignment. The information is necessary to outline the rights and obligations of the prospective Participant and the Exchange under the terms of the agreement. Both the BSTX Participant Agreement and BSTX User Agreement will be available on the Exchange's website (*boxoptions.com*).

D. BSTX Security Market Designated Market Maker Selection Form

In accordance with proposed Rule 25230(b)(1), BSTX will maintain the BSTX Security Designated Market Maker Selection Form, which is attached as Exhibit 3D. The issuer may select its DMM from among a pool of DMMs eligible to participate in the process. Within two business days of the issuer selecting its DMM, it will use the BSTX Security Market Designated Market Maker Selection form to notify BSTX of the selection. The form must be signed by a duly authorized officer as specified in proposed Rule 25230(b)(1).

E. Clearing Authorization Forms

In accordance with proposed Rule 18010, BSTX Participants that are not members/participants of a registered clearing agency must clear their transactions through a BSTX Participant that is a member of a registered clearing agency. A BSTX Participant clearing through another BSTX Participant would do so using, as applicable, either the BSTX Clearing Authorization (non-Market Maker) form (attached as Exhibit 3E) or the BSTX Participant Clearing Authorization (Market Maker) form (attached as Exhibit 3F). Each form would be maintained by BSTX and each form specifies that the BSTX Participant clearing on behalf of the other BSTX Participant accepts financial responsibility for all transactions on BSTX that are made by the BSTX Participant designated on the form.

F. BSTX Listing Applications

The Exchange proposes to specify the required forms of listing application, listing agreement and other documentation that listing applicants and listed companies must execute or complete (as applicable) as a prerequisite for initial and ongoing listing on the Exchange, as applicable (collectively, ''listing documentation''). As proposed, the listing forms are substantially similar to those currently in use by NYSE American LLC, with certain differences to account for the trading of Securities. All listing

documentation will be available on the Exchange's website (*boxoptions.com*). Each of the listing documents form a duly authorized representative of the company must sign an affirmation that the information provided is true and correct as of the date the form was signed. In the event that in the future the Exchange makes any substantive changes (including changes to the rights, duties, or obligations of a listed company or listing applicant or the Exchange, or that would otherwise require a rule filing) to such documents, it will submit a rule filing in accordance with Rule 19b–4.[344]

Pursuant to Rule 26130 and 26300 of the Exchange Rules, a company must file and execute the BSTX Original Listing Application (attached as Exhibit 3G) or the BSTX Additional Listing Application (attached as Exhibit 3H) to apply for the listing of Securities on BSTX.[345] The BSTX Original Listing Application provides information necessary, and in accordance with Section 12(b) of the Exchange Act,[346] for Exchange regulatory staff to conduct a due diligence review of a company to determine if it qualifies for listing on the Exchange. The BSTX Additional Listing Application requires certain further information for an additional listing of Securities. Relevant factors regarding the company and securities to be listed would determine the type of information required. The following describes each category and use of application information:

1. Corporate information regarding the issuer of the security to be listed, including company name, address, contact information, Central Index Key Code (CIK), SEC File Number, state and country of incorporation, date of incorporation, whether the company is a foreign private issuer, website address, SIC Code, CUSIP number of the security being listed and the date of fiscal year end. This information is required of all applicants and is necessary in order for the Exchange's regulatory staff to collect basic company information for recordkeeping and due diligence purposes, including review of information contained in the company's SEC filings.

2. For original listing applications only, corporate contact information including the company's Chief Executive Officer, Chief Financial Officer, Corporate Secretary, General Counsel and Investor Relations Officer. This information is required of all initial applicants and is necessary in order for the Exchange's regulatory staff to collect current company contact information for purposes of obtaining any additional due diligence information to complete a listing qualification review of the applicant.

3. For original listing applications only, offering and security information regarding an offering, including the type of offering, a description of the issue, par value, number of Securities outstanding or offered, total Securities unissued, but reserved for issuance, date authorized, purpose of Securities to be issued, number of Securities authorized, and information relating to payment of dividends. This information is required of all applicants listing Securities on the Exchange, and is necessary in order for the Exchange's regulatory staff to collect basic information about the offering.

4. For original listing applications only, information regarding the company's transfer agent. Transfer agent information is required for all applicants. This information is necessary in order for the Exchange's regulatory staff to collect current contact information for such company transfer agent for purposes of obtaining any additional due diligence information to complete a listing qualification review of the applicant.

5. For original listing applications only, contact information for the outside counsel with respect to the listing application, if any. This information is necessary in order for the Exchange's regulatory staff to collect applicable contact information for purposes of obtaining any additional due diligence information to complete a listing qualification review of the applicant and assess compliance with Exchange Rule 26130.

6. For original listing applications only, a description of any security preferences. This information is necessary to determine whether the Applicant issuer has any existing class of common stock or equity securities entitling the holders to differential voting rights, dividend payments, or other preferences.

7. For original listing applications only, type of Security listing, including the type of transaction (initial public offering of a Security, merger, spin-off, follow on offering, reorganization, exchange offer or conversion) and other details related to the transaction, including the name and contact information for the investment banker/financial advisor contacts. This information is necessary in order for the Exchange's regulatory staff to collect information for such company for purposes of obtaining any additional due diligence information to complete a listing qualification review of the applicant.

8. For original listing applications only, exchange requirements for listing consideration. This section notes that to be considered for listing, the Applicant Issuer must meet the Exchange's minimum listing requirements, that the Exchange has broad discretion regarding the listing of any Security and may deny listing or apply additional or more stringent criteria based on any event, condition or circumstance that makes the listing of an Applicant Issuer's Security inadvisable or unwarranted in the opinion of the Exchange. The section also notes that even if an Applicant Issuer meets the Exchange's listing standards for listing on the BSTX Security Market, it does not necessarily mean that its application will be approved. This information is necessary in order for the Exchange's regulatory staff to assess whether an Applicant Issuer is qualified for listing.

9. For original listing applications only, regulatory review information, including a certification that no officer, board member or non-institutional shareholder with greater than 10% ownership of the company has been convicted of a felony or misdemeanor relating to financial issues during the past ten years or a detailed description of any such matters. This section also notes that the Exchange will review background materials available to it regarding the aforementioned individuals as part of the eligibility review process. This regulatory review information is necessary in order for the Exchange's regulatory staff to assess whether there are regulatory matters related to the company that render it unqualified for listing.

10. For original listing applications only, supporting documentation required prior to listing approval includes a listing agreement, corporate governance affirmation, Security design affirmation, listing application checklist and underwriter's letter. This documentation is necessary in order to support the Exchange's regulatory staff listing qualification review (corporate governance affirmation, listing application checklist and underwriter's letter) and to effectuate the listed company's agreement to the terms of listing (listing agreement).

11. For additional listing applications only, transaction details, including the purpose of the issuance, total Securities, date of board authorization, date of

[344] The Exchange will not submit a rule filing if the changes made to a document are solely typographical or stylistic in nature.

[345] Pursuant to proposed Exchange Rule 26130, an applicant seeking the initial listing of its Security must also provide a legal opinion that the applicant's Security is a security under applicable United States securities laws.

[346] 15 U.S.C. 78l(b).

shareholder authorization and anticipated date of issuance. This information is required of all applicants listing additional Securities on the Exchange, and is necessary in order for the Exchange's regulatory staff to collect basic information about the offering.

12. For additional listing applications only, insider participation and future potential issuances, including whether any director, officer or principal shareholder of the company has a direct or indirect interest in the transaction, and if the transaction potentially requires the company to issue any Securities in the future above the amount they are currently applying for. This information is required of all applicants listing additional Securities on the Exchange, and is necessary in order for the Exchange's regulatory staff to collect basic information about the offering.

13. For additional listing applications only, information for a technical original listing, including reverse Security splits and changes in states of incorporation. This information is required of all applicants listing additional Securities on the Exchange, and is necessary in order for the Exchange's regulatory staff to collect basic information about the offering.

14. For additional listing applications only, information for a forward Security split or Security dividend, including forward Security split ratios and information related to Security dividends. This information is required of all applicants listing additional Securities on the Exchange, and is necessary in order to determine the rights associated with the Securities.

15. For additional listing applications only, relevant company documents. This information is required of all applicants listing additional Securities on the Exchange, and is necessary to assess to support the Exchange's regulatory staff listing qualification review.

16. For additional listing applications only, reconciliation for technical original listing, including Securities issued and outstanding after the technical original event, listed reserves previously approved for listing, and unlisted reserves not yet approved by the Exchange. This information is required of all applicants listing additional Securities on the Exchange, and is necessary to assess to support the Exchange's regulatory staff listing qualification review and to obtain all of the information relevant to the offering.

G. Checklist for Original Listing Application

In order to assist issuers seeking to list its Securities on BSTX, the Exchange has provided a checklist for issuers to seeking to file an original listing application with BSTX. The BSTX Listing Application Checklist, attached as Exhibit 3I, provides that issuers must provide BSTX with a listing application, listing agreement, corporate governance affirmation, BSTX Security design affirmation, underwriter's letter (for an initial public offering of a Security only) and relevant SEC filings (*e.g.,* 8–A, 10, 40–F, 20–F). Each of the above referenced forms are fully described herein. The checklist is necessary to assist issuers and the Exchange regulatory staff in assessing the completion of the relevant documents.

H. BSTX Security Market Listing Agreement

Pursuant to proposed Exchange Rule 26132, to apply for listing on the Exchange, a company must execute the BSTX Security Market Listing Agreement (the ''Listing Agreement''), which is attached as Exhibit 3J. Pursuant to the proposed Listing Agreement, a company agrees with the Exchange as follows:

1. Company certifies that it will comply with all Exchange rules, policies, and procedures that apply to listed companies as they are now in effect and as they may be amended from time to time, regardless of whether the Company's organization documents would allow for a different result.

2. Company shall notify the Exchange at least 20 days in advance of any change in the form or nature of any listed Securities or in the rights, benefits, and privileges of the holders of such Securities.

3. Company understands that the Exchange may remove its Securities from listing on the BSTX Security Market, pursuant to applicable procedures, if it fails to meet one or more requirements of Paragraphs 1 and 2 of this agreement.

4. In order to publicize the Company's listing on the BSTX Security Market, the Company authorizes the Exchange to use the Company's corporate logos, website address, trade names, and trade/service marks in order to convey quotation information, transactional reporting information, and other information regarding the Company in connection with the Exchange. In order to ensure the accuracy of the information, the Company agrees to provide the Exchange with the Company's current corporate logos, website address, trade names, and trade/service marks and with any subsequent changes to those logos, trade names and marks. The Listing Agreement further requires that the Company specify a telephone number to which questions regarding logo usage should be directed.

5. Company indemnifies the Exchange and holds it harmless from any third-party rights and/or claims arising out of use by the Exchange or, any affiliate or facility of the Exchange (''Corporations'') of the Company's corporate logos, website address, trade names, trade/service marks, and/or the trading symbol used by the Company.

6. Company warrants and represents that the trading symbol to be used by the Company does not violate any trade/service mark, trade name, or other intellectual property right of any third party. The Company's trading symbol is provided to the Company for the limited purpose of identifying the Company's security in authorized quotation and trading systems. The Exchange reserves the right to change the Company's trading symbol at the Exchange's discretion at any time.

7. Company agrees to furnish to the Exchange on demand such information concerning the Company as the Exchange may reasonably request.

8. Company agrees to pay when due all fees associated with its listing of Securities on the BSTX Security Market, in accordance with the Exchange's rules.

9. Company agrees to file all required periodic financial reports with the SEC, including annual reports and, where applicable, quarterly or semi-annual reports, by the due dates established by the SEC.

The various provisions of the Listing Agreement are designed to accomplish several objectives. First, clauses 1–3 and 6–8 reflect the Exchange's SRO obligations to assure that only listed companies that are compliant with applicable Exchange rules may remain listed. Thus, these provisions contractually bind a listed company to comply with Exchange rules, provide notification of any corporate action or other event that will cause the company to cease to be in compliance with Exchange listing requirements, evidence the company's understanding that it may be removed from listing (subject to applicable procedures) if it fails to be in compliance or notify the Exchange of any event of noncompliance, furnish the Exchange with requested information on demand, pay all fees due and file all required periodic reports with the SEC. Clauses four and five contain standard legal representations and agreements from the listed company to the

Exchange regarding use of its logo, trade names, trade/service markets, and trading symbols as well as potential legal claims against the Exchange in connection thereto.

I. BSTX Security Market Company Corporate Governance Affirmation

In accordance with the proposed Rule 26800 Series, companies listed on BSTX would be required to comply with certain corporate governance standards, relating to, for example, audit committees, director nominations, executive compensation, board composition, and executive sessions. In certain circumstances the corporate governance standards that apply vary depending on the nature of the company. In addition, there are phase-in periods and exemptions available to certain types of companies. The proposed BSTX Security Market Corporate Governance Affirmation, attached as Exhibit 3K, enables a company to confirm to the Exchange that it is in compliance with the applicable standards, and specify any applicable phase-ins or exemptions. Companies are required to submit a BSTX Security Market Corporate Governance Affirmation upon initial listing on the Exchange and thereafter when an event occurs that makes an existing form inaccurate. This BSTX Security Market Corporate Governance Affirmation assists the Exchange regulatory staff in monitoring listed company compliance with the corporate governance requirements.

J. Security Design Affirmation for the BSTX Security Market

In accordance with proposed Rule 26138, in order for a Security to be admitted to dealings on BSTX, such Security must follow the BSTX Protocol. The BSTX Protocol will be provided via Regulatory Circular and posted on the Exchange's website. The Exchange has included an overview of the BSTX Protocol as Exhibit 3N. The Security Design Affirmation, attached as Exhibit 3L, enables a company to affirm to the Exchange that it is in compliance with the applicable standards. Companies are required to submit a Security Design Affirmation upon initial listing on the Exchange. This Security Design Affirmation assists the Exchange's staff in verifying that an issuer's Securities meet the requirements of the BSTX Protocol.

K. Sample Underwriter's Letter

In accordance with proposed Rule 26101, an initial public offering of a Security must meet certain listing requirements. The Exchange seeks to require the issuer's underwriter to execute a letter setting forth the details of the offering, including the name of the offering and why the offering meets the criteria of the BSTX rules. This information, set forth in the proposed Sample Underwriter's Letter and attached as Exhibit 3M, is necessary to assist the Exchange's regulatory staff in assessing the offering's compliance with BSTX listing standards for an initial public offering of a Security.

L. BSTX Protocol Summary Overview

BSTX Rule 26138 requires that a BSTX listed company's Securities must comply with the BSTX Protocol to trade on BSTX. Exhibit 3N provides fundamental information related to the Ethereum blockchain and background information on the functions, configurations, and events of the Asset Smart Contract of the BSTX Protocol. Exhibit 3N also provides information on the Registry and Compliance features of the BSTX Protocol.

VII. Regulation

In connection with the operation of BSTX, the Exchange will leverage many of the structures it established to operate a national securities exchange in compliance with Section 6 of the Exchange Act.[347] Specifically, the Exchange will extend its Regulatory Services Agreement with FINRA to cover BSTX Participants and trading on the BSTX System. This Regulatory Services Agreement will govern many aspects of the regulation and discipline of BSTX Participants, just as it does for options regulation. The Exchange will perform Security listing regulation, authorize BSTX Participants to trade on the BSTX System, and conduct surveillance of Security trading on the BSTX System.

Section 17(d) of the Exchange Act[348] and the related Exchange Act rules permit SROs to allocate certain regulatory responsibilities to avoid duplicative oversight and regulation. Under Exchange Act Rule 17d–1,[349] the SEC designates one SRO to be the Designated Examining Authority, or DEA, for each broker-dealer that is a member of more than one SRO. The DEA is responsible for the financial aspects of that broker-dealer's regulatory oversight. Because Exchange Participants, including BSTX Participants, also must be members of at least one other SRO, the Exchange would generally not be designated as the DEA for any of its members.[350]

Rule 17d–2 under the Exchange Act[351] permits SROs to file with the Commission plans under which the SROs allocate among each other the responsibility to receive regulatory reports from, and examine and enforce compliance with specified provisions of the Exchange Act and rules thereunder and SRO rules by, firms that are members of more than one SRO (''common members''). If such a plan is declared effective by the Commission, an SRO that is a party to the plan is relieved of regulatory responsibility as to any common member for whom responsibility is allocated under the plan to another SRO. The Exchange plans to join the Plan for the Allocation of Regulatory Responsibilities Regarding Regulation NMS.[352] The Exchange may choose to join certain Rule 17d–2 agreements such as the agreement allocating responsibility for insider trading rules.[353]

For those regulatory responsibilities that fall outside the scope of any Rule 17d–2 agreements that the Exchange may join, subject to Commission approval, the Exchange will retain full regulatory responsibility under the Exchange Act. However, as noted, the Exchange will extend its existing Regulatory Services Agreement with FINRA to provide that FINRA personnel will operate as agents for the Exchange in performing certain regulatory functions with respect to BSTX. As is the case with the Exchange's options trading platform, the Exchange will supervise FINRA and continue to bear ultimate regulatory responsibility for BSTX. Consistent with the Exchange's existing regulatory structure, the Exchange's Chief Regulatory Officer shall have general supervision of the regulatory operations of BSTX, including responsibility for overseeing the surveillance, examination, and enforcement functions and for administering all regulatory services agreements applicable to BSTX. Similarly, the Exchange's existing Regulatory Oversight Committee will be responsible for overseeing the adequacy and effectiveness of Exchange's regulatory and self-regulatory organization responsibilities, including those applicable to BSTX. Finally, as it does with options, the Exchange will

[347] 15 U.S.C. 78f.

[348] 15 U.S.C. 78q(d).

[349] 17 CFR 240.17d–1.

[350] *See* Exchange Rule 2020(a) (requiring that a Participant be a member of another registered national securities exchange or association).

[351] 17 CFR 240.17d–2.

[352] Exchange Act Release No. 85046 (February 4, 2019), 84 FR 2643 (February 7, 2019).

[353] Exchange Act Release No. 84392 (October 10, 2018), 83 FR 52243 (October 16, 2018).

perform automated surveillance of trading on BSTX for the purpose of maintaining a fair and orderly market at all times and monitor BSTX to identify unusual trading patterns and determine whether particular trading activity requires further regulatory investigation by FINRA.

In addition, the Exchange will oversee the process for determining and implementing trade halts, identifying and responding to unusual market conditions, and administering the Exchange's process for identifying and remediating ''clearly erroneous trades'' pursuant to proposed Rule 25110. The Exchange shall also oversee the onboarding and application process for BSTX Participants as well as compliance by issuers of Securities with the applicable initial and continuing listing requirements, including compliance with the BSTX Protocol.[354]

VIII. NMS Plans

The Exchange intends to join the Order Execution Quality Disclosure Plan, the Plan to Address Extraordinary Market Volatility, the Plan Governing the Process of Selecting a Plan Processor, and the applicable plans for consolidation and dissemination of market data. The Exchange is already a participant in the NMS plan related to the Consolidated Audit Trail. Consistent with Section 6(b)(5) of the Exchange Act,[355] the Exchange believes that joining the same set of NMS plans that all other national securities exchanges that trade equities must join fosters cooperation and coordination with other national securities exchanges and other market participants engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of the Exchange Act,[356] in general and with Section 6(b)(5) of the Exchange Act,[357] in particular, in that it is designed 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; and it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, or to regulate by virtue of any authority conferred by this title matters not related to the purposes of this title or the administration of the Exchange.

The Exchange believes that BSTX will benefit individual investors, other market participants, and the equities market generally. The Exchange proposes to establish BSTX as a facility of the Exchange that would trade equities in a similar manner to how equities presently trade on other exchanges. However, BSTX would also require reporting of end-of-day Security balances to the Exchange in order to facilitate the use of blockchain technology as an ancillary recordkeeping mechanism. The Exchange believes that using blockchain technology as an ancillary recordkeeping mechanism that operates in parallel with the traditional trading, recordkeeping, and clearance and settlement structures that market participants are familiar with is an important first step toward exploring the potential uses and benefits of blockchain technology in securities transactions. The entry of an innovative competitor such as BSTX seeking to implement a measured introduction of blockchain technology in connection with the trading of equity securities may promote competition by encouraging other market participants to find ways of using blockchain technology in connection with securities transactions. The proposed regulation of BSTX and BSTX Participants, as well as the execution of Securities using a price-time priority model and the clearance and settlement of Securities will all operate in a manner substantially similar to existing equities exchanges. In this way, the Exchange believes that BSTX provides a robust regulatory structure that protects investors and the public interest while introducing the use of blockchain technology as an ancillary recordkeeping mechanism in connection with listed equity securities.

In order to implement the use of blockchain technology as an ancillary recordkeeping mechanism, the Exchange proposes two requirements pursuant to proposed Rule 17020 to: (i) Obtain a wallet address through BSTX to which end-of-day Security balances may be recorded to the Ethereum blockchain as an ancillary recordkeeping mechanism; and (ii) requiring BSTX Participants to report their end-of-day Security balances to BSTX to facilitate updates to the Ethereum blockchain as an ancillary recordkeeping mechanism to reflect changes in ownership as a result of trading Securities.

The Exchange believes that the proposed address whitelisting and end-of-day Security balance reporting requirement is consistent with the Exchange Act, and Section 6(b)(5)[358] in particular, because it is designed to foster cooperation and coordination with persons engaged in regulating, clearing, settling, and processing information with respect to transactions in Securities and does not unfairly discriminate among BSTX Participants, all of whom are subject to the same wallet address and end-of-day reporting requirement. The requirement to obtain a wallet address is a one-time, minimal obligation similar to obtaining an MPID or other market participant identifier that is applicable to each BSTX Participant. The end-of-day Security balance reporting obligation would be used to update the Ethereum blockchain as an ancillary recordkeeping mechanism, which the Exchange believes would be a first step in demonstrating the potential use of blockchain technology in connection with securities transactions. The Exchange does not propose to charge a fee in connection with either of these requirements. As discussed in greater detail above,[359] the Exchange believes that these proposed requirements are consistent with the Exchange Act as they are necessary to facilitate the blockchain-based ancillary recordkeeping mechanism and are consistent with authority that the Commission has already approved for exchanges regarding furnishment of records by members of the exchange. The Exchange believes that blockchain technology offers potential benefits to investors, and while such benefits may not be immediately evident while the blockchain is used only as ancillary recordkeeping mechanism, the Exchange believes that a measured and gradual introduction of blockchain technology is a useful way to explore these potential benefits that is consistent with the protection of investors and the public interest.

The Exchange also believes that the proposed rule change is consistent with Section 11A of Exchange Act which sets forth the Commission's authority to establish and maintain a national market system.[360] In setting forth the Commission's authority to establish a

[354] *See* proposed Exchange Rules 26230 (Security Architecture Audit) and 26138 (BSTX Protocol).

[355] 15 U.S.C. 78f(b)(5).

[356] 15 U.S.C. 78a *et seq.*

[357] 15 U.S.C. 78f(b)(5).

[358] 15 U.S.C. 78f(b)(5).

[359] *See supra* Parts II.G. through J for further discussion regarding why these proposed requirements are consistent with the Exchange Act.

[360] 15 U.S.C. 78k–1.

national market system, Congress expressly contemplated that the national market system ''may include use of subsystems for particular types of securities with unique trading characteristics.'' [361] The Exchange has proposed here a type of security (*i.e.,* Securities) that trade, clear, and settle entirely within the scope and using the same processes as the existing national market system, but that pursuant to the proposed BSTX Rules would have the unique characteristic of an end-of-day Security balance reporting process as an ancillary recordkeeping function using the ''subsystem'' of blockchain technology.[362] The clear intent of Congress was to provide for a national market system that could include such ''securities with unique trading characteristics.'' For these reasons the Exchange believes that the proposed rule change is consistent with Section 11A of the Exchange Act.

Finally, the Exchange believes that the proposal is consistent with Section 6(b)(5) of the Exchange Act because the BSTX Rules would not be designed to regulate by virtue of any authority conferred by the Exchange Act matters that are not related to the purposes of the Exchange Act or the administration of the Exchange. Congress adopted Section 2 of the Exchange Act to set forth the reasons for the necessity of the Exchange Act, which expressly include that ''transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are effected with a national public interest which makes it necessary to provide for regulation and control of such transactions *and of practices and matters related thereto, including . . . to require appropriate reports[.]*'' [363] [emphasis added]. The Exchange Act and rules of self-regulatory organizations, including national securities exchanges and national securities associations, include reporting requirements that regulate and control matters and practices related to securities transactions conducted on securities exchanges and in the over-the-counter markets. For example, all of the U.S. options exchanges and FINRA maintain rules approved by the Commission that require their member broker-dealers to prepare and submit daily large options position reports to a third-party administrator that maintains a large options position reporting system.[364] These large option positions reports are not reports regarding the trading or clearance and settlement of securities transactions themselves but, instead, are reports that are related to end-of-day positions of the members of the options exchange and/or FINRA in a particular class of standardized or over-the-counter securities option. As described above, the proposed BSTX Rules regarding the ancillary recordkeeping process would similarly require BSTX Participants to provide reports regarding their end-of-day positions in Securities. Also as described above, the Exchange believes that the requirements regarding the ancillary recordkeeping process will promote the use of the functionality of smart contracts and their ability to allocate and re-allocate Security balances in tokenized form across multiple addresses in connection with end-of-day Security position balance information of BSTX Participants such that the requirements will allow market participants to observe and increase their familiarity with the capabilities and potential benefits of blockchain technology in a context that parallels current equity market infrastructure and thereby advances and protects the public's interest in the use and development of new data processing techniques that may create opportunities for more efficient, effective and safe securities markets.[365]

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 Exchange Act. The Exchange operates in an intensely competitive global marketplace for transaction services. Relying on its array of services and benefits, the Exchange competes for the privilege of providing market services to broker-dealers. The Exchange's ability to compete in this environment is based in large part on the quality of its trading systems, the overall quality of its market and its attractiveness to the largest number of investors, as measured by speed, likelihood and costs of executions, as well as spreads, fairness, and transparency.

The Exchange believes that the primary areas where the proposed rule change has the potential to result in a burden on competition are with regard to the terms on which: (1) Issuers may list their securities for trading, (2) market participants that may access the Exchange and use its facilities, (3) Security transactions may be cleared and settled, (4) Security transactions occurring OTC, and (5) Security transactions occurring on other exchanges that might extend unlisted trading privileges to Securities.

Regarding considerations (1) and (2), and as described in detail in Item 3 above, the BSTX Rules are drawn substantially from the existing rules of other exchanges that the Commission has already found to be consistent with the Exchange Act, including regarding whether they impose any burden on competition that is not necessary or appropriate in furtherance of its purposes. For example, the BSTX Listing Rules in the 26000 and 27000 Series that affect issuers and their ability to list Securities for trading are based substantially on the current rules of NYSE American. The Exchange has proposed that issuers would be required to create and maintain a Security compliant with the BSTX Protocol. The Exchange recognizes that these requirements are additional to those of other exchanges. However, the Exchange does not believe this poses a burden on competition because issuers are free to choose to list on other exchanges without such requirements. The Exchange believes that these requirements may attract issuers that are interested in exploring the potentials of blockchain technology. Additionally, the BSTX Rules regarding membership and access to and use of the facilities of BSTX are also substantially based on existing exchange rules. Specifically, the relevant BSTX Rules are as follows: Participation on BSTX (Rule 18000 Series); business conduct for BSTX participants (Rule 19000 Series); financial and operational rules for BSTX participants (Rule 20000 Series); supervision (Rule 21000 Series); miscellaneous provisions (Rule 22000 Series); trading practices (Rule 23000 Series); discipline and summary suspension (Rule 24000 Series); trading (Rule 25000 Series); market making

[361] 15 U.S.C. 78k–1(a)(2).

[362] The Exchange notes that to the extent the Commission believes that the ancillary recordkeeping process regarding Securities under the proposed BSTX Rules is not a ''unique trading characteristic'' of Securities for purposes of Section 11A of the Exchange Act insofar as it does not directly relate to ''trading'' of Securities, then there would not be any concern with respect to Securities regarding consistency with Section 11A. In other words, either the ancillary recordkeeping process is a unique trading characteristic of Securities as explicitly contemplated by Congress as part of the national market system or it is not a unique trading characteristic of Securities because they will trade, clear, and settle the same as all other NMS stock. In the latter case, Securities would be consistent with Section 11A just like all other NMS stock.

[363] 15 U.S.C. 78(b).

[364] *See e.g.,* FINRA Rule 2360(b)(5) and Cboe Rule 8.43.

[365] Report of the Senate Committee on Banking, Housing & Urban Affairs, S. Rep. No. 94–75, at 8 (1975) (expressing Congress' finding that new data processing and communications systems create the opportunity for more efficient and effective markets).

(Rule 25200 Series); and dues, fees, assessments, and other charges (Rule 28000 Series). As described in detail in Item 3, these rules are substantially based on analogous rules of the following exchanges, as applicable: BOX; Investors Exchange LLC; Cboe BZX Exchange, Inc.; The Nasdaq Stock Market LLC; and NYSE American LLC. The address whitelisting and end-of-day Security balance reporting requirements to facilitate the use of the Ethereum blockchain as an ancillary recordkeeping mechanism in proposed Rule 17020 would apply equally to all BSTX Participants and therefore would not impose any different burden on one BSTX Participant compared to another. The Exchange believes that these requirements would impose only a minimal burden on BSTX Participants that is unlikely to materially impact the competitive balance among investors and traders of Securities.

Regarding consideration (3) above and the manner in which Security transactions may be cleared and settled, the Exchange proposes to clear and settle Securities in accordance with the rules, policies and procedures of a registered clearing agency, similar to how the Exchange believes other exchange-listed equity securities are cleared and settled today. Therefore, BSTX's rules do not impose any burden on competition regarding the manner in which trades may be cleared or settled because market participants would be able to clear and settle Security transactions in substantially the same manner as they already clear and settle transactions in other types of NMS stock.

With respect to consideration (4) above, as previously noted, market participants would not be limited in their ability to trade Securities OTC because Securities could be traded OTC and would be cleared and settled in the same manner as other NMS stocks through the facilities of a registered clearing agency. Thus, the Exchange does not believe that its proposal will place any new burden on competition with respect to OTC trading, given that trading, clearance and settlement will take place in the same manner as for other NMS stocks. The Exchange acknowledges that BSTX Participants would be subject to additional requirements (*i.e.,* acquiring a wallet address and end-of-day Security balance reporting pursuant to proposed Rule 17020) that are not required of non-BSTX Participants trading Securities. The Exchange believes that these additional requirements impose only a minimal burden on BSTX Participants and should not have any material or undue burden or impact on competition between BSTX Participants and non-BSTX Participants. Acquiring a wallet address is a one-time burden that can be readily addressed by contacting the Exchange, and the end-of-day Security balance reporting requests only that the BSTX Participant, either directly or through its carrying firm, report information that it (or its carrying firm) already has available to it from DTC on a daily basis regarding the balance of Securities held.

Finally, with respect to consideration (5) noted above regarding other exchanges extending unlisted trading privileges to Securities, the Exchange does not believe that the proposed Rules would impose a burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. Securities would trade, clear, and settle in the same manner as other NMS stock. Accordingly, other exchanges would be able to extend unlisted trading privileges to Securities in accordance with Commission rules.[366]

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received comments on the proposed rule change.

III. Summary of the Comment Letters Received

While the Commission has received a comment letter on the proposal as filed under SR–BOX–2020–14,[367] as discussed above, the Commission also will consider comment letters received in connection with SR–BOX–2019–19.[368] The aspects of the proposal to which those comments relate are substantively similar to the current proposal. One commenter stated that the proposal's requirements with respect to maintaining end-of-day security ownership balances on the blockchain are inconsistent with Section 6(b)(5) of the Act because the maintenance of these records does not appear to be necessary for the clearance and settlement of these securities, the fair and orderly trading of securities, or any purpose regulated by the Act.[369] This commenter asserted that the proposal does not provide sufficient detail regarding the purpose and design of the ancillary record to enable a review under Section 6 of the Act, including how the ancillary record may benefit investors and/or add to transactional, operational, and other types of risks.[370] The Exchange responded that the proposal would ''allow market participants to observe and increase their familiarity with the capabilities and potential benefits of blockchain technology in a context that parallels current equity market infrastructure and thereby advance and protect the public's interest in the use and development of new data processing techniques that may create opportunities for more efficient, effective and safe securities market.'' [371]

Another commenter stated that the proposal provided insufficient information to assess compliance with the Act or the costs to market participants because the proposal does not describe in detail how the official and the ancillary records will interact or reconcile, which is likely to render the proposal confusing to market participants and investors.[372] Similarly, another commenter stated that, given the potential discrepancies between the official records of ownership and the ancillary records of the Wallet Manager, it is unclear what efficiencies or purpose an ancillary recordkeeping mechanism would provide or why a Wallet Manager would improve rather than complicate the current market structure.[373] Another commenter stated its belief that the Exchange should address whether there is some ''best-effort'' threshold around inaccurate and/or partial end-of-day securities ownership balances on the blockchain that would sufficiently address the risk of investor confusion.[374] In response, the Exchange stated that it does not believe there is likely to be investor confusion between official and ancillary

[366] In the SIFMA April Letter, SIFMA asked whether other exchanges would be able to access the distributed ledger technology that BSTX proposes to use, which is the Ethereum blockchain. SIFMA April Letter at 4. The Exchange notes that use of Ethereum technology is not exclusive to BSTX. Ethereum is an open source public blockchain that supports smart contract functionality. Thus, all market participants would have open access to the distributed ledger technology associated with the proposal.

[367] *See supra* note 3.

[368] *See supra* notes 7–10 and accompanying text.

[369] *See* Letter from Holly H. Smith, Eversheds Sutherland (US) LLP (February 12, 2020) (''Eversheds Letter''), at 3.

[370] *See* Eversheds Letter, supra note 369, at 2.

[371] Letter from Lisa J. Fall, President, BOX Exchange LLC (April 9, 2020) (''BOX Response I''), at 13.

[372] *See* Letter from Joan C. Conley, Senior Vice President & Corporate Secretary, The Nasdaq Stock Market LLC (March 27, 2020) (''Nasdaq Letter''), at 3.

[373] *See* Letter from David A. Schrader, Partner, Paykin Krieg & Adams, LLP (February 25, 2020), at 1–2.

[374] *See* Letter from Benjamin Connault, Economist, Investors Exchange LLC (March 26, 2020), at 5.

records because the block-chain based records are ancillary and would be associated with anonymous wallet addresses, and market participants would not have access to the official records to be able to compare the records and become confused.[375]

According to one commenter, the proposal places an unreasonable burden on competition because, to avail itself of the ancillary end-of-day securities balance reporting to the blockchain, the purchaser must be a BSTX Participant and the proposal is designed to provide an advantage to the Exchange as the exclusive provider of blockchain technology for securities.[376] The Exchange responded that it disagrees with this assertion because BSTX-listed securities would be capable of trading on other markets irrespective of the proposed ancillary end-of-day balance recordkeeping process and there is no limitation in the proposal that would prevent another national securities exchange from adopting its own ancillary recordkeeping process.[377]

Another commenter asserted that the proposed proprietary Ether-based distributed ledger technology to be used to track ownership of securities on an ancillary basis would encourage the adoption of the technology with the likely eventual goal of having it become a system for tracking equity security ownership outside of the current system maintained by DTC and broker-dealers.[378] The commenter stated that complications in the equity markets may arise if there are varying forms of the technology used to track equity securities.[379] In response the Exchange stated that the proposal is designed to operate entirely within the existing equity market structure and that the end-of-day securities balance reporting process would apply only to firms that choose to become BSTX Participants and would impose only a minimal reporting burden.[380]

IV. Proceedings To Determine Whether To Approve or Disapprove SR–BOX–2020–14, as Modified by Amendment No. 1, and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act[381] to determine whether the proposed rule change should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change to inform the Commission's analysis of whether to approve or disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,[382] the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of the proposed rule change's consistency with Section 6(b)(1) of the Act, which requires that a national securities exchange be so organized and have the capacity to be able to carry out the purposes of the Act and to comply, and enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and regulations thereunder, and the rules of the exchange.[383] In addition, the Commission is instituting proceedings to allow for additional analysis of the proposed rule change's consistency with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, 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 to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers;[384] and Section 6(b)(8) of the Act, which requires that the rules of a national securities exchange not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[385]

Under the Commission's Rules of Practice, the ''burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder . . . is on the [SRO] that proposed the rule change.''[386] The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,[387] and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.[388]

The Commission is instituting proceedings to allow for additional consideration and comment on the issues raised herein, including as to whether the proposal, as modified by Amendment No. 1, is consistent with the Act.

V. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposal, as modified by Amendment No. 1, is consistent with Sections 6(b)(1),[389] 6(b)(5),[390] and 6(b)(8)[391] of the Act or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to

[375] *See* BOX Response I, *supra* note 371, at 6.

[376] *See* Nasdaq Letter, *supra* note 372, at 2–3.

[377] *See* BOX Response I, *supra* note 371, at 3.

[378] *See* Letter from Ellen Greene, Managing Director, Equities & Options Market Structure, & Thomas F. Price, Managing Director, Operations, Technology, Cyber & BCP, Securities Industry and Financial Markets Association (April 22, 2020) (''SIFMA Letter''), at 3. Several of the comments from this commenter focused on the Exchange's proposal for trades on the Exchange to on a T+1 settlement cycle. In Amendment No. 1, the Exchange removed this aspect of its proposal from its proposed rule change. Therefore, those comments that related solely to the deleted portion of the Exchange's proposal are not relevant to the amended proposal. *See* Amendment No. 1, *supra* note 6.

[379] *See* SIFMA Letter, *supra* note 378, at 3. This commenter expressed its concern that new technology with wider implications for the equity market infrastructure would be considered in the framework of a proposed rule change by a single exchange which, according to this commenter, is not a good overall outcome for the equity markets. *See* SIFMA Letter, *supra* note 378, at 3–4.

[380] *See* Letter from Lisa J. Fall, President, BOX Exchange LLC (April 27, 2020) (''BOX Response II''), at 3.

[381] 15 U.S.C. 78s(b)(2)(B).

[382] *Id.*

[383] 15 U.S.C. 78f(b)(1).

[384] 15 U.S.C. 78f(b)(5).

[385] 15 U.S.C. 78f(b)(8).

[386] 17 CFR 201.700(b)(3).

[387] *See id.*

[388] *See id.*

[389] 15 U.S.C. 78f(b)(1).

[390] 15 U.S.C. 78f(b)(5).

[391] 15 U.S.C. 78f(b)(8).

Rule 19b–4 under the Act,[392] any request for an opportunity to make an oral presentation.[393]

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal, as modified by Amendment No. 1, should be approved or disapproved by September 9, 2020. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by September 23, 2020.

The Commission asks that commenters address the sufficiency of the Exchange's statements in support of the proposal, which are set forth in Amendment No. 1,[394] in addition to any other comments they may wish to submit about the proposed rule change.

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–BOX–2020–14 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–BOX–2020–14. 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–BOX–2020–14 and should be submitted by September 9, 2020. Rebuttal comments should be submitted by September 23, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[395]

J. Matthew DeLesDernier,

Assistant Secretary.

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[392] 17 CFR 240.19b–4.

[393] Section 19(b)(2) of the Act, as amended by the Securities Act Amendments of 1975, Public Law 94–29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. *See* Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

[394] *See* Amendment No. 1, *supra* note 6.

[395] 17 CFR 200.30–3(a)(57).

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Part IV

The President

Proclamation 10061—National Employer Support of the Guard and Reserve Week, 2020

Order of August 14, 2020—Regarding the Acquisition of Musical.ly by ByteDance Ltd.

Federal Register
Vol. 85, No. 161
Wednesday, August 19, 2020

Presidential Documents

Title 3—

The President

Proclamation 10061 of August 14, 2020

National Employer Support of the Guard and Reserve Week, 2020

By the President of the United States of America

A Proclamation

In the early days of our Nation's quest for independence, volunteer forces and militias formed the backbone of our armed resistance. These first patriots fought valiantly when called upon to defend liberty, and then returned to their everyday jobs as farmers, blacksmiths, cobblers, merchants, and a host of other occupations when the fighting was over. Today, the citizen warriors of the National Guard and Reserve carry forward this proud legacy and are essential to our prosperity, resilience, and national defense. During National Employer Support of the Guard and Reserve Week, we honor the employers who hire and support these brave men and women and who stand beside them in their mission to ensure the security of our Nation.

Our National Guard and Reserve service members are critical to businesses and organizations in every sector of our economy, from education and healthcare to construction and agriculture. Just as they deliver meaningful contributions in civilian life, these men and women also provide strategic depth and operational capability to the Joint Force in uniform, deploying in support of critical missions throughout the world and responding to natural disasters and numerous other challenges on the home front. This year in particular, we have clearly seen their courage and unwavering resolve as they have selflessly served on the front lines of our Nation's response to the coronavirus pandemic. Despite the risk to their own health, they have supported medical staff at hospitals and nursing homes, distributed food to hard-hit communities, built, staffed, and equipped alternate care facilities, and delivered life-saving medical equipment and supplies.

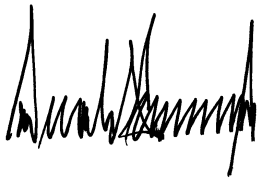
Because of the vital importance of our National Guard and Reserve forces to our national security, those who employ them are key partners in the defense of our Nation. Their support in providing stability and flexibility to these men and women is critical to the country's ability to mobilize quickly in times of crisis. These employers often make great financial sacrifices themselves to ensure that their National Guard and Reserve employees are able to carry out their missions and responsibilities quickly and effectively. As one Nation, we extend our gratitude and respect to the men and women who employ our National Guard and Reserve forces for their role in ensuring the readiness and retention of our fighting force.

Our military is the finest in the world thanks in no small part to our brave service members and their patriotic employers. During this week of recognition, I salute and honor all employers who cooperate and partner with our National Guard and Reserve service members for their unwavering support and selfless commitment to protecting our Nation and preserving our American way of life.

NOW, THEREFORE, I, DONALD J. TRUMP, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim August 16 through August 22, 2020, as National Employer Support of the Guard and Reserve Week. I call upon all Americans to join me in expressing our heartfelt thanks to the civilian employers who provide critical support to the men

and women of the National Guard and Reserve. I also call on State and local officials, private organizations, and all military commanders to observe this week with appropriate ceremonies and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this fourteenth day of August, in the year of our Lord two thousand twenty, and of the Independence of the United States of America the two hundred and forty-fifth.



[FR Doc. 2020–18340
Filed 8–18–20; 11:15 am]
Billing code 3295–F0–P

Presidential Documents

Order of August 14, 2020

Regarding the Acquisition of Musical.ly by ByteDance Ltd.

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 721 of the Defense Production Act of 1950, as amended (section 721), 50 U.S.C. 4565, it is hereby ordered as follows:

Section 1. *Findings.* (a) There is credible evidence that leads me to believe that ByteDance Ltd., an exempted company with limited liability incorporated under the laws of the Cayman Islands (''ByteDance''), through acquiring all interests in musical.ly, an exempted company with limited liability incorporated under the laws of the Cayman Islands (''Musical.ly''), might take action that threatens to impair the national security of the United States. As a result of the acquisition, ByteDance merged its TikTok application with Musical.ly's social media application and created a single integrated social media application; and

(b) Provisions of law, other than section 721 and the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*), do not, in my judgment, provide adequate and appropriate authority for me to protect the national security in this matter.

Sec. 2. *Actions Ordered and Authorized.* On the basis of the findings set forth in section 1 of this order, considering the factors described in subsection (f) of section 721, as appropriate, and pursuant to my authority under applicable law, including section 721, I hereby order that:

(a) The transaction resulting in the acquisition by ByteDance of Musical.ly, to the extent that Musical.ly or any of its assets is used in furtherance or support of, or relating to, Musical.ly's activities in interstate commerce in the United States (''Musical.ly in the United States''), is hereby prohibited, and ownership by ByteDance of any interest in Musical.ly in the United States, whether effected directly or indirectly through ByteDance, or through ByteDance's subsidiaries, affiliates, or Chinese shareholders, is also prohibited.

(b) In order to effectuate this order, not later than 90 days after the date of this order, unless such date is extended for a period not to exceed 30 days, on such written conditions as the Committee on Foreign Investment in the United States (CFIUS) may impose, ByteDance, its subsidiaries, affiliates, and Chinese shareholders, shall divest all interests and rights in:

(i) any tangible or intangible assets or property, wherever located, used to enable or support ByteDance's operation of the TikTok application in the United States, as determined by the Committee; and

(ii) any data obtained or derived from TikTok application or Musical.ly application users in the United States. Immediately upon divestment, ByteDance shall certify in writing to CFIUS that all steps necessary to fully and permanently effectuate the actions required under sections 2(a) and 2(b) have been completed.

(c) Immediately upon divestment, ByteDance shall certify in writing to CFIUS that it has destroyed all data that it is required to divest pursuant to section 2(b)(ii), as well as all copies of such data wherever located, and CFIUS is authorized to require auditing of ByteDance on terms it deems appropriate in order to ensure that such destruction of data is complete.

(d) ByteDance shall not complete a sale or transfer under section 2(b) to any third party:

(i) until ByteDance notifies CFIUS in writing of the intended recipient or buyer; and

(ii) unless 10 business days have passed from the notification in section 2(d)(i) and CFIUS has not issued an objection to ByteDance. Among the factors CFIUS may consider in reviewing the proposed sale or transfer are whether the buyer or transferee: is a U.S. citizen or is owned by U.S. citizens; has or has had a direct or indirect contractual, financial, familial, employment, or other close and continuous relationship with ByteDance, or its officers, employees, or shareholders; and can demonstrate a willingness and ability to support compliance with this order. In addition, CFIUS may consider whether the proposed sale or transfer would threaten to impair the national security of the United States or undermine the purpose of this order, and whether the sale effectuates, to CFIUS's satisfaction and in its discretion, a complete divestment of all tangible or intangible assets or property, wherever located, used to enable or support the operation of the TikTok application in the United States.

(e) From the date of this order until ByteDance provides a certification of divestment to CFIUS pursuant to section 2(b), ByteDance and TikTok Inc., a Delaware corporation, shall certify to CFIUS on a weekly basis that they are in compliance with this order and include a description of efforts to divest the interests and rights described in section 2(b) and a timeline for projected completion of remaining actions.

(f) Any transaction or other device entered into or employed for the purpose of, or with the effect of, evading or circumventing this order is prohibited.

(g) Without limitation on the exercise of authority by any agency under other provisions of law, and until such time as the divestment is completed and verified to the satisfaction of CFIUS, CFIUS is authorized to implement measures it deems necessary and appropriate to verify compliance with this order and to ensure that the operations of the TikTok application are carried out in such a manner as to ensure protection of the national security interests of the United States. Such measures may include the following: on reasonable notice to ByteDance and TikTok Inc., employees of the United States Government, as designated by CFIUS, shall be permitted access, for purposes of verifying compliance with this order, to all premises and facilities of ByteDance and TikTok Inc., and any of their respective subsidiaries, operated in furtherance of the TikTok application located in the United States:

(i) to inspect and copy any books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of ByteDance or TikTok Inc., or any of their respective subsidiaries, that concern any matter relating to this order;

(ii) to inspect or audit any information systems, networks, hardware, software, data, communications, or property in the possession or under the control of ByteDance or TikTok Inc., or any of their respective subsidiaries; and

(iii) to interview officers, employees, or agents of ByteDance or TikTok Inc., or any of their respective subsidiaries, concerning any matter relating to this order. CFIUS shall conclude its verification procedures within 90 days after the certification of divestment is provided to CFIUS pursuant to subsection (b) of this section.

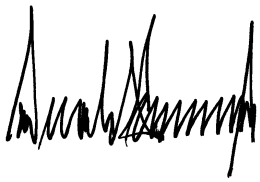
(h) If any provision of this order, or the application of any provision to any person or circumstances, is held to be invalid, the remainder of this order and the application of its other provisions to any other persons or circumstances shall not be affected thereby. If any provision of this order, or the application of any provision to any person of circumstances, is held to be invalid because of the lack of certain procedural requirements, the relevant executive branch officials shall implement those procedural requirements.

(i) The Attorney General is authorized to take any steps necessary to enforce this order.

Sec. 3. *Reservation.* I hereby reserve my authority to issue further orders with respect to ByteDance, Musical.ly, Musical.ly in the United States, and TikTok Inc. as shall in my judgment be necessary to protect the national security.

Sec. 4. *Publication and Transmittal.* (a) This order shall be published in the *Federal Register.*

(b) I hereby direct the Secretary of the Treasury to transmit a copy of this order to the appropriate parties named in section 1 of this order.



THE WHITE HOUSE,
August 14, 2020.

[FR Doc. 2020–18360
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